

# **KYMLICKA AND THE ABORIGINAL RIGHT**

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## Thesis Abstract

This thesis is concerned with two central questions. The first is theoretical and asks, "Can a direct appeal be made to the foundational principles of liberalism to support collective rights?" The second question is practical and asks: "Would such a defense serve the interests of contemporary Canadian Aboriginal claims to special constitutionally recognized collective rights known as the Aboriginal Right?" I utilize Will Kymlicka's defense of minority rights as the theoretical framework in assessing this first question and in assessing the latter, I refer to various reported Aboriginal conceptions of the so-called Aboriginal Right which have been formalized by Aboriginal people themselves through constitutional addresses, Royal Commission hearings, discussion papers and legal claims.

Part I of the thesis involves an enquiry into the nature of the revisions that Kymlicka proposes to make to liberal theory, and asks whether, in making such changes, he is able to retain identification with the so-called "modern" liberals, with whom Kymlicka identifies himself, *and* consistently defend the kind of group minority rights of the sort actually being claimed in Canadian society today. I conclude that Kymlicka argument fails in two respects: it fails to do the work required of it by modern liberals and it ultimately fails to do the work required by the standards of Kymlicka own theory.

In Part II, I argue that even if it were theoretically possible to protect the good of culture in the way that Kymlicka hopes, such a defense of collective rights fails in the most important respect: that is, it cannot do the work required of it by the Aboriginal people for whom it was designed.

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## Table of Abbreviations

"ASU" Nozick, Robert; *Anarchy State and Utopia*, (1974); Basic Books, Inc., New York

"IDE" Dworkin, Ronald; "In Defense of Equality"; *Social and Political Philosophy*, Vol. 1; 1983;

"JAP" "Justice and Aboriginal People"; Royal Commission *Report of the National Round Table on Aboriginal Justice Issues*, 1992; Ottawa, Ont. Cat No. Z1-1991/1-11-2E; ISBN 0-660-14932-X.

"KLRCM" Tomasi, John; "Kymlicka, Liberalism and Respect for Cultural Minorities", *Ethics*, April, 1995;

"LCC": Kymlicka, Will; *Liberalism, Community and Culture*: Oxford University Press; 1989;

"OL": *On Liberty and Other Essays*; Mill, John Stuart; ed Gray, John; Intro by John Gray; ; Oxford University Press; 1991;

"PL": Rawls, John; *Political Liberalism*; Columbia University Press; 1993

"QJ" \*\* : Boldt, Menno and Long, Anthony J. (eds); *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*; University of Toronto Press; 1985;

- Boldt, Menno and Long, Anthony J. ; "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians" pgs. 333 - 346;

- Ittinuar, Peter; "The Inuit Perspective on Aboriginal Rights" pgs. 47 - 53

- Lyons, Oren; "Traditional Native Philosophies"; pgs. 19 - 23

- Plain, Fred; "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America", pgs. 31 - 40

"SV" Miller, J.R.; *Shingwauk's Vision: A History of Native Residential Schools*; University of Toronto Press; 1996;

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\*\* "QJ" (Quest for Justice: Aboriginal Peoples and Aboriginal Rights) is used to denote many different articles. The particular article names and authors are "bulleted" under the "QJ" abbreviation and page numbers indicated for particular references.

'**TLI**' Narveson, Jan; (1988) *The Libertarian Idea*; Temple University Press; 1988;

"**Theory**": Rawls, John; *A Theory of Justice*; The Belknap Press of Harvard University Press; 1971;

"**Webber**" See Royal Commission *Report of the National Round Table on Aboriginal Justice Issues*, 1992; Ottawa, Ont. Cat No. Z1-1991/1-11-2E; ISBN 0-660-14932-X.

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## CHAPTER I

### Introduction

There are two central questions which this thesis considers: The first is theoretical and asks, "Can a direct appeal be made to the foundational principles of liberalism to support collective rights?" I will utilize Will Kymlicka's defense of minority rights as the theoretical framework for this question. The second question is practical and asks: "Would such a defense serve the interests of contemporary Canadian Aboriginal claims to special constitutionally recognized collective rights known as the Aboriginal Right?" Part I of this thesis deals with the first question; Part II with the second.

Will Kymlicka believes that a liberal defense can be made for collective minority rights, but only if liberals and non-liberals alike recognize that "...the resources available within the liberal view of community and culture have been misdescribed, and underestimated" by both the opponents of liberals and by liberals themselves (5, LCC). Indeed, Kymlicka argues that once some key liberal conceptions are given a "more explicit and systematic account" (1, LCC) it not only becomes clear that liberal individualism accords with, rather than opposes, the undeniable importance to us of our shared community, but that the nature of the individualism which underlies liberalism actually *requires* that the good of cultural membership take its place as a primary good within liberal theory (2, 3, LCC). Moreover, in specific circumstances of disadvantage and when the good of cultural membership is threatened by dominant cultures, then liberal principles of equality will sanction special group rights.

In considering Kymlicka's response to the question of collective rights, it is important to recognize that he does not intend that his revisionist account be taken as an *alternative* to liberal theory, but makes the stronger claim of being "linked" to the more familiar liberal views on individual rights and state neutrality.(1, LCC) Indeed, it is Kymlicka's concern to defend the political morality of 'modern' liberals "from J.S. Mill through to Rawls and Dworkin".<sup>1</sup> (LCC, 10) And his objective is to show how the arguments of Rawls for liberty and Dworkin for equal rights and resources can be used to defend the value of culture and collective minority rights.

### GENERAL OUTLINE

The overall thesis objective will be to enquire into the nature of the revisions that Kymlicka proposes to make to liberal theory, and whether in making such changes he is able to retain identification with so-called 'modern' liberals *and* consistently defend the kind of group minority rights of the sort actually being claimed in Canadian society today.

Given this objective, the first task will be to explicate the key liberal concepts on which Kymlicka depends. These concepts are: the essential interests of humans and the role of rationality as a precondition to individual choice; the individual self and its relationship to culture; and the liberal context of choice. A comparison of these revised concepts and their functional roles will then be made with the original corresponding concepts of so-called 'modern' liberal theory represented primarily by Rawls and Mill. Later a similar comparison will be made with libertarians such as Nozick. The

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<sup>1</sup> Kymlicka is careful to separate himself from "classical" liberals, such as Locke, wanting to leave open the relationship between classical and modern liberalism. Kymlicka's concern is to defend modern liberalism, not "this 17th century" liberalism. (10, LCC).

comparisons will help to identify just what traditional liberal concepts and definitions undergo change in Kymlicka's analysis and the effects of those changes to the foundational principles of liberalism.

I hope to show through an explication of Rawls, Mill and Nozick that individual autonomy, and a particular notion of rationality is at the centre of the shared liberal account of human value(Chapter I). Satisfying this first objective will involve tracking this feature through traditional liberalism,<sup>2</sup> Nozick through to Mill and Rawls, to identify it as the conceptual thread that strings liberal theories together along the same value spectrum . In tracking the rationality feature of autonomy an emphasis will be placed on the important role that this feature has in specifying a context of choice of a general nature and scope. I will then come back to examine Kymlicka's representative account of liberalism with a view to arguing that his emphasis on the liberty to revise individual ends is misplaced. This misguided focus, distracts from a more properly placed emphasis on the liberty to exercise choice under informed circumstances, within a wide range of alternative options, in accordance with the requirements of the rationality feature of Liberalism.

From this point , I will look at Kymlicka's revisionist account of Liberalism in an attempt to explain why his representative account understates the traditional demand for a wide range of options, as the proper context for individual choice (Chapter II). I will argue that in understating this demand, Kymlicka cannot make it go away - even with the introduction of the good of cultural membership and the psychological strictures dictated by his concept of the cultural structure. I will argue that under the pressures of this

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<sup>2</sup> Hereafter, when I refer to traditional liberals I mean libertarians through egalitarians. When I refer to modern liberals I mean those liberals identified by Kymlick as a "modern" namely, Rawls, Dworkin and Mill.

demand Kymlicka's revisions fail in two respects: they fail to do the work required of them by so-called modern liberals and ultimately fail to do the work demanded by Kymlicka's own standards (Chapter III).

In Chapter IV, I will attempt to explore some of the fundamental assumptions made in Chapter III regarding the nature of collective rights. This enquiry will lead me to revisit the concept of cultural structure and the ways in which it might be interpreted. This analysis will involve assessing interpretations made by others, followed by my own objections to those interpretations. These objections will point to what I believe is the most consistent interpretation of cultural structure which in turn will bring us to a particular view of the nature of the disadvantage which must be suffered by members of Aboriginal cultures to qualify for a protection grounded in liberal theory. Finally, Chapter V attempts to reconstruct the experience of the Inuit girl first illustrated in Kymlicka's equality defense and later taken up in one of the interpretations of his cultural structure concept. The intent of this discussion, with the help of some metaphoric analysis, is to suggest a "coherence" interpretation of the good of culture as the only defensible disadvantage suffered by Aboriginal members.<sup>3</sup> I conclude by looking at actual Aboriginal notions of the so-called Aboriginal Right which have been formalized by Aboriginal people themselves through constitutional addresses, Royal Commission hearings, discussion papers and legal claims, and I argue that even if it were theoretically possible to protect the good of culture in the way that Kymlicka hopes, such a defense of collective rights would be uninteresting from the Aboriginal point of view. So

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<sup>3</sup> When I say "defensible" here, I mean defensible solely in reference to the Kymlickean framework. I believe that there are ways in which liberals can acknowledge permanent rights of Aboriginal communities without appealing to liberal foundations. And I believe that there may be ways in which the rights of Aboriginal communities may be defended on liberal grounds, but grounds which don't fit within the Kymlickean framework provided.

ultimately, Kymlicka's defense fails in the final and most important respect: it cannot do the work required of it by the Aboriginal people for whom it was designed.

◆ **PRELIMINARY DISTINCTIONS**

**(1) Analytical Framework**

As an organizational measure it will be useful to set up an analytical framework for the forthcoming discussion. This will involve distinguishing between two different ways of looking at the liberal tradition (the "Tradition"). The first way, is to see the Tradition as a related group of theories extending over time (e.g. 'classical', 'modern', 'contemporary' liberalism) but leaving open the nature of their respective relationships. The second way, is to see the Tradition as a range of theories which find themselves on a single value spectrum according to a shared core concept of value (and by virtue of which such theories share the name liberalism) even though their respective places are distinguished by diverging interpretations of this core concept (and hence differentiate themselves by the names 'libertarians' or 'conservatives', and 'egalitarians').<sup>4</sup> This second way of representing the Tradition will hereinafter be referred to as the "Value Spectrum")

Kymlicka seems to conflate these two ways of looking at the liberal tradition when placing his own views in the context of the Tradition. On the one hand, when he distinguishes his own arguments from some but not other liberal theories, he favours

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<sup>4</sup> I will argue that despite disagreement over the question of equality there is even deeper agreement about the centrality of individual autonomy in a pluralistic society. For both libertarians and liberals there is the common moral ideal of a society of autonomous agents protected by individuals rights competing in the market place and participating in democratic processes. (see Michael McDonald; *After Virtue, Taking Rights Seriously* Journal of Business Ethics 5 (1986) 21-28.

terms like "classical" and "17th century", "modern", "new" and "contemporary", rather than 'conservative', 'libertarian' or 'egalitarian'. This implies that he is presenting the Tradition as an historical line; moreover one which is progressive - suggested, in particular, by his account of the liberal concern for minority rights as rising and falling with changing events and circumstances of post world war II social and political history (chpt. 10, LCC).

However, despite this preference for describing the tradition in historical terms, Kymlicka actually aligns himself with some but not other liberals not because of their position on any time line, but because of their position on the value spectrum. For example, in giving his 'equality argument' for collective rights, he remarks that "contemporary" theories of liberal equality "seek, in Dworkin's terms, to be 'endowment-insensitive' and 'ambition-sensitive'" (190, LCC) as if to imply that these are features of 20th century liberalism rather than qualities of *egalitarian* theories on the value spectrum. When Kymlicka explicitly identifies himself with 'modern' liberals like Rawls and Dworkin - as distinct from 'classical' liberals like Locke - we can assume, I think, that what he really intends to distinguish here is his place along the Value Spectrum, at a distance from conservative or libertarian versions of liberalism. He would as surely distinguish his views from those of Nozick as he would align his views with Dworkin, even though they are both contemporary liberals. And he would distinguish his views from those of Nozick *for the same reasons* that he distinguishes his views from those of Locke, even though, on the time line one is a contemporary liberal and the other classical.<sup>5</sup> Therefore, I suggest that when Kymlicka sets out to defend 'modern'

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<sup>5</sup> See pg. 10 of LCC. Kymlicka writes that "my concern is with modern liberalism and not 17th century liberalism". 17th Century Liberalism is identified with Locke further down on the page.

liberalism it is not a group of liberals more recent, or more advanced, in history that he is defending, but rather 'egalitarian leaning' liberal theory.<sup>6, 7</sup>

I raise the time line/value spectrum distinction in order to clarify the implications of Kymlicka's desire to "leave open" the relationship between classical and modern liberalism; to take up only the defense of the modern liberal (10, LCC) Kymlicka's disassociation from classical liberalism is valid to the extent that he wants to rely on the egalitarian aspects of liberalism to defend the equality portion (the portion that establishes collective rights) of his argument.<sup>8</sup> Group rights cannot come out of 'classical'

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<sup>6</sup> On this note, it is somewhat puzzling why Mill has been included in the 'modern' cluster of liberals since he was virtually silent on the issue of equality except to say that when there is a conflict of individual rights the principle of utility prevails, which principle is notoriously *unequalitarian*. (John Stuart; *On Liberty*, (ed) John Gray, p. 84) One explanation is that Mill's recognition of the importance of the influence of culture on the individual is consistent with Kymlicka's own analysis and so Mill has been, somewhat incongruently, placed with the 'modern' liberals. However it is interesting that Mill's conclusions are exactly contrary to Kymlicka's. That is, the influence of culture for Mill is good reason to protect the individual from such *influences* rather than to protect the influences culture has on the individual.

<sup>7</sup> Having said this, I do not deny that Kymlicka *does* want to identify himself with liberal theories represented by more recent liberals on the historical time line. His interest in identifying himself with the more contemporary liberals seems to stem from an interest in showing that the events of social and political history have not played out in accordance with first assumptions made by liberals. For example, assimilation and stability did not come with liberalization of multinational states after WWII, as expected. Aboriginal people in Canada and elsewhere in the world largely resisted efforts to assimilate them into the larger political community. In Canada, the overwhelming response to liberal efforts to relinquish the Indian Act and subject Aboriginal people to equal treatment under the same law for everyone was one of offense rather than gratitude. To dismantle the Indian Act represented the dismantling of treaties and any recognition that may exist that Aboriginal people are a separate nation - separate but co-existing with the larger political community. My concern is merely to point out that Kymlicka hasn't distinguished the two ways in which he uses the liberal tradition, and this ultimately causes confusion when we come to the question of whether Kymlicka can *entirely* dismiss "17th century" liberalism or leave open its relationship to 'modern' liberalism given his objective of offering a 'liberal' defense of minority rights. As I will suggest further on in the thesis, while it may be permissible to leave open the relationship from a 'time line' perspective, the same does not hold true from a 'value spectrum' perspective if Kymlicka's defense is to be considered liberal.c

<sup>8</sup> Specifically, the egalitarian view that individuals are not responsible for their unchosen, disadvantaged circumstances (cultural circumstances on Kymlicka's account) and that such disadvantages must be rectified by instituting special rights.

liberalism; the 'rights' portion of the argument depends on an egalitarian view of responsibility.<sup>9</sup> Nevertheless, if Kymlicka's account of collective rights is indeed a 'liberal' defense then there must be a relationship between Kymlicka's form of liberalism and classical liberalism which binds them as closely as the issue of responsibility divides them. Indeed, the nature of this relationship between libertarian and egalitarian forms of liberalism takes us to the very *heart* of liberal theory. I am suggesting here that if Kymlicka "leaves open" the relationship between classical and modern liberalism in order to give an egalitarian defense, he cannot ignore that a deeper relationship must nonetheless be sustained. The nature of this deeper relationship is, I suggest, the criterion for judging his theory as liberal or non-liberal.

In other words, if Kymlicka *is* to put forward a 'liberal' defense of minority rights, he must make certain to identify his arguments with the *relevant* feature of modern liberalism. He must make sure that his arguments identify with modern liberalism through features specific to *liberalism* rather than specific to *egalitarianism*. From this perspective, then, when we see the Tradition as a spectrum of varying and sometimes diverse theories threaded together by a shared core value - the value of individual autonomous choice - rather than as different theories along an historical time line the relative relationships of which are left open, we see that Kymlicka cannot leave open

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<sup>9</sup> I am using the notions of responsibility to distinguish between classical, or libertarian, and egalitarian liberalism as follows: Generally speaking, libertarians hold that individuals are responsible for the choices they make, regardless of individual unchosen circumstances. This follows from accepting the principle of self-ownership. Egalitarians, on the other hand, hold that individuals should be held responsible only for their choices, but not for their unchosen circumstances. Differences that arise among individuals due to unchosen circumstances (such as social environment or natural endowments) are not the responsibility of the individual. Hence egalitarians typically favor compensating individuals who suffer from such disadvantages. (see, Kymlicka, p. 186, *Liberalism, Community and Culture* and his reference to Rawls, pp 74 - 102, *Theory*; and Dworkin, part 2; "What is Equality?") It is just this kind of difference in cultural circumstance that Kymlicka argues is the basis for granting special rights to certain minority groups.

altogether his relationship to classical liberalism. It will not be enough that the relevant feature of modern liberalism, with which Kymlicka's own arguments must be identified, is about shared values pertaining to equality and responsibility and self-ownership, found at the centre of the conflict between libertarian and egalitarian liberal theories. Rather it must be about the *common* feature - individual autonomy - which threads the theories together, and classifies them as a group of *liberal* theories rather than, for instance, as a group of communitarian theories. And to this extent, the gap must be closed between Kymlickean liberalism and "classical" liberalism.

With the foregoing in mind, I think that an effective way to frame the question first posed, is in terms of the relationship between Kymlicka's revisionist 'liberalism' and 'modern' liberalism; then in terms of the relationship between 'modern' liberalism and other liberal theories along the liberal spectrum, such as libertarianism, and finally in terms of the contrast between liberalism in its broadest sense, and its political and ideological opponents. In getting these relationships straight, I hope to keep a finger on what liberal theories along the spectrum have in common, even while acknowledging the disparity among the different camps, and therefore what distinguishes these theories from their non-liberal ideological opponents. With these components of the framework in place, we then have a criterion for answering the question of whether Kymlicka's defense can be identified as liberal.

## **(2) Value and Equality**

There are two important conceptions within traditional liberal theory which should be kept distinct if Kymlicka's defense of minority rights is to be fully understood in terms of its relationship to 'modern' liberalism. First, is the conception of the essential

interest of humans.<sup>10</sup> This concept, I will argue, constitutes the shared core concept of value to which I have been referring, and contains the identifying feature of liberalism. As I have said, I will argue that the same core conception of the essential interests of humans is shared by libertarians and egalitarians alike.

The second important conception is that of equality. While there are divisions among liberals and their non-liberal ideological opponents on the issue of equality, the *first* point of separation among liberals and non-liberals is in their distinct core conceptions of the essential interests of humans. Indeed, competing conceptions of equality separate liberals from their opponents primarily because their respective conceptions of equality follow from *incommensurable core conceptions*, or starting premises to the essential interests of humans. On the other hand, competing conceptions of equality separate the two liberal camps too, not because their core conceptions differ but because interpretations of a *shared* conception differ: most notably because of disparate positions on the issues of personal responsibility and desert, and self-ownership which lead them to different views about justice and equality.<sup>11</sup>

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<sup>10</sup> The term "essential interest of humans" need not imply a theory of human nature at the foundations of liberalism. Rawls, for example, begins with the model of a modern constitutional democracy as a unified and fair system of cooperation over time. Within this context, the essential or highest order interests or good of humans are descriptions of what matters, or what should matter, to humans if they are to be fully cooperating members of a fair system of social cooperation over time. Therefore the essential interests of humans in political liberalism more closely specify citizenship requirements for living in a politically liberal, pluralist state.

In view of this clarification, whenever I use the term "essential interest" I am using it in the context of ongoing discussions among liberals to refer to a core value shared by liberals. The term is, therefore, not to be construed as implying a theory of human nature.

<sup>11</sup> Libertarians and Egalitarians also disagree about whether and to what degree other values ought to be included in the content of the equal distribution ideal, based on the relationship that those values have to freedom. For example whether resources (social and economic), opportunity, preferences etc. ought to be included in the content for equal distribution.

These two conceptions - a core concept of our essential interests as humans and a positive conception of equality - together with a very broad conception of the individual, lay the ground work for Kymlicka's defense of group minority rights. The core concept is developed as an argument for the value of community as a primary good and the egalitarian equality conception (in particular Dworkin's equality of resources argument) is developed to argue for permanent collective rights.

I will focus primarily on the first of these two conceptions.

◆ **KYMLICKA'S REPRESENTATIVE ACCOUNT OF THE ESSENTIAL INTERESTS OF HUMANS**

(1) As I have said, it will be useful to see Kymlicka's revisionist account of liberalism in the context of traditional, and in particular, modern liberal theory.

Kymlicka gives an account of modern liberalism which he believes is representative of the kind of liberalism he wants to defend (hereafter "Kymlicka's representative account") (10 - 13, LCC).

(2) Liberalism, writes Kymlicka, "begins with some basic claims about our interests" (LCC, 10). He then refers to our "*essential* interests" under three different descriptions. The first, I take it, is the most general description of our essential interests and the two following are explications of what follows from the more general description.

"Our essential interest is in leading a good life, in having those things that a good life contains" (10, LCC). We also have an essential interest in *revising current mistaken beliefs* about value (12, LCC). Still later he writes that "...our *most* essential interest is in

getting these beliefs [about value] right and acting on them" (LCC, 13).<sup>12</sup> It follows from these definitions, that the essential interest of living a good life involves living a life that is *actually* good and not just one that we currently believe to be good, and assumes that we recognize the fallibility of our beliefs and desire to correct them when they are mistaken.

Kymlicka says that two preconditions follow from living a life that is good: The first is the precondition that we be allowed to live it "from the inside" in accordance with our own beliefs - not someone else's - about what gives value to life (LCC, 13). The second is that we have the freedom to question and examine these beliefs in light of whatever information, examples and arguments our *culture* can provide (LCC, 13).<sup>13</sup>

So, we have a representative sketch of our essential interests as humans and the preconditions to those interests. Kymlicka points out that these preconditions specify the securing of certain traditional liberties and resources, namely, the traditional liberal concern for civil and personal liberties which allow us to explore different aspects of our collective *cultural heritage*.<sup>14, 15</sup> And hence, the "traditional liberal concern" with securing *cultural*<sup>16</sup> conditions "...conducive to acquiring an awareness of different views about the good life, and to acquiring an ability to intelligently examine and re-examine these views" (LCC, 13).

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<sup>12</sup> Italics mine.

<sup>13</sup> Italics mine.

<sup>14</sup> Italics mine.

<sup>15</sup> In particular, "freedom of expression, freedom of the press, artistic freedom etc." and liberal concern for education (LCC, 13).

<sup>16</sup> italics mines.

I will pause here to make a precautionary note about the representative sketch just presented. The caution is in respect of Kymlicka's use of the word "culture". I have italicized the word as a way of flagging the ambiguity of the term. The ambiguity arises from the fact that this word has two possible different referents in the context of *Liberalism, Community and Culture*. The first is the relevant liberal context of choice as understood by modern liberals. The second is the dramatically narrower context of choice represented in Kymlicka's own revisionist form of liberalism. The word "culture" in the context of modern liberalism specifies the wider political structure of liberal society, or the political community, which may *house* a plurality of cultures within it. The same word is used to describe the context of choice specified by his own account of liberalism: which in that context is meant to specify any one of a number of particular cultures *housed* by - and understood as distinct from - the broader political structure. It is of primary importance to keep these two meanings of culture distinct, for the different meanings produce very different implications when viewed as conditions for securing the essential interests of humans.<sup>17</sup>

If Kymlicka uses the word 'culture' here to refer to the latter narrower structure when specifying the conditions for fulfilling our essential interests, then his account

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<sup>17</sup> There is a fairly transparent reason for using the term "culture" to specify both modern and Kymlicka's context of choice. Kymlicka believes that Rawls and Dworkin are actually referring to cultural structure when they refer to the liberal context of choice (pgs. 177, 178, LCC). For instance, when Rawls writes that "the basic structure shapes the way the social system produces and reproduces over time a certain form of culture " (p. 55, Rawls, "The Basic Structure as Subject", *Values and Morals* ed. A. Goldman and J. Kim. Reidel, Dordrecht) Kymlicka believes that he is assuming that the basic structure houses only one culture (178, LCC). He reads the same assumption into Dworkin's statement that: "we inherited *a* cultural structure" centered on its shared language. While I question whether the basic structure can't produce and reproduce a plurality of cultures and remain the context of individual choice (rather than assuming as Kymlicka does, that the cultural structure rather than the basic structure is the *only* context of choice in a culturally plural liberal state, I defer this argument to another paper.

clearly misrepresents modern liberalism, for modern liberals identify the wider political structure as the proper liberal context of choice. But since Kymlicka acknowledges in his own revisionist argument that modern liberals have traditionally assumed that the political structure is coterminous with one cultural structure, I am taking Kymlicka here to mean by "culture" the wider political structure, albeit with a view to correcting mistaken modern assumptions about this structure in his revisionist argument.<sup>18 19</sup>

(3) Now, let's return to Kymlicka's representative liberal account of the essential interests. Kymlicka believes that his sketch of modern liberalism is essentially the same as that given by Rawls, with the following exception: Rawls, Kymlicka observes, often identifies our highest-order interests with the exercise of a particular capacity: the capacity to form and revise our rational plans of life (LCC, 11, 12).<sup>20</sup> Kymlicka, on the other hand, supports Ronald Dworkin's observation that Rawls "... puts the cart before the horse". Dworkin writes that: 'Our highest-order interest is not an interest in exercising a capacity because we find that we have it...but rather we develop and train capacities of the sort that [they] describe because we have a certain interest' - namely, an

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<sup>18</sup> See p. 166, 177, 178 of LCC.

<sup>19</sup> It should be understood that I am not taking a position on whether traditional or modern liberals view the cultural structure or the political structure as that which constitutes the range of options. Indeed, I would like to argue at some other time that, in a culturally plural state, it is the political structure which imposes the range of options for choice, in *addition* to the cultural structure. I would argue that in a liberal society the political structure superimposes itself upon the cultural structure, so that the most direct range of options is determined by the culture but a background range of options is also psychologically real for the individual within any particular culture. However, in the present paper it is my concern to examine the problems that follow from *accepting* Kymlicka's arguments, and incorporating them into liberal theory in the way that he intends, rather than from challenging them.

<sup>20</sup> This capacity is what Rawls refers to as 'goodness as rationality' which is specified more particularly by the Aristotlean principle, discussed in detail in footnote 40.

interest in having as good a life as possible, a life that has all the things that a good life should have.<sup>21</sup>

Whether or not the value of rationality is an intrinsic or instrumental liberal value, the point to note is that Kymlicka and Dworkin identify the good of autonomy as an instrumental value of liberalism expressed as the exercise of rationality in its function of enabling autonomously chosen activities. This particular conception of autonomy<sup>22</sup> as the independent exercise of our rational capacities in forming and revising a rational plan of life is one consistently recognized by liberals as the core value of liberal theory.<sup>23</sup> For liberals, rationality plays an important role in providing a criterion for issues about individual choice. Individual choices are the preferences or demands made by rational persons. Rational persons are defined without making reference to their moral concerns, but rather in reference to something like exposure to the facts and logic in forming life plans.

It is crucial to understand Kymlicka in the context of the kind of liberalism he wishes to defend. Kymlicka explicitly acknowledges in his representative account - the account of liberalism that he is defending - that individual autonomy and, in particular rationality, is "crucially important" to pursuing our essential interest in having as good a

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<sup>21</sup> Dworkin, Ronald. 1983; "In Defense of Equality", p. 26.

<sup>22</sup> Gerald Dworkin has noted that autonomy has been equated with many different traits: liberty, self-rule, sovereignty, freedom of the will, dignity, integrity, individuality, independence, responsibility, self-knowledge, self-assertion, critical reflection, freedom from obligation and absence of external causation. (p. 203, *Liberalism, Citizenship and Autonomy*; eds. Milligan, David and Miller, William Watts; Ashgate Publishing company; 1992).

<sup>23</sup> See Tomasi, John; *Kymlicka, Liberalism and Respect for Cultural Minorities*, Ethics; Symposium on Citizenship, Democracy and Education; Volume 105, No. 3, April 1995, The University of Chicago Press; p. 584; and Nozick, John *Anarchy, State and Utopia*, p. 49; and Mill, John Stuart; *On Liberty*; (ed) John Gray, ch. III, 4) and Rawls, John *Political Liberalism and Theory*.

life as possible (12, LCC). He can therefore be seen to accept the traditional liberal emphasis on individual autonomy, expressed as rationality.

Indeed, Kymlicka has described the value of autonomy as the content of the essential interests of humans in his representative sketch. He specifies "revising" mistaken beliefs and "questioning" current ends as part of what it is to live a good life, as well as living one's life "from the inside". Considered separately these features do not constitute individual autonomous choice.<sup>24</sup> However, when combined and added to our "most essential" interest - that is, the interest we have in "getting our beliefs [about value] right, and acting on those beliefs" - they do constitute individual autonomous choice. For they describe or imply the capacities required to conceptualize of oneself in accordance with a picture of what a good life is, to formulate and deliberate independently about beliefs about the good and to consider and reason in the abstract and judge based on these considerations.

I now turn to what interests me most about the liberal value of autonomy: the conditions that follow from it. In the next section, I suggest that liberals typically recognize a necessary connection between the value of individual autonomy and the liberty to choose from a range of alternatives of a scope and kind most conducive to forming unmistakable beliefs about value and for correcting beliefs when they are

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<sup>24</sup> This observation came out in a tutorial discussion with Jim Dybikowski. He pointed out that communitarians also provide for the revising of mistaken beliefs and the questioning of ends - although not by each individual of the community, but rather by qualified and experienced persons. (see MacIntyre's *After Virtue* ) Communitarians also value living our lives "from the inside" even though this may require that we are first led to practice activities judged by the community as virtuous; but which will be ideally followed by internal rewards experienced by the individual in practicing virtuous activity, at which point the value is internalized and the practice becomes motivated from the inside by the reward of internal goods (the rewards of virtuous behavior) (see MacIntyre, *After Virtue*).

mistaken. I will eventually suggest that the value of individual autonomy demands certain minimum conditions for rational enquiry.

◆ **Autonomy and The Liberal Context of Choice**

(1) On Robert Nozick's account of libertarianism, individual autonomy is at the root of moral and political liberalism. According to Nozick individual rights (or side constraints<sup>25</sup>) have a moral basis which on the one hand specifies the nature of the inviolability of other persons while, on the other, justify constraints on individual behavior (32, ASU). The moral basis of side constraints is the value that each person places on their living in accordance with their own autonomous choices. According to Nozick, autonomy is either a component of or a necessary connection to what he calls the "M variable". The "M-variable" represents "meaningfulness", in the sense of what gives meaning to an individual life (50, ASU). According to Nozick, the traits of autonomy - rationality, free-will and moral agency - are either components of, or necessary conditions for 'M'. So the kind of being capable of "M" is a being able to formulate long term plans for its life, to consider and decide on the basis of abstract principles or considerations it formulates to itself (and, hence, is not merely the play thing of immediate stimuli) and a being that limits its own behavior in accordance with some principles or picture it has of what an appropriate life is for itself and others (49, ASU). Nozick adds a third trait to these three: the ability to regulate and guide one's life in accordance with an overall conception of its life and what it is to add up to. This third trait is designed to address the problem posed by the individual who possesses the first three traits but has no memory between acts. A person's shaping his life in accordance with some overall plan is his way

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<sup>25</sup> Side constraints are expressed as negative rights, as against physical and paternalistic aggression, which call for respecting certain legitimate claims as inviolable even if the result is that overall claim-violations are increased (see ASU, p. 34 and LCC, p. 1989).

of giving meaning to his life. Without an overall conception of one's own life and its ends, individual plans of life would arguably lack meaning.

So, like Rawls, Nozick characterizes the central value of liberalism as exercising the capacity to form and revise and act on our rational plans of life.<sup>26</sup> What follows from the value of individual autonomy on this libertarian account? According to Nozick, if we equally value an individual's capacity to choose autonomously among alternatives it follows that the only basis for constraining individual choice is on the grounds that one's actions harm or threaten to cause harm to others. It follows that individuals should be allowed the widest possible range of choice, short of this harm. For the libertarian, the bare *having* of options is a value, regardless of what the options lead to or even whether they are exercised. This is not to say that the Libertarian would argue that the more options there are the better *because* more is better. Rather, she would argue that since alternatives - in the form of ideas, philosophies, viewpoints etc. - are tools, or the means by which our current beliefs can be evaluated as correct or mistaken in exercising individual choice there is very limited justification for preventing the individual from deciding which alternative views or ways of living or acting can contribute to or improve upon the life she currently leads. Having alternatives, it is thought, is more conducive to getting it right about the life we are currently leading than not having alternatives. And the value of any choice made in respect of those alternatives is meaningful only when made, as Kymlicka says, from the inside. Only the individual is qualified to decide which alternatives are relevant and which are not. Consequently, the libertarian context

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<sup>26</sup> When we look at Rawls' account of the essential interests of humans, we will notice that Rawls seems to identify the human interests with the *exercise* of the moral powers, while it is not as clear whether Nozick assigns essential value in the mere existence of these capacities. The latter view would not necessarily require the promotion of conditions for the development and growth of autonomy and but would seem to require simply that these capacities be respected and be free from interference *if* and *when* exercised; while the other would seem to require conditions conducive to growth and development of autonomy.

of choice is constituted by the widest possible scope of alternative choices (regardless of what kind) short of harming or constraining the autonomously chosen activities of others (168, TLI).

(2) For the so-called "modern" liberal, John Stuart Mill, individual autonomy is also at the centre of moral and political liberalism. Mill's indirect utilitarianism advocates that utility "in the largest sense" is "grounded on the permanent interests of man as a progressive being" (I, II, cf. chap. III, OL). And when we look at happiness in the sense of what it means to be happy *as a progressive being* we are led to value the abilities of progressive beings to form, revise and implement plans projects and commitments. Notice, once again, the repeated characterization of autonomy as the capacity to independently form and revise our rational plans of life.

Mill, perhaps more than any other liberal, emphasized what Kymlicka calls "our *most essential interest*": the value of "getting our beliefs right" about the value of the ends we set for ourselves as individuals. Mill's arguments for free discussion (ch. II, OL) and his emphasis on the value of experience, particularly experience in alternative ways of living, are powerful illustrations of how seriously Mill took to heart the value of "getting it right". For Mill rectifying our mistaken beliefs is not just a matter of questioning, or pondering our current ends, or worrying, or deliberating. Rather experience and *informed* deliberation are essential conditions of autonomous choice. Experiments in living provide different contexts for evaluating pleasures and thereby function to help us remedy our mistakes about value. According to Mill, we can only recognize the higher pleasures which constitute happiness, after we have experienced the relevant range of alternatives; only experiments in living enable people to discover the most suitable forms of life for them (xii, intro, OL). Indeed, we can judge one activity as better than another only by having experienced each of them under circumstances of

liberty (ch. I, OL). However, although experience is an important condition of choice, for Mill we cannot rectify our mistakes by experience alone (25, OL). Rather "...there must [also] be discussion, to show how experience is to be interpreted" (25, OL). According to Mill, the whole strength and value of human judgment depends on keeping at hand the means to set our beliefs right when they are wrong (25,OL). As fallible beings, we have an *obligation* to ensure that "...we have neglected nothing that could give the truth a chance of reaching us" (26,OL). This requires no less than putting our beliefs out to the world with "a standing invitation to prove them wrong". Only then will we have done the best that human reason admits of in attaining certainty (26, OL).

In Mill we are able to clearly see how the liberal view is guided by the value of rationality. In order to be confident about the value of our individual projects we must be able to give grounds for such confidence. Grounds which take the form of reasons. Not just any reasons but good reasons. Reasons that are rationally grounded and not just caused. What follows from emphasizing the good of rationality as characteristic of individual autonomy? For Mill, like Nozick, the interests of Man as a progressive being are so essential to one's humanity that only the harm principle justifies the subjection of individual choice to external control (OL, 15). "...The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection" and the "...sole reason for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (14, OL). Hence, we have once again the liberal demand for the widest possible range of alternative choices subject to the constraints of the harm principle.

It is true that the Millian scope for choice may well be narrower than the libertarian range of choices, given an interpretation of Mill as an autonomist.<sup>27</sup> In such a case the bare having of options is not as important as the value of liberty in its indispensability for autonomous life. This interpretation would have Mill advocating a more positive form of freedom, requiring more of liberty than merely to be left alone. On this view, it is thought that the growth of individuality is not automatically provided by ensuring that one confronts numerous open options, but is provided rather by presenting options which stimulate and promote autonomy. This interpretation of the liberal value might arguably permit a higher level of government involvement in the lives of individuals insofar as such involvement relates to implementing and regulating conditions which promote individual autonomy. Moreover, the autonomist interpretation of "harm" may produce a wider scope of legitimate interferences than would a strictly libertarian interpretation of liberty. It is possible, for example, that interference with an individual's actions may be justified on this view given the threat that those actions pose to the promotion of the individual's own autonomy.<sup>28</sup>

(3) Finally, we see the same requirement for a wide range of options stemming from the Rawlsian account of value. Although the range is significantly narrower than that demanded by the libertarian, because of different interpretations of personal responsibility,<sup>29</sup> it nevertheless concentrates on the widest possible range of *relevant*

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<sup>27</sup> For an autonomist interpretation of Mill, see David O. Brink; "Mill's Deliberative Utilitarianism"; *Philosophy and Public Affairs*. It seems to follow from this sort of interpretation that "harm" may be much broader given

<sup>28</sup> See Haworth, Lawrence, *Autonomy*, (New Haven, Conn.: U Yale University Press, 1986) referred to in Narveson, Jan; *The Libertarian Idea*; Temple University Press; 1988) and John R. Danley; "Liberalism, Aboriginal Rights, and Cultural Minorities" for a general discussion on this topic.

<sup>29</sup> Recall (footnote 11) that because libertarians advocate a principle of self-ownership, individuals are held responsible for the choices they make, regardless of individual unchosen circumstances. Egalitarians, on the other hand, hold that individuals should be held responsible only for their choices, but not for their unchosen circumstances. Differences that arise among individuals due to

options. Relevant, that is, to the exercise and development of the two moral powers, which enable individuals to form and pursue determinate conceptions of the good within a liberal pluralist state<sup>30</sup> (77,PL). The value placed upon developing and exercising the two moral powers is so essential for Rawls that the criterion for deciding principles of justice in the Original Position is to be decided on the basis of whether or not they adequately develop and exercise the two moral powers: i.e. our capacity for a sense of justice which enables individuals to understand and act from reasonable and fair principles of justice, and the capacity for a conception of the ends and purposes worthy of pursuit and whether they allow individuals to pursue their determinate conceptions of the good (106, PL).

Rationality plays the central guiding role for Rawlsian theory, as it does for Mill. For both, forming, revising, implementing and pursuing individual determinate conceptions of the good *is* the good, while rationality is the enabler. Indeed, according to Rawls, exercising our innate or trained abilities in an increasingly complex fashion characterizes an essential precondition to developing the two moral powers (426, 427 *Theory*). It follows from this emphasis, on rationality and the development of our capacity for justice and for forming worthy ends, that Rawls also encourages the kinds of

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unchosen circumstances (such as social environment or natural endowments) are not the responsibility of the individual. Accordingly, egalitarians typically favor compensating individuals who suffer from such disadvantages. In levelling the playing field of circumstances, egalitarian liberalism will necessarily impose restrictions on choice that libertarians will not tolerate. For example, the freedom to contribute to political campaigns may be restricted to a certain dollar value in order to level the playing field of political participation so that inequalities in political participation are a result of choice rather than economic circumstance. Naturally, then, the egalitarian scope of choice will be more restrictive than the libertarian scope of choice.

<sup>30</sup> Rawls' two moral powers are: (a) a capacity for a sense of justice that enables them to understand, apply, and to act from the reasonable principles of justice that specify fair terms of social cooperation; and (b) a capacity for a conception of the good: a conception of the ends and purposes worthy of our devoted pursuit, together with an ordering of those elements to guide us over a complete life." (p. 103, 104, PL).

rights and liberties that guarantee the conditions of choice needed to intelligently decide for ourselves what is valuable in life, and the conditions to accept or reject particular opinions presented to us. Indeed, in the following quote from *Theory* Rawls supports Mill's insistence that the rational pursuit of value requires that institutions of liberty provide opportunities for different experiences, at least to some degree, if men's preferences among different activities are to be *rational and informed*.<sup>31</sup> Otherwise, human beings have no other way of knowing what things they can do and which of them are most rewarding (209,210, *Theory*).

This emphasis on *informed* choice, or as Kymlicka puts it: 'getting it right', through experiencing a range of different alternatives, is carried over in Rawls' argument for the priority of liberty and the need for state neutrality regarding religious affiliation. Rawls argues that, although particular associations may be freely organized as their members wish, and they may have their own internal life and discipline, such associations are subject to the restriction that their members have a "*real*" choice of whether to continue their affiliation (p. 212, *Theory*)<sup>32</sup>. This assumes that liberal institutions can, and should provide opportunities and freedoms to go outside of their associations and affiliations to consider relevant alternative activities and to question their projects and commitments.

For Rawls and Mill, in particular, confidence in the value of one's projects can only be generated by the removal of impediments and distortions in reasoning. The greater the confidence, the nearer we are to certainty about our value judgments. We have to think we have good *reasons* for our confidence and we'd lose that confidence if

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<sup>31</sup> italics mine.

<sup>32</sup> Italics mine.

we thought our beliefs weren't rationally grounded, but merely caused (62, LCC). But in order to have confidence that our reasons are good reasons we need conditions conducive to the pursuit of independent rational enquiry.

(4) I hope that my attempts in this section to represent the liberal tradition as operating through the value of 'autonomy' and, more particularly, 'rationality' are unobjectionable. I have tried to show that the relationship between libertarians and egalitarians, between classical liberals and moderns should not be left 'open'. Rather, a clear - even obvious - constant from one theory to the next is the central value of individual autonomy, where autonomy is expressed in terms of rational choice, and where rationality demands at the very least the bare having of options and sometimes the securing of conditions which promote the optimal exercise and expression of rationality. And I hope that I have provided satisfactory evidence that liberals - in particular Rawls and Mill - recognize a necessary connection between this core value and the liberties instrumental to protecting (in the case of libertarians) and promoting (in the case of "moderns") opportunities that allow us to ground our individual ends and pursuits in reason rather than mere desire or cause. And that this involves instituting liberties that allow us to consider and experience and compare our choices against a broad range of alternative options.

## *Chapter II*

### ◆ **Kymlicka's Representative Account Revisited and a Distinction Between the Freedom to Revise and the Freedom to Get it Right**

(1) Having identified individual autonomy at the heart of traditional liberalism, and the importance of its connection to those liberties that secure the widest possible range of alternatives, let us now go back to Kymlicka's representative account of liberalism to notice that Kymlicka has "moderns" emphasizing liberties of quite a different sort.

Although, we have seen that Kymlicka recognizes - indeed defends - the liberal morality that has individual autonomy at its centre, time and again his representative account falls short of calling for liberties necessary for individuals to truly exercise autonomous choice: to get our beliefs about value right. Instead, he emphasizes the importance of securing liberties which allow us to *revise* our current ends and values.

As an example, Kymlicka illustrates the importance of rational enquiry to liberalism in his observation that "liberalism is not just concerned with the freedom to act on our present desires" (LCC, 18). For a person can still lead her life from the inside in accordance with her own desires, but be brainwashed into accepting certain ends as her own. They could be discouraged from experimenting with other ways of life, through socialization, the press etc.. Kymlicka rightly argues that this would be unacceptable to the liberal because the liberal is concerned not solely with desire satisfaction but with the satisfaction of desires based on *unmistaken* beliefs about the values of our individual ends (LCC, 18).

One would think that this point would lead naturally to the conclusions that Nozick, Mill and Rawls have drawn: that the conditions under which people acquire their ends must be conducive to enabling the kind of critical enquiry necessary for testing the validity of our beliefs. Conditions that provide individuals with the opportunity to 'track bestness' (in Nozick's phrase); and the opportunity to expose oneself to different views about the good and to alternative ways of living; and to develop the capacities necessary to acquire knowledge about different goods; and intelligently examine these differences. As we have seen, there is plenty of material in Mill's liberalism to support this conclusion. But, instead, Kymlicka seems to suggest that Mill's concern with securing the freedom to *revise* our individual ends is intended to answer the liberal concern that we ground our values on unmistaken beliefs:

...for Mill it mattered... whether education and cultural socialization... opened up or closed off the possibility of revising [individual] ends *because* people not only want to act on their choices, *they also want to get those choices right* (LCC, 19).<sup>33</sup>

This is a queer point. For, while it is true that Mill and other liberals *are* concerned with securing conditions which open up rather than close off the possibility of revising individuals ends (there is little point in getting our beliefs right if we can't revise those of our ends that are mistaken) it does not follow that such conditions, by themselves, are sufficient for getting our choices *right*. Although, Kymlicka clearly recognizes that Mill's concern to secure conditions that open up the possibility of revising individual ends is motivated by a prior concern to get our choices right: "for Mill [revising individual ends] mattered...*because* people...*want to get those choices right*", he

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<sup>33</sup> Italics mine.

stops short of recognizing that this prior concern is answered by securing the freedom to make *informed* choices rather than the freedom to *revise ends* .

Another example of Kymlicka's failure to acknowledge the importance liberals attach to securing the freedom to inform our choices, occurs when he distinguishes his own account of our essential interests from that of Rawls.<sup>34</sup> In this section Kymlicka acknowledges that the capacities to form and exercise our rational plans of life are "crucially important" in allowing us to examine and change the social conditions in which we live, but he observes, with Dworkin, that our interest in them is only instrumental to and not the same as our essential interest in leading a life that is good (LCC,12). What interests me here, is that Kymlicka then plays down this difference between him and Rawls by explaining that Rawls wouldn't *really* disagree with the sketch of our essential interests that he has provided, since both are concerned that individuals not be forced to take current social roles and expectations as "predetermined yardsticks" of a valuable life<sup>35</sup> (LCC, 12). As if questioning current social roles and expectations is a sufficient feature to align he and Rawls as liberals. But again, I question why Kymlicka assumes that liberalism's value of individual autonomy is *sufficiently* protected by the liberties to question, examine and revise individual ends. Certainly, each are necessary for the liberal project of securing individual autonomy, but I suggest that they are not sufficient without securing the additional liberty to inform our choices through a wide range of alternative views and lifestyles and experiences.

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<sup>34</sup> p. 12, LCC.

<sup>35</sup> Kymlicka also aligns Marx with Rawls in this difference between them, because Rawls also puts identifies our highest order interest in a capacity: the capacity for freely creative labor.

Kymlicka once again carries this misplaced emphasis on revision into his defense of liberalism against charges of skepticism about the good. Kymlicka objects to charges of skepticism by arguing that non-liberals have created a straw man in attributing to the liberal position a skeptical view about the good by pointing to the liberal value of freedom to act on our desires. Kymlicka objects by saying that the liberal position actually rests precisely on the view that the good *can* be discovered (18, LCC). To prove this point, he argues that the liberal concern for basic freedoms that allows individuals to examine and revise their respective ends would be meaningless if liberals did not believe that the good could be discovered through such means. He warns critics against confusing or equating the freedom to live our lives from the inside (to act on present desires) with the freedom to examine our own ends.<sup>36</sup> But then Kymlicka fails to heed his own warning by confusing the freedom to examine our ends with the freedom to learn about the good. While it is true that we can't get our choices right without the freedom to examine and revise our ends; it still doesn't follow that the freedom to examine and revise our ends is equivalent to the freedom to get our choices right. To secure our ability to examine and revise our individual ends is just not the same as securing conditions which maximize our chances of getting our beliefs about value right. We can "question", "worry about", "agonize" and "deliberate" to exhaustion; but for facts and arguments to produce any effect on our beliefs, *they must first be brought before us*.<sup>37</sup> Freedom to revise or examine our individual ends will be inadequate for determining the good unless such ends can be compared and evaluated against a certain background. A reasonably wide background of *alternative* views about the good. If Kymlicka is serious about defending the liberal commitment to discovering the good, then why does he support his

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<sup>36</sup> LCC, p. 19.

<sup>37</sup> Mill; *On Liberty*; chap. II, p. 25.

argument by pointing only to *some* of the freedoms *necessary* to discovering the good rather than to *all* of the freedoms *sufficient* for discovering the good?

For Mill "...the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind."<sup>38</sup> It is this process ...of correcting and completing [our opinions] *by collating it with those of others* that... is the only stable foundation for a just reliance on [those opinions].<sup>39</sup> This is the kind of liberty that Kymlicka needs to put forward in order to show that liberals really are not skeptics about discovering the good. But, he falls short of putting forward this stronger commitment, choosing instead to point to freedoms which provide necessary but incomplete support for his arguments.<sup>40</sup>

Of the examples I have noted, Kymlicka seems to rely on necessary but insufficient evidence to support the premises of his arguments. In each case he has defended the liberal value of getting our beliefs about the good right, by pointing to liberal freedoms which secure our ability to revise individual ends, or to examine individual ends or to question them. But at no time does he include the condition that would, when added to the freedoms he does emphasize, provide sufficient conditions for protecting the essential interests that individuals have in getting their beliefs about value right.

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<sup>38</sup> (Mill, On Liberty, chap. II, p. 25).

<sup>39</sup> Mill; On Liberty; chap. II, p. 25; Italics mine.

<sup>40</sup> For another discussion on the freedom of choice which emphasizes the freedom to revise rather than the freedom to choose against a broad background of alternative views see p. 60, LCC.

Consider the case of an individual protected by the freedoms to revise, question and examine his individual ends within a theocratic (say catholic) culture - a culture that permits such freedoms but excludes integration of other cultures (and their attending religions) into the community. Given the freedom to examine and question current ends and to revise them, this individual might choose among the options presented to him by the catholic community. He might, for example, choose to be a priest or he might marry and be a teacher. Given the freedom to question and revise his individual ends he might even choose to be a priest *and* marry if he chooses to question and challenge his community's values which may then result in his establishing a new branch of Christian religion which expresses his revised beliefs about value. If he is strong enough in his convictions, he may do this given the freedoms he has to question, examine and revise his individual ends. However, if we take seriously Mill's argument that what is required for certainty in our convictions involves hearing what can be said about our convictions by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind, it would follow that the individual member of the catholic community should be provided with the freedom to go outside of his community, or to bring into his community, other different religions, philosophies and opinions as examples of alternative experiences. According to Mill the more we can test the validity of our own views against existing alternative views the closer the individual comes to certainty. A community or culture which excludes such views from integrating with the views of their own members, would on this account, fall short of advocating the full set of liberal concerns that follow from valuing individual autonomy.

I would like to suggest that Kymlicka's failure to make a strong commitment to securing an adequate range of options as a background to forming individual aims and ambitions reflects an ambivalence about the liberal project. He exhibits both a reluctance

to let go of the rational<sup>41</sup> choice criterion of value for 'tracking bestness' in our lives, but shows an equal reluctance to follow through on the conditions required in holding such a value. I further suggest that the ambivalence in Kymlicka's representative account is a consequence of a similar ambivalence in his revisionist account, which has apparently leaked into his interpretation of modern liberalism, causing him to emphasize liberty conditions more accommodating to his revisions than the actual liberty condition most emphatically defended by liberals themselves. Ultimately, I will suggest that this ambivalence renders his revisionist account ineffective in doing the work required of it by both liberal theory and by the contemporary claimants of collective minority rights in Canada.

◆ **Kymlicka's Revisionist Account - Culture, Context and the Individual**

This suggested ambivalence becomes less puzzling when we examine Kymlicka's revisions to liberal theory and the way in which he proposes to apply them to liberalism - and in particular Rawlsian liberalism - to defend an argument for the primary good of culture. When we see the particular tensions that develop with this kind of application it is not surprising that the natural strain is on the good of autonomy in the sense I have described.

According to Kymlicka, there are essentially four related and mistaken oversights made by modern liberals, which have prevented them from recognizing the value that culture has in liberal theory. The first of these, concerns a conception of what constitutes the individual context of choice so crucial to liberal individualism. The second, third and

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<sup>41</sup> that is, guided by a knowledge of human capacities and well-formed preferences (Rawls, p. 440, *Theory*).

fourth oversights involve a misunderstanding concerning the nature of the psychological limits on individual choice and of the psychological attachments which are in turn related to the psychology of individual self-respect and identity. I will address each of these so-called oversights in what follows.

◆ **The Value of Culture as Context**

(1) Kymlicka notes that liberals have always recognized that our individual beliefs about value, which are said to give meaning and purpose to our lives, come from the ideals and alternative forms of life that have been developed and tested sometimes for generations by individuals. (p. 164, LCC) Moreover they have recognized that these ideals and forms of life are provided by the cultural structure based on a shared language.<sup>42</sup> But, what liberals have failed to see is that the political culture, which has always been the assumed context for individual choice, is not *coterminus* with the smaller cultural communities of which individuals are members. They have failed to recognize that individuals cannot explore a number of different lifestyle patterns which might in principle be judged in abstraction from any cultural structure.<sup>43</sup>

Contrary to these assumptions, Kymlicka argues that the particular cultural structure within which individuals live out their lives is the only possible context of choice for the individual members within it. The range of alternatives that is so important

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<sup>42</sup> See Rawls 1971, pp. 563-4, and see Mill in Rawls 1971 pp. 209-10 and Dworkin 1985 pp. 230, 233).

<sup>43</sup> It would be curious, though, to explore how far modern technologies like television, internet resources, etc. would facilitate in allowing individuals to experience options not presented by one's own culture; and to what extent individuals from minority cultures within a culturally plural state have access to alternatives presented by the political structure which are incorporated into the minority culture as a legitimate alternatives.

to liberal individualism is determined not by the larger political structure - the *Canadian* structure so to speak - but, rather, by the particular cultural structures that Canadian culture houses and the activities that each of *them* recognize as relevant alternatives for individual choice. (165, LCC) Consequently, "it is the existence of a cultural community *viewed as a context of choice*, that is a primary good, and a legitimate concern of liberals" (169,LCC).<sup>44</sup>

The proposal that the cultural structure determines for the individual what alternatives are relevant as life options does not mean that the cultural structure is identical with the values held up by it. On the contrary, Kymlicka argues that the good of community will not lend protection to the preferred choices or traditions of the community (191,LCC). Rather, Kymlicka distinguishes between the idea of cultural structure and that of cultural character. On the one hand, the *structure* of a culture is represented by its shared language, heritage, and history etc. Cultural structure is "...the existence of a viable community of individuals with a shared heritage (language, history etc.)" (165,LCC). This structure is the good of culture because it is the media by which we become aware of the options available to us. Kymlicka argues that different ways of living have meaning to us because they are identified as having significance by our *culture*, because they fit into some pattern of activities which is *culturally* recognized as a way of leading one's life (165, LCC). It is precisely by examining the cultural structure, that we come to an awareness of the possibilities it has and the different activities it identifies as significant (165, LCC). So there are two aspects to cultural structure: it sets out options of life choices and it assigns values to those options relative to one another.

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<sup>44</sup> The implication here seems to be that if an individual became suddenly and completely divested of his cultural context, he would be severed from the only psychologically real alternatives that represent life options for him. This position seems to assume that the alternatives presented by his culture are not modelled somewhere else in another culture within the political structure and that he doesn't or couldn't share the language of that culture.

On the other hand, the *character* of a culture is represented by the content of the actual norms and values of a culture and their attendant institutions (165, LCC). These norms and values are uninteresting as a primary good from the Kymlickean viewpoint. Rather, it is only culture *as context* which is significant.

If we accept the claim that particular cultural structures are the *only* psychologically realistic determinants of the range of choices available to the individual, then liberals must acknowledge that cultures generally are a good thing from a liberal standpoint, not, as Kymlicka says "...because they have some moral status of their own, but because it is *only* through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value."<sup>45</sup> In other words, the value of cultural structure to the individual should be significant to liberalism in its role as a context of choice - the *only* context of choice - available to the individual chooser. Moreover, if we accept that cultural structure is the only available context of choice this might explain Kymlicka's tendency to overlook what I have stated as the missing condition for autonomous choice. Perhaps it is senseless to speak of a range of alternatives other than that provided by one's community or cultural structure because there just is no other range to speak of which could be considered psychologically real. In this context, it makes more sense to speak of whether there exists the freedom to question and revise our individual chosen ends within a given range rather than to focus, in an abstracted sense, on the scope of that range.

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<sup>45</sup> Italics mine.

◆ **The Value of Particular Cultures**

At this point the modern liberal might ask: granted that I, as a liberal, should value cultural structure generally speaking, in its function as a context of choice, why should any one *particular* culture be valued over another? Even more to the point, why should I value a culture which presents a very narrow range of alternatives, over one, which offers a relatively broad range of alternatives. If the security of the "narrower" culture is threatened, why not just assimilate individuals occupying that threatened culture with a narrow range of alternatives into a healthy one which offers a broader range of alternatives, rather than institute special rights to protect them? Rights that inevitably require the subjugation of some individual rights of choice (both within and without the protected culture) in order to protect the existence of the threatened minority culture.

The question of assimilation was precisely the question posed by Pierre Elliott Trudeau's government in the White Paper on Indian Policy in 1969. The White Paper recommended an end to the special constitutional status of Indians in Canada. Among other things, it proposed that the reservation system, which had protected Aboriginal communities from assimilation, be dismantled (142, LCC). The paper was motivated by the idea of racial equality<sup>46</sup> and the ideal of a colour blind constitution (143, LCC). Influenced by the *United States Brown v. Board of Education* case, it was felt that separate but equal services did not provide truly equal treatment (143, LCC). The reservation system was (and is still) subject to legislation which treated Aboriginals and

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<sup>46</sup> Racial equality, of course, was not the only motivate. There was to consider , as well, the economic benefits of dismantling a system which supported the ongoing financial dependancy of the government wards that were Indians.

non-Aboriginals differentially and therefore presented a moral problem for liberal politicians. How could liberals reconcile with liberal notions of equality the fact that Indian reservations formed "special political jurisdictions over which Indian communities [had] certain guaranteed powers, and within which non-Indians [had] restricted mobility, property and voting rights"? (LCC, 136) Eventually, the outcry from Aboriginal people against the White Paper proposal - expressed in the so-called Red Paper - prevented the liberal government from dismantling the reservation system. But the moral controversy persists. Even today, in an attempt to define Aboriginal self-government and the constitutionally protected Aboriginal Right, liberals wrestle against any notion of equality that does not lead in the direction of a colour blind ideal. Liberals must find a way to reconcile the continued existence of a reservation system that gives every Indian the right to live on the land of her band, but restricts her ability to use the land, or dispose of her estate as she sees fit, and prohibits any alienation of the land. The reservation system also places restrictions on mobility, residence, and voting rights of non-Indians on the Indian territory; and in the case of voting rights, the restriction remains even when the non-Indian married into the Indian community. Until recently, Indian women, marrying non-Indians lost their Indian status and the off spring of such a family would never gain Indian status. Even today, Whites<sup>47</sup> who marry aboriginals (and their offspring) do not share the same rights as aboriginals who marry aboriginals (and their offspring). Under the White Paper proposal these special rights and restrictions would change. While Indians would be free to co-ordinate the way they used their resources in the market, so as to preserve their way of life, they would receive no legal or constitutional help in their efforts.

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<sup>47</sup> This term designates all those who are not in the class of aboriginals, rather than a particular race.

◆ **The Enforced Assimilation Problem - Cultural Attachment, Respect, and Agency**

(1) According to Kymlicka, the assimilation solution - such as that proposed by the White Paper - must be rejected by liberals just as it was rejected by Aborigine in the Red Paper, in part because of a special relationship which holds between the individual member and her cultural structure; a relationship that goes beyond the observation that one's particular culture is the sole context for an individual's choice about the good life. This unique relationship goes to the heart of the personal identity of each individual and his or her ability to exercise the capacities which enable her to form coherent plans of life, to become an autonomous chooser, to fulfill her essential interests. Cultural membership, Kymlicka argues, affects our very sense of personal identity and capacity (175, LCC).

**Culture and Personal Identity**

(2) What is the nature of this relationship between culture and personal identity? Kymlicka's answer rides on the coat tails of the Rawlsian value of 'self-respect' and its function as a precondition to developing the two moral powers, required in forming and exercising our rational plans of life.

According to Rawls, the aim of the parties in the Original Position is to agree on principles of justice that enable the citizens they represent to become full persons, that is to adequately develop and exercise their moral powers and to pursue determinate conceptions of the good they come to form. Moreover, the list of primary goods and the index of these goods is to be explained so far as possible by reference to the interests citizens have in the two moral powers (106, PL).

Rawls identifies 'self-respect' as "perhaps the most important primary good" because it is a precondition to exercising and developing the two moral powers; in particular the moral power to pursue determinate conceptions of the good (440, Theory). The circumstances that support the first aspect of self-respect<sup>48</sup> are characterized by the conception of "goodness as rationality" or, put another way, by having a rational plan of life - in particular one that satisfies the *Aristotelian Principle*.<sup>49</sup> In the absence of these

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<sup>48</sup> The second aspect is: (2) finding our person and deeds appreciated and confirmed by others who are likewise esteemed and their associations enjoyed (400, Theory).

<sup>49</sup> The *Aristotelian Principle* is defined by Rawls as follows: "...the Aristotelian Principle [states that] other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity.

A Rawlsian footnote goes on to explain: the name "Aristotelian Principle" seems to me appropriate in view of what Aristotle says about the relations between happiness, activity, and enjoyment in the *Nicomachean Ethics*... Yet since he does not state such a principle explicitly, and some of it is at best only implied, I have not called it "Aristotle's Principle." Nevertheless, Aristotle certainly affirms two points that the principle conveys: (1) that enjoyment and pleasure are not always by any means the result of returning to a healthy or normal state, or of making up deficiencies; rather many kinds of pleasure and enjoyment arise when we exercise our faculties; and (2) that the elism.

The intuitive idea here is that human beings take more pleasure in doing something as they become more proficient at it, and of two activities they do equally well, they prefer the one calling on a larger repertoire of more intricate and subtle discriminations. For example, chess is a more complicated and subtle game than checkers, and algebra is more intricate than elementary arithmetic. Thus the principles says that someone who can do both generally prefers playing chess to playing checkers, and that he would rather study algebra than arithmetic...(426, 427, *Theory*). This assumption seems somewhat culturally biased in favour of analytic thinking. One rather prominent feature of Aboriginal peoples across their respective cultures, is 'visionary' or 'holistic' thought. This involves an emphasis on spirituality rather than rationality. *Spiritually* embracing the "whole" means embracing the interconnectedness of humans, earth, animals, the universe and the circular, reciprocal relationship among them. It involves adopting the viewpoint of "walking into the future looking backwards" and resists taking a piece of the world, isolating it in a conceptual box and intellectually dissecting it to see how it fits with the whole. Rather, it requires embracing the entirety of things in one glance. It emphasizes, understanding the greater sum, rather than its parts. It does not necessarily follow from the premises of this holistic or visionary epistemology that individuals are psychologically motivated by greater and greater complexity of action and thought, or that they naturally prefer the more complex action or series of actions to the less complex, particularly if this implies an analytic interpretation of complexity. Nor does it follow that a rational plan of life is better represented by an analytic epistemology than a holistic one.

The Aristotelian Principle is a psychological principle of motivation and accounts for many of our major desires,...why we prefer to do some things and not others by constantly exerting an

circumstances, self-respect would be left - at least partially<sup>50</sup> - unsupported. Because of the connection between self-respect and the two moral powers upon which Rawlsian political stability depends, Rawls says that 'the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect' (440, Theory). For without self-respect, an individual can neither develop a rational plan of life nor, consequently, either of the two moral powers.

It is by a purported further connection between self-respect and culture that Kymlicka establishes a position to argue, from a Rawlsian standpoint, for the recognition of membership in *particular* cultures as a primary good of liberal theory.

According to Kymlicka, people and their cultures are bound in an important way. Cultural structure presents a source of security and strength to its individual members. "Our upbringing," writes Kymlicka, "...is and remains a constitutive part of who we are" (175, LCC).<sup>51</sup> Moreover, a fact long recognized by sociologists is that attachment to our

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influence over the flow of our activity. ...implies that a person's capacities increase over time...as he trains capacities...comes to prefer the more complex activities...(426 fn; Theory).

<sup>50</sup> I say "partially" given that there are other circumstances to self-respect beyond the circumstances of having a rational plan of life and practicing rationality as goodness in accordance with the Aristotelian Principle. That is, the second aspect of self-respect - the support and admiration of one's peers. However, when considering this second aspect of self-respect, it seems fairly clear that respect or admiration from others isn't forthcoming without the practice of rationality which brings forth the kind of action required for such respect. For example, one needs at least to have formulated rational action to the extent of contributing toward his community, taking a certificate or degree, etc. Although, one might argue that one could commit a heroic deed, such as saving another's life, without having established such rationality conditions to any sophisticated degree beyond impulse, and have gained the respect and admiration of his peers.

<sup>51</sup> Communitarian Alistair MacIntyre also argues that our upbringing is a constitutive part of who we are. MacIntyre says we can't understand the actions of a human being apart from their individual history. To degrade our personal heritage is to degrade our personal efficacy, Kymlicka argues. MacIntyre argues similarly, that we cannot think "atomistically about human action" or analyse complex actions and transactions into simple components (p. 575, Moral Philosophy, "The Virtues, the Unity of a Human Life, and the Concept of a Tradition"). Rather we must see individual action as actions with a history and unity. As a protagonist in a narrative. A person's good is the way he lives out that unity to bring it to completion. Kymlicka doesn't go this far. but

culture may even affect our sense of agency. The same sociologists cite evidence of racist and oppressive regimes who have tried to destroy and degrade the cultural heritage of the people they oppress in order to undermine their sense of personal efficacy. Kymlicka says these strategies only make sense if one's sense of personal agency is tied to one's cultural heritage (175, LCC).<sup>52</sup> If we accept this claim, then cultural structure is crucial not only to the pursuit of our chosen ends, but also to the very sense that we are capable of pursuing them efficiently (176, LCC). To degrade the cultural heritage of an individual would be to undermine her personal efficacy (LCC, 175). Asking someone to trade off her cultural identity for some amount of money would be like expecting someone to trade off her self respect. But if, as Rawls says, self-respect is crucial to forming and exercising our rational life plans then to deny an individual her culture, is to deny her means to self-respect and, consequently, the ability to lead a good life.

On this interpretation of the individual, then, there are three aspects to the circumstances of self-respect: the first is rationality as goodness; the second is being esteemed by those whom we ourselves esteem; and the third is a secure cultural structure.

If we accept the reasoning presented so far, the liberal must, in the first place, value cultures in *general*, solely in view of their function as the sole context of choice for the individual; and value cultures *in particular*, solely in view of the psychological

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he does say that cultural structure is crucial not only to the pursuit of our chosen ends, but also to the very sense that we are capable of pursuing them efficiently (176, LCC).

<sup>52</sup> What Kymlicka does not note, however, is how the destruction and degradation of culture heritage may motivate cultural survival in the long term rather than extinguish it. Examples are the Jews throughout history and North America's own Aboriginal peoples, and Indigenous peoples throughout the world. While oppression of these peoples unquestionably constitutes gross injustice, in the long term their efficacy and identity, rather than being extinguished, seems in all cases to be re-affirmed and revitalized in the process of re-grouping against unjust and oppressive measures.

attachment that individuals have to their particular cultures as a source of security, and foundation for self-respect, and possibly even for agency. In short, to reject the value of *particular* cultures, would be for the revisionist<sup>53</sup> liberal to deny the individual the option of becoming an autonomous chooser.

Two questions remain to be asked: first, we might still want to know how we can treat individuals differentially based on cultural heritage and still treat individuals with equal respect. Second, we will want to know why valuing particular cultures leads us to support entrenched special collective rights - rights that trump the entrenched rights of other individuals.

◆ **Respect for Cultural Members v. Respect for Citizens**

(1) Kymlicka argues, in effect, that respecting persons sometimes requires that we treat individuals the same, while other times it requires that we treat them differently, depending largely on the choices of individuals.<sup>54</sup> Treating individuals differentially can be justified within liberal theory by distinguishing between the kind of respect we pay to individuals, either as *members* of their *cultural* communities or as *citizens* of their *political* community.

As a focus for this distinction, Kymlicka asks us to consider two different cases. In the case of Blacks in the United States, their exclusion from the dominant culture - the

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<sup>53</sup> When I speak of "revisionist" liberal I am speaking of the Kymlickean liberal.

<sup>54</sup> Feminists will recognize this reasoning as one expression of the "equality trap". For a very good discussion of the paradox of equality, see *Canadian Feminism and the Law: LEAF: Women's Legal Education and Action Fund*. Also see: The Law Society of British Columbia; *Gender Equality In the Justice System*; 1992; p. 1 - 2.

legal requirement that Blacks sit at the back of buses, that their children attend different schools, that they use different drinking fountains etc. - called for equal rights of citizenship, which permitted them to assimilate with the dominant culture, should they so desire.<sup>55</sup> Conversely, in the case of aboriginals, the aboriginal desire *not* to assimilate calls for *inequality* of rights in order to respect the choices of aboriginal individuals as members of a particular culture. In the first case individuals are asking to be respected *as citizens*, in the second case *as members of a particular culture*. But in both cases, Kymlicka argues, the issue is one of individual choice. Aborigines argue that without special measures to protect them from assimilation, from the choices of members of the dominant culture,<sup>56</sup> their culture will become extinct. And, as Kymlicka has argued, with it will go the individual context of choice that it represents for the individual and a primary means of the self-respect necessary to autonomous choice.

Framed in this way, the conflict for the liberal to consider is not one between individuals and community (a conflict irrelevant from the liberal point of view) but between *individuals*, as members of a particular culture, on the one hand, and as citizens of the political community on the other. To treat individuals with equal respect on this view, is to respect their choices in the context of their particularly situated circumstance.

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<sup>55</sup> Kymlicka does not use these examples, but I believe they compliment his argument. However, they also introduce contradictions. For example, when segregation laws were lifted and busing policies implemented there was, in an large number of cases, busing occurred against the objections of black parents who did not want their children harmed by the ill treatment they would receive from the prejudices of white children once they were bused. Moreover, many blacks felt that the children would be taken out of their secure (albeit poor) cultural environment in the black areas of town. In this sense, enforced assimilation occurred to some degree in the example of the blacks).

<sup>56</sup> e.g. the choices of transient workers to vote for large hotels and satellite disks in the Inuit north and the choices of non-aboriginal spouses of aboriginals to incorporate White values into the aboriginal culture (LCC, 146, 147).

◆ **Collective Rights**

(1) But we might still ask: "Why does the primary good of culture call for *special* rights strong enough to override constitutionally recognized basic individual rights?" This is the part of Kymlicka's argument that is specifically egalitarian. According to egalitarian theories of liberal justice, differences between individuals are legitimate as long as they are a result of their *choices* (186, LCC). But differences that arise from peoples *circumstances* are clearly not their own responsibility. They are, as Rawls puts it, arbitrary from the moral point of view (186, LCC).<sup>57</sup> So liberals need to know whether a request for special rights is grounded in differences resulting from choices or from circumstances.

According to Kymlicka, the aboriginal request for special rights should be granted on the grounds of unequal circumstance. The two-year-old Inuit girl, for example, even before she has an opportunity to make her choices, is born into a cultural structure which is threatened. She is therefore disadvantaged from the point of view that she and other members of the community will have to spend all of their resources on securing the cultural membership which makes sense of their lives. For the aboriginal it is necessary to outbid non aboriginal people just to ensure that their cultural structure survives, leaving them few resources to pursue the particular goals they've chosen from within that structure (LCC, 189). On the other hand, non-aboriginal people get the security of cultural context "for free" leaving them to use their resources to pursue their plans of life. Therefore, special rights are needed to rectify the inequalities resulting from the disadvantaged circumstances in which aboriginal individuals find themselves.

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<sup>57</sup> Of course the Libertarian would allow these differences of circumstances, while the egalitarian will not.

◆ **Summary**

To summarize Kymlicka's Revisionist argument then: the liberal should value culture *generally*, in view of its function as the sole and exclusive context of choice for the individual; and value cultures *particularly*, in view of the psychology of attachment between individuals and their particular cultures which goes to the heart of individual personal identity and capacity, and therefore, to the heart of autonomous choice. This latter value - of *particular* cultures - sometimes leads to special collective rights to protect certain cultural structures when their existence is threatened by the choices of the dominant culture and when members are disadvantaged in a way that is the consequence of circumstances rather than choice.

◆ **- Side Issues**

(1) Kymlicka's compelling and novel revisionist argument invites many challenges, all of which deserve careful attention. However given the scope of this thesis I can do no more than waive a hand in the direction of a few of them.

One conception particularly deserving of analysis is the notion of the range of options as determined by a particular cultural structure. We need an explanation for why Kymlicka apparently sees culture and political community as mutually exclusive structures within a culturally plural state. Why, for example, must we see the *particular* culture as being an exclusive determinant of the individual's range of options? Why not instead see the cultural structure as translucent, so to speak; superimposed against a background of perhaps differentially influential structural layers represented by the larger political culture, with its liberal values, and more distantly, by other particular cultures

which model the different lifestyles and experiences and values which make up the range of alternatives provided by the larger political structure? Why not see most minority cultures as hybrid forms, made up of the particular cultures *and* the political culture, in which alternatives presented by the political structure take on meaning and expression within the culture, constantly adding to and changing the cultural weave? Why is it not this wider notion of culture to which individual identity is attached?

Kymlicka argues that the psychological boundary of individual choice is the cultural structure itself and the options *it* presents, but he also argues that the freedom of individual members of illiberal cultures that hold collective rights, can be protected by allowing them to 'opt out' of the cultural context and into the broader society. But unless culture is viewed as a kind of hybrid, how could such opting out be a psychologically realistic alternative? And if we can just opt out of our own cultures, then by continuing to participate in them aren't we doing so by choice rather than circumstance? Don't we choose continued participation in our cultures, based on a preference for a certain set of values over other sets of values. And if this latter point is reasonable, then by what disadvantage in circumstance entitle minority claimants to special collective rights? What feature specifies the part of cultural context that is not a matter of preferred values and is attached to individual personal identity by sheer circumstance? And if Kymlicka believes that opting out is realistic for individual members of protected illiberal cultures then doesn't this suggest a transferability of this feature from culture to culture?

Another puzzle is the problem of distinguishing those minority cultures which qualify for special rights protections from those that do not. There is the question of whether any inherited cultural membership can ever be said to be a matter of anything other than circumstance. Kymlicka attempts to distinguish the Aboriginal cultures from those non-first nations cultural minorities by suggesting that members of immigrant

cultures chose - by virtue of their immigration - to live under a political liberal system of government. However, while this may be true of the first immigrants of Canada, one wonders what difference exists between the aboriginal girl born into disadvantaged circumstances and the disadvantaged third generation Sikh girl born into a minority culture also under the threat of assimilation - by no choice of her own, nor of her mother's.<sup>58</sup> Among other questions, we need to ask whether "choice" or the memory of choice is part of the heritage of immigrant cultures just as oppression and paternalism is part of the heritage of the Aboriginal culture.

There is the further question of the psychology of self-respect and its determinants. There are ways in which culture *undermines* self-respect and the individual creative will, a view convincingly advocated by Mill. And there are ways in which the *struggle* for beliefs about values, rather than the *protection* of them against resistance, is the basis of individual self-realization and, ultimately, self-respect.

There is also the difficulty presented by the cultural structure/character distinction and the question of how protection of structural stability can be secured without stabilizing the values and beliefs of the culture. On a theoretical level, we need to ask whether cultural discourse: modes of speaking, frames of reference, heritage and history can be separated from shared norms and values? Can we even engage in discourse about protecting Aboriginal culture without invoking the language of value? If we can, on a practical level, we need to ask "will that language be one that answers Aboriginal

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<sup>58</sup> This question was first raised by Peter Danielson in one of our discussions. Peter challenges the notion that any relevant distinction can be made between aboriginal minority groups and other Canadian minority groups in deciding entitlement standards for special collective rights. It is not clear to me whether he had this particular point in mind when he made the objection.

concerns?" These questions will be the natural result of observations made in the next section and will be followed through in some detail in Part II.

As tempting as these issues are, I will resist these discussions in order to pursue the present concern; and that lies not in challenging Kymlicka's revisions but anticipating the consequences of *accepting* and incorporating them into the liberal (and particularly, Rawlsian) theory. What I am primarily concerned to challenge is Kymlicka's claim that his defense of collective rights is a *liberal* defense.

### *Chapter III*

#### ◆ **The Dilemma of Kymlickean Liberalism**

(1) We have already seen that, on Kymlicka's revisionist account, there is an additional aspect introduced to the circumstances of self-respect: that is, a secure cultural structure. Kymlicka has argued that securing this third aspect<sup>59</sup> sometimes requires special rights in certain cases of disadvantaged circumstances. I would like to suggest that a dilemma follows from incorporating the third aspect of self-respect into the Rawlsian account and instituting special rights. This dilemma follows regardless of the relative weight or ranking assigned the 'autonomy' value (represented by the 'goodness as rationality' circumstances of self-respect and the exercising of the two moral powers) and the value of cultural membership.

The dilemma follows when we consider the liberal position after special protective rights have been granted to disadvantaged minority cultures, such as Aboriginal peoples. Once special rights are secured by way of Kymlickean reasoning, I suggest that the Kymlickean liberal<sup>60</sup> must still address the remaining problem of securing the first aspect of self-respect: having a rational plan of life in accordance with the Aristotelian principle; and he must secure the essential interests we have in forming and exercising our two moral powers.<sup>61</sup> These are the *embodiment* of autonomy: the power to pursue our individual conceptions of the good and the power to form and

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<sup>59</sup> Recall the second aspect is footnoted but not discussed and the first aspect is the value of goodness as rationality.

<sup>60</sup> Hereafter, I will call the Kymlickean liberal a "revisionist".

<sup>61</sup> Kymlicka, as we have already noted, sees these powers as necessary to a good life though not *constitutive* of it.

exercise our sense of justice. And, recall, that intrinsic to the liberal idea of pursuing our individual conceptions of the good, is the value of rationality - the notion of "getting it right" about our beliefs about the good.

Whether or not Kymlicka would agree with this requirement is, unfortunately, not fully clear. On the surface, it looks as if he might agree. He points out himself, that liberal values require *both* individual freedom of choice and a secure cultural context from which individuals can make their choices (169, LCC). Indeed, he acknowledges that the very importance of culture is that it allows "*meaningful* individual choice" (172, LCC). Although he supports some temporary (and otherwise illegitimate) restrictions on individual freedoms in cases where the very survival of a culture depends on such restrictions, he acknowledges that the *long term* ideal of protecting cultural structure must always be "*full* liberal freedoms"<sup>62</sup> within the protected cultural structure.

But as I have suggested before, *full* liberal freedoms in the absence of an adequate range of alternatives are insufficient for individual autonomous choice. When required to give an official definition of the kind of liberalism he is defending, Kymlicka seems to acknowledge this point. Indeed, he stresses the feature of 'getting it right' about our beliefs about value as "*the most*"<sup>63</sup> essential interest that liberalism is concerned to defend. On the other hand, in giving his defense of collective rights, he seems to fall back on a much narrower interpretation of autonomy. He suggests that the liberal good of cultural membership is satisfied when "...each individual member of the community is free to choose what they see to be most valuable *from the options provided*" (198, LCC). But he fails to remark on the importance of the range of those options, implying that the

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<sup>62</sup> Italics mine.

<sup>63</sup> Italics mine.

freedoms to question, deliberate about and revise individual ends within any given cultural range meets the standard of individual choice.

There seem to be three possible interpretations of autonomy that are expressed at different times either explicitly or implicitly in Kymlicka's discussions. The first is a notion of autonomy which includes the 'getting it right' feature together with the freedom to question, deliberate and revise individual ends. The second is a notion of autonomy that includes the latter freedoms but excludes the 'getting it right' feature. This latter form is the one most frequently implied throughout the book, and I have already argued at some length why it is not a sufficient definition of autonomy from the liberal perspective. There is yet a third interpretation, still to be discussed. On pages 170 and 171 of LCC, Kymlicka discusses the conditions under which illiberal cultures may justifiably be protected. In this discussion he implies that a "fully liberal society" is one in which the individual has at her disposal all of the resources of the modern world and is the ideal toward which collective rights, on the revisionist view, strives (170, LCC). On the same page he speaks of helping minority cultures<sup>64</sup> "make their way" toward "the unlimited possibilities" of modernity. So, when Kymlicka writes: "...so long as everyone has her fair share of resources and the freedom to live her life as she chooses within her cultural community, then the primary good of cultural membership is properly recognized", the implication is that by "resources" he means the resources provided by the modern world rather than those limited to the cultural structure (172, LCC).

It is worth pursuing the question of whether this last interpretation of autonomy satisfies the principle of 'getting it right'. But before we pose these kinds of questions we

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<sup>64</sup> cultures which lack the structure of social understandings that point out the dangers and limits of the resources at our disposal in the modern world.

can observe that the first and the last interpretation of Kymlicka's notion of autonomy are far more demanding than the second. Given my argument that the first interpretation of Kymlicka is the interpretation required by liberalism and, in particular, by the so-called 'moderns' with whom Kymlicka wishes to align his defense, let's consider what falls out when this interpretation is applied to liberal - and in particular Rawlsian - theory.

(2) For the sake of discussion, let's assume that we can distinguish between cultural character and cultural structure<sup>65</sup> and that stabilizing the structure does not require that we stabilize the character. Let us consider whether the 'autonomy' aspect of 'self-respect' can be satisfied by the revisionist account once collective rights have been secured.

In the first place, I would like to raise the point that even in accepting Kymlicka's argument that cultures provide the only *possible* range of alternatives for individual choice, while this frees the liberal from the possibility of *choosing* the widest context of choice (individuals cannot choose a context beyond what their own culture introduces to them) there is nonetheless an important difference between the possibility of choosing among *existing* ranges, and *developing* an existing range.

I suggest that the liberal value of autonomy requires that the revisionist, having secured the cultural structure, develop the existing range to its fullest liberal capacity. Let's consider what this might mean.

The justification for special collective minority rights is supposedly made in virtue of the disadvantaged *circumstances* in which aboriginal individuals find

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<sup>65</sup> Tomasi argues that they are not distinguishable in KLCM alternatives *specified as significant* by the *culture*.

themselves.<sup>66</sup> Their problem is that their disadvantaged circumstances (the insecure cultural structure) have them utilizing all of their resources to secure the structure rather than to examine and pursue their individual determinate conceptions of the good. So let's suppose we secure the cultural structure as Kymlicka suggests. Over a period of time it becomes stable (assuming for the moment that we can identify and judge such these things). Now individuals are free to spend their resources on pursuing their current conceptions of the good life in accordance with their individual *choices*....from a range of alternatives specified as significant *by the culture*.

Now, if the revisionist is to take seriously the liberal value of autonomy - the feature of liberalism which demands not just that we be allowed to question and revise current ends and beliefs but also, and perhaps most importantly, that we be allowed to pursue our "most essential interest" in "getting those beliefs right" - then she cannot dismiss her obligation, as a liberal, to *develop all* of the conditions necessary for individual autonomy. This includes the liberties that open up the fullest liberal range of options - for exercise of independent choice within the cultural structure. Once the cultural structure is secure, this obligation becomes imperative, particularly in consideration of the fact that the individual Aboriginal is now - finally, and for the first time - in a position to use his resources to develop and exercise independent choice. The very *reason* special group rights were granted by the revisionist in the first place was in order to establish for the individual, the self-respect she requires to pursue individual autonomous choice with the view to living a good life. Having secured the third aspect of self respect - cultural security - it is now up to the revisionist to follow through with the first aspect of self-respect: rationality as goodness, and the conditions which secure

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<sup>66</sup> For objections to this claim, see John Danley; "Aboriginal Rights and Cultures".

the essential interests of individuals to get their choices right through individual autonomous activity.

If the revisionist takes seriously the value of autonomy then the alternatives deemed significant by the culture can be no less than the alternatives deemed significant by political liberalism. Under a secure cultural structure it is not enough that individuals be permitted to question, revise and act on their beliefs. They must now be permitted to get those beliefs right. To be free to become full citizens of a liberal culture, to develop and exercise their autonomy so that they are as certain as they can be that the life they are currently leading is a life that is actually good and not just believed to be good. And as we have seen, for both Mill and Rawls, this means that our basic institutions must provide the opportunity for experiencing alternative views and lifestyles if individual preferences are to be rational and informed.

From a Rawlsian perspective, adopting the values of political liberalism means in part, developing and acting on our capacity for tolerance, which involves being open to a plurality of reasonable moral, philosophical and religious, but often incommensurable, comprehensive doctrines.

Recall that the two moral powers consist in a capacity for a conception of the good and a capacity for a sense of justice - a sense of justice which enables us to give priority to the *political* values of liberalism necessary for participating (which includes pursuing our individual conceptions of the good) within a fair system of social cooperation (103, 104, PL). Fully liberal citizens give priority to the political values of liberalism, over the values of their personal individual moral, philosophical; and religious comprehensive doctrines (which may themselves constitute their conceptions of a good life). The priority of political values ensures an overlapping consensus which in turn

secures our ability to pursue our determinate conceptions of the good in a society made up of a plurality of such conceptions which stem from *incommensurable* comprehensive doctrines. If the first aspect of self-respect and the two moral powers are constitutive of (as in Rawls and arguably Mill) or necessary (as in Kymlicka and Dworkin) to leading a good life in accordance with autonomous choice, then it follows that the revisionist must advocate that the members of protected cultures become *fully* liberal in this sense. The autonomy aspect of liberalism requires that the context of individual choice be specified by the values of liberalism and if those values are not specified by the cultural structure then the autonomy feature of liberalism demands that those values be *developed* by the cultural structure.

But doesn't it follow that protected cultures in this case ought to develop political constitutions that are open to receiving alternatives specified not only by their own culture but by whatever information, examples, and alternative lifestyles that may be introduced to the cultural structure? Wouldn't such a policy welcome information, examples and lifestyles introduced by Buddhists, Confucians, Protestants and the various cultures which tend to attach to these doctrines? And wouldn't that naturally include the beliefs and values of the dominant cultures?

If we take the good of culture as seriously as we do the good of autonomy, the Kymlickean answer to these questions must be 'no'. Not when those cultures and beliefs threaten the disadvantaged minority culture. And this has also been the actual response of Aboriginal peoples according to Kymlicka's survey of Aboriginal rights claims.<sup>67</sup>

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<sup>67</sup> See LCC, chpt. 7 esp. p. 145-151.

For example in all cases Aboriginal leaders demand that Aboriginal communities be able to restrict mobility, property rights and voting rights of non-Aboriginal people even after the non-aboriginal has married into community (138, 142, LCC). Preventing non-Aborigine from having an influence on what matters in the community, helps sustain the existence of the community. These are the kinds of restrictions that Kymlicka deems reasonable.

Some Aboriginal leaders have sought exemption from the Charter of rights and freedoms particularly with respect to guarantees to all Canadian citizens of the right to a public education in either of the two official languages (English or French). According to Aboriginal leaders, allowing new residents in the community to receive education and public services in English would "weaken the long-term viability of the community". It would mean not only that new residents will not have to fully integrate into the minority cultures, but that "...the establishment of an anglophone infrastructure will attract new anglophone arrivals who may have no interest in even partial integration into the aboriginal community." In other words, those who may want to become only partially integrated into the Aboriginal community, but retain their own cultural ties, are unwelcome. Though this restriction is admitted by Kymlicka to be more controversial, he questions whether education in *any* language ought to be guaranteed and therefore doubts whether denying Aboriginal members a publicly funded education in English is problematic from the revisionist perspective.

It would seem then, that according to Kymlicka such cases in which the viability of the culture are threatened, a capacity for a conception of justice of the sort required by Rawls would be pre-empted by the primary good of culture. In the case of the Aboriginal peoples, giving priority to political values that honour pluralism may lead to extinction of the community. If protected cultural structures adopt a fully liberal constitution the

culture may once again - will almost certainly - become threatened by the choices of the individuals of dominant cultures. It's a simple case of being outnumbered. That is why special collective rights must be permanent and not just an affirmative action plan toward a colour blind constitution. That is why Aboriginal cultures must be exclusive. In the case of threatened, disadvantaged minorities, the political values honouring plurality have caused grievous harm. Indeed, a harm so serious - so the claim goes - that it threatens the very existence of the minority culture.

What kind of fall out for revisionist theory results from this response? On first analysis, an entire one-half of the moral powers which constitute the essential value of liberalism are extinguished by granting collective rights. That is, the capacity for a sense of (liberal) justice is lost, given its value of toleration and plurality requirement. Moreover, when we analyze what it means to develop the remaining moral power - our capacity for the good - we are led to 'goodness as rationality' and the value of 'getting it right' with respect to our beliefs about the good. When we recall Mill's interpretation of what it means to get it right - to experience alternative ways of living; to hear other views of the good and to defend our own against those views - then it seems that to deny other cultures penetration through the cultural structure is to deny individuals of the minority culture not only the first moral power of Rawlsian political liberalism, but also to deny them sufficient means of developing the second moral power. True - the value of questioning, deliberating about and revising individual ends *can* be retained on the Kymlickean account. But, as I have argued, these features are not sufficient for the "most essential interest" we have in getting it right about the good. These features are not even sufficient to distinguish Kymlickean liberalism from communitarianism.<sup>68</sup>

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<sup>68</sup> Communitarian individuals, with the requisite experience, may also question, deliberate, and revise individual ends (see Alisdair MacIntyre *After Virtue*).

This analysis - if it is correct - seems to force the revisionist to choose between two equally unacceptable consequences. If she chooses to protect cultural structure at the expense of autonomous choice in the sense I have argued, then she fails to meet her objective in identifying with the characteristic feature of liberalism. In particular, she fails to identify with the individual modern liberals personally singled out as the kind of liberalism the revisionist wishes to defend. And this means that she has failed to give a *liberal* defense of collective rights. On the other hand, if the revisionist chooses to develop autonomy within the protected cultural structure it seems it can only be at the expense of cultural security. There seems to be no way in which *both* aspects of self-respect can be achieved at the same time...*unless* we accept a version of our essential interests which excludes any real ideal of 'getting it right' with respect to our beliefs about value.

And this leads me now to pick up the question introduced at the beginning of this section: why does Kymlicka's representative account fail to emphasize sufficient conditions for autonomy? Why is there an ambivalence to follow through on the conditions required in holding such a value? One answer, I suggest, is that to do so would force the revisionist into what I have identified as the Kymlickean Dilemma. To acknowledge autonomy in the 'getting it right' sense and at the same time to prohibit development of an adequate range of alternatives for individual choice is to prevent the very thing for which special rights were designed. But to acknowledge autonomy and to encourage development in the relevant sense is culturally suicidal to the minority culture. The alternative, it seems, is to put a different spin on the notion of autonomy so that development of autonomy does not entail a fully open society. Rather, it requires only that members are able to question, examine, challenge and revise individual ends within

the community. This appears to have been the route that Kymlicka chose. But in doing so, he lets go of his hold on the most relevant of liberal principles in his defense.

◆ **Conclusion:**

The self-imposed standard of self-respect necessary for individuals to form rational conceptions of a good life - apparently is not met by Kymlickean liberalism. To make matters worse, in the following section I will suggest that if Kymlicka's liberalism could be made to satisfy individual autonomy while protecting the good of culture it would appear to be a toothless defense of collective rights in any event, in view of the actual definition of the Aboriginal Right given by the particular groups he chooses to defend. Why? Because, the content of the Aboriginal right is vastly different from the aboriginal perspective envisioned by Kymlicka. It is this claim that I will take up in the next section.

◆ **Summary**

The central question so far has been to ask whether Kymlicka's defense of collective minority rights can properly be called 'liberal'. This has involved establishing a framework which conceives of liberalism as a range of theories which take their place along a certain value spectrum, from libertarian to egalitarian, and which share a core value concept and hence share the name liberalism. This core concept is identified as the liberal value of individual autonomous choice and, in particular, an interpretation of it as the goodness of rationality I have put forward this core concept as a criterion for evaluating Kymlicka's defense as 'liberal'.

An explication of some key concepts of Kymlicka's "representative" account of liberalism introduced this central feature. I then attempted to track it through traditional liberalism, Nozick through to Mill and Rawls, to identify it as the conceptual thread of liberal theory, and to note the very important role that this feature has in specifying access to a context of choice of a general nature and scope.

I then re-examined Kymlicka's representative account and observed certain "misfits" which do not actually occur in the traditional liberal account. In particular, I observed a misplaced emphasis on the liberty to revise individual ends. I then examined Kymlicka's revisionist account of liberalism, and suggested certain motivations for understating the traditional liberal demand for a broad range of alternatives for individual choice, in favour of emphasizing liberties more accommodating to Kymlicka's revisionist argument for special group rights.

I argued that in understating the traditional requirement for a broad range of individual choice, Kymlicka has not made it go away - even with the introduction of the good of cultural membership. The suggested consequence is that his revisionist account of liberalism introduces tensions between the primary good of culture and the self-imposed criterion of self-respect which leads to a dilemma in which either the primary good of culture is honoured at the expense of individual self-respect, or the other way around, but that both cannot be honoured at the same time.

## ***PART II***

### ***Chapter IV***

(1) The central argument of Chapter III, which I have called the Kymlickean Dilemma, depends on certain assumptions about the primary good of cultural *structure* which need to be explored. The most fundamental assumption I have been making is that the kind of rights required to secure the existence of the cultural structure are rights of the sort that resist the penetration or amalgamation of alternative cultures and their attendant philosophies, religions, ideals, norms and values. I have thus far supported this assumption by touching on the Aboriginal claims to restrictions on voting and language rights as examples of exclusive rights which prevent integration of non-Aboriginal values into the community and are illustrations of legitimate rights by Kymlicka's own declaration.

In effect, by pointing to examples of the kinds of restrictions on personal liberties which are supported by Kymlicka and by then arguing that such examples barr the penetration of alternative values into the community, I have implied that in protecting cultural *structure* one is protecting cultural *character*, and to the exclusion of the characters of other cultures.

I think it is worth making a deeper enquiry into the theoretical grounds for this claim. In making such an enquiry I hope to accomplish three things: First, I hope to flush out the nature of the disadvantage suffered by members of threatened Aboriginal minority cultures and enquire about what kinds of rights flow from this disadvantage. Second, I hope to strengthen the claim that structural protection requires exclusive measures, which bring us back to the dilemma noted in Part I; and, finally, I hope to re-

enforce the observation that the usefulness of Kymlicka's defense to actual Aboriginal claims to collective rights is dependent upon the *inseparability* of structure and character. In other words, if there was a way to protect structure without protecting values the Kymlickean defense would be of no use to the cultural community for which it was designed.

(2) In taking a deeper look at the theoretical possibility of protecting cultural survival without disabling the liberal value of autonomous choice, we can no longer avoid a closer look at the primary good of cultural structure: We also need to know the exact nature of cultural structure (in the existential sense). How do we identify it apart from the character of a culture; and what does it mean for the *existence* of culture to be threatened? We need to know in exactly what way self-respect attaches to structure without attaching to character; and what kind of rights would sufficiently protect this attachment. Unfortunately, Kymlicka either does not answer these questions or is unclear in the answers he does give. However, we can try to extrapolate the answers from what he has either stated or implied.

#### ◆ **The Concept of Cultural Structure Revisited**

While Kymlicka is vague about the nature of the primary good of cultural structure he has said some things about it. We know that cultural structure is represented by the *existence* of a cultural community, with shared language, heritage, history and culture. We also know that the cultural structure is something that persists even when fundamental changes to its values, norms and attending institutions occur (166-7, LCC). We know that the cultural structure is the *only* psychologically realistic context of individual choice and it is the structure and not the character upon which individual self-respect is dependent. We can infer from the latter, I think, that the structure and the

character are thought by Kymlicka to be distinguishable concepts which can also be separated in some practical sense.

We also know that the cultural structure is a context for individual choice which has two aspects: it sets out options of life choices, and it assigns values to those options relative to one another. It has been my ongoing concern that control of the range of life choices that are the first aspect disables the legitimacy of the process that is the second aspect.

This kind of concern arises out of a related concern that becomes immediately obvious in considering the nature of the concepts of cultural character and cultural structure: that is their seemingly fused state. In trying to sort out the distinction between structure and character, John Tomasi offers two interpretations of what the actual good of the cultural structure could be. The first interpretation leads to the conclusion that cultural structures can almost never be threatened and so require virtually no protection. On the second interpretation, Tomasi concludes that securing cultural structure requires the securing of its character, which is self-defeating on Kymlicka's own analysis..

◆ **An "Existential" Interpretation of Culture**

Tomasi's first interpretation gives an 'existential' reading to the meaning of cultural structure since it is this reading which the first and most explicit of interpretations given by Kymlicka himself: "It is the *existence* of a cultural community viewed as a context of choice that is a primary good, and a legitimate concern of liberals" (169, LCC). On this view, it is the mere existence of this primary good, to which individual self-respect is tied.

Given an existential reading of the good of culture, how is it that individual members are disadvantaged with respect to it? Tomasi's response is "almost never" because 'existence' outlives virtually any transition of values (588, KLRCM). He reasons that, if, as Kymlicka claims, it is mere existence of a cultural structure of one's own as a context of choice that is a primary good, and if a structure is a context which persists in spite of the activity of its character, then notwithstanding ongoing change in cultural values, norms and institutions, a cultural structure could, by its very make up, withstand almost any change "short of a terrible natural catastrophe or war, perhaps" (588, KLRCM). In other words, there will be almost no case in which an individual's cultural structure does not exist or where existence is threatened.

To illustrate this point, Tomasi argues that it would be absurd to say that the Inuit girl described by Kymlicka, who from age two to eighteen experienced the rapid and disorienting transition of her culture from Inuit to White ways, had *no* cultural structure within which to make her choices. While she may have grown up in a society that was transitionally bilingual and bicultural "(jarringly so)" and while some options may have become unavailable and other new ones created, she still made choices within *a* cultural structure - and, most importantly, one that was hers. She made choices as a member of an Inuit group within the context of her own cultural structure which was in the midst of a disorienting transition to White society (588, KLRCM).

Tomasi concludes from this analysis that "it cannot be the mere existence of a cultural structure that is one's own that Kymlicka really has in mind when he speaks of cultural membership as a primary good" since, practically speaking, almost *no one* is differentially disadvantaged with respect to that good. Therefore cultural structure in the existential sense cannot generate special rights (589, KLCM). He concludes that Kymlicka must have meant that the primary good is not just the bare existence of a

cultural structure of one's own but the existence of a *stable* cultural structure of one's own (589, KLRCM).

◆ **The Stability Interpretation of Cultural Structure**

Tomasi thinks there is further evidence for this latter conclusion in the shift that Kymlicka makes from describing the primary good of cultural structure as the *existence* of a context of choice to a *stable* context of choice (162-66, LCC). As Tomasi points out, for example, on p. 167, of LCC the concern moves to a "(stable) context of choice" and on p. 169 and 170, a "secure cultural context" or "a secure cultural context of choice". Again, on p. 169, the original distinction between the cultural structure and the character of the culture (made on p. 166-67) becomes a distinction between "the stability of a cultural community" and its character.

Taking a "stability" reading of Kymlicka Tomasi asks: "what does it mean for a cultural context to be stable and, how is it that individual members are disadvantaged with respect to this primary good?" He reasons that since cultural structure sets out options of life choices, and assigns values to those options, then such a context is *unstable* in periods when new options suddenly and unpredictably appear among the life-choice possibilities while important old options disappear (589, KLRCM). At the same time, and possibly as a result, the traditional rankings of the various options become unsettled - because those rankings become a matter of disagreement, or real uncertainty, within the community. Furthermore, the character of these new options and the disordering of the rankings are profound and pervasive enough to reach to the very foundations of the cultural community: They threaten not merely the cultural community's values, norms, and attendant institutions (the "character") but the history,

language, and culture of the groups (the structure itself). It is instability of this sort that Kymlicka wants to avoid (589, 590 KLRCM).

Now, keeping in mind Kymlicka's belief that the only relevant attachment between self-respect and culture is the one between the individual and the cultural *structure*, Tomasi argues that we must therefore, be able to distinguish between the two, when the cultural structure is under threat in the way described by Tomasi. Otherwise, Kymlicka's concern to ensure that flexibility of the cultural character remain intact may be at risk. In order to maintain this distinction, Tomasi argues, it must be possible to show ipso facto that changes to the group's values, norms and attendant institutions are not changes to its history, language and heritage.

But Tomasi argues that it is not plausible for the character of a culture to change without changing its structure. When Quebec Catholicism was rejected during the quiet revolution it changed the history, and the culture of Quebec. Even, if we interpret culture as language alone, the structure is still changed by a change in character. Because even if the language (in a taxonomical sense) does not itself change, the set of options it transmits - along with its substantive evaluations - can change in profound ways. Inuit can talk in their own language about leaving the tribe (with some addition of new Inuit words for 'university' or 'satellite dish' for example).

So, on either of these interpretations (structure as history or structure as language) character change causes structural change. But that means there is no principled way to distinguish between changes in character and changes in structure. And a distinction is crucial to identifying in what respect people can be disadvantaged regarding the primary good of culture (593). It follows that if stability of structure is the good of community, and a distinction can't be made then Kymlicka's argument tells us to avoid differential

degrees of instability in the cultural structure. Therefore, Tomasi concludes, that to avoid differential instabilities of this kind one would need to allow cultural groups or their leaders to invoke whatever measures are required to prevent transition periods in those communities, including transition of the character (593, KCLM).

If we accept the last of Tomasi's arguments, then the assumptions that I have made in arguing that it is theoretically implausible on Kymlicka's account, to secure cultural structure while securing individual autonomous choice, should be unobjectionable. On Tomasi's account, any time a change in the various options and value rankings cause the cultural structure to flex, the stability of structure would, by definition, be threatened because the flex represents change and differential degrees of change are disallowed. In other words, on a strict analysis of 'stability', *any* degree of instability of structure would constitute a disadvantage and justify special rights to prevent it. Such rights, in turn, would have to prevent the coming and going of the alternative views which provide the thrust behind the structural change, but which are also preconditions to autonomous choice of the kind that gives individuals any chance of getting their choices right.

For the sake of my own argument, I would like to end right here. But in doing so, I would feel that Kymlicka had not been given a fair reading, for it is my feeling that Tomasi's interpretation of Kymlicka is short of the mark in some important respects.

#### ◆ **Some Objections**

With respect to his existential interpretation, I will suggest that Tomasi oversimplifies the nature of structural 'existence'. With respect to his stability

interpretation I will suggest that it depends on holding Kymlicka to an unnecessarily strict standard. I will attempt to support both of these claims in one argument.

Tomasi claims that in order for Kymlicka to maintain a distinction between character and structure he "...must say that changes in a group's beliefs, values and institutions need not be changes...in a group's history, language and culture". From this premise Tomasi goes on to illustrate how *any* change in character is also a change in structure. He concludes that the distinction cannot be maintained: the concept of structure collapses into character. To secure structure (the primary good of culture) the character must first be secured. But this is a concept contrary to liberal values and to Kymlicka's own requirement that cultural content remain flexible.

I suggest that Kymlicka is being held to unreasonable standards on this analysis. It seems to me that Kymlicka *can* maintain a distinction between character and structure while admitting that every change in character is also a change in structure. Indeed, he need only claim that every change in character need not correspond to the *relevant kind* of change in the cultural structure, and that the relevant kind of change is identifiable relative to other changes in the cultural structure. In other words, Kymlicka is concerned with a particular kind of change in the cultural structure. Not just *any* change. While it may turn out that preventing the kind of change in structure that Kymlicka is concerned with may require that a corresponding movement in character must also be secured, there is no reason to suppose from this that minority leaders would be allowed to take "...whatever measures are required to prevent transition periods..." in their communities.

I think this point can be clarified by taking a closer look at Kymlicka's definition of cultural structure in the context of the general development of his argument and asking, again, the question: "What does it mean for the existence of cultural structure to

be threatened?" I suggest that by doing so, we may be led down a bit of a different path than Tomasi would take us.

◆ **Structure and the Media Metaphor**

It strikes me that some of the tensions identified by Tomasi point to a possible reading of cultural structure that Kymlicka does not make obvious. I will attempt to explain this reading, as I see it, by taking another look at what I find to be the most expressive metaphor used by Kymlicka for distinguishing between cultural structure and culture character. That is the metaphor of structure as medium (175, LCC).

For Kymlicka, cultural structures are experiential (historical) and linguistic processes (165, LCC). It is language that "renders vivid for us" the activities which are the options posed by the cultural structure. Our language and history "are the media through which we come to an awareness about our options" (165, LCC). We learn about present activities "through their presence in stories... real or imagined, of the lives of others (165). Unfortunately, Kymlicka doesn't take this metaphor to its fullest expression, even though it seems to me that in doing so the distinction between cultural structure and character might be better understood. To attempt this task, I will turn to Jeremy Webber's article concerning parallel systems of justice for Aboriginal peoples <sup>69</sup>.

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<sup>69</sup> See Royal Commission *Report of the National Round Table on Aboriginal Justice Issues*, 1992; Ottawa, Ont. Cat No. Z1-1991/1-11-2E; ISBN 0-660-14932-X.

◆ **Culture as Conversation**

In his discussion paper for the Round Table on Aboriginal Justice, Webber asks us to think about culture as "conversation". More particularly it is "a conversation through time". What makes cultural conversation distinct is that each one has "...its own points of references and its own distinctive modes of discussion" (137, Webber). Though Webber does not explicitly identify this 'conversation' as cultural 'structure', relative to cultural 'character', he nevertheless does seem to make a distinction between *the way* the conversation is being framed and what it is that is being talked *about*. What is distinct about the conversation that is culture is that it "...is marked by the specific character of its debates, by the way it poses and then goes about resolving questions" (137, Webber). The conversation is not marked by the uniformity of its content (137, Webber). On the contrary ...the content changes, develops, and indeed can include specific positions that are strongly opposed to each other (137, Webber).

An example of the difference between culture as conversation v. culture as content is the distinctive structure of public debate in Canada in contrast to the United States. Both draw upon a certain body of experience and use specific ways of framing issues. And there is a uniqueness in *the way* opposing views are worked out by these separate political cultures (e.g. the particular context of the interactions of French and English speaking Canadians) which marks a specific character of the conversation of a culture, as much as it does the views themselves (137, Webber).

Webber suggests that a similar distinction holds true for legal paradigms. The *content* of law, Webber writes, "...does not and cannot exhaust the law. Legal reasoning is of necessity a creative process, in which previous principles are reinterpreted - sometimes radically - and new principles are developed (138, Webber).

We see examples of this fact in law all the time due to the rapid pace of reproductive technology. The way the term 'person' in Canadian jurisprudence has undergone substantial revision with changing circumstances and experiences. In the '20s it changed as a result of the suffrage movement from including only men, to including women, and with the possibility of abortion that modernity has brought, it has since been challenged to exclude foetus's. But throughout these changing perspectives the law..."still has its own distinctive character, its own manner of marshaling reasons, methods by which lawyers and judges refer in structured ways when making their arguments" (138, Webber). While there is considerable deference to previous decisions, this deference simply serves to channel the debates, setting the terms in which questions are addressed while doing nothing to constrain it.

It is this interpretation of cultural structure that I believe more clearly reflects the subtle distinctions involved in Kymlicka's idea of the primary good of culture. When Kymlicka refers to cultural "context" as "language, history and culture" he means the characteristic way in which cultures speak about and make sense of the world based on the experience of its members. This is an idea that I will try to bring out more graphically in a minute. I believe that if we consider cultural structure in this light, Tomasi's existential interpretation of the primary good of culture turns out to be the correct interpretation of Kymlicka, with some important distinctions. These distinctions require that we look into the meaning of the existence of structure "as a context of choice" of the Webbarian kind, which will lead us to a deeper connection between culture as context and its functional character in relation to the 'good of rationality'. I suggest that in overlooking this deeper connection, Tomasi gives an overly loose definition of 'existence'.

◆ **Existential Interpretation Revisited**

To address just where I think Tomasi has gone wrong, I'd like to go back to his stability interpretation of Kymlicka to take issue with his reading of a particular passage. As we've already seen, Tomasi notes that Kymlicka's original distinction between the cultural structure and the character of the culture (made on p. 166-67, LCC) takes a shift toward a distinction between 'the *stability* of a cultural community' and its character..." (169, LCC) (587, KLRCM). The following is the entire paragraph (and part of the previous one) from which Tomasi extracted the sentence at issue. I have underlined the quote taken by Tomasi and I've italicized what I believe to be important context to which Tomasi has failed to give adequate attention:

The problem as Dworkin notes, is that Devlin takes the preferences of those who dislike *change* as sufficient grounds for thinking that the *survival* of a society is at stake (Dworkin 1977, ch. 10).

Dworkin's response to Devlin requires just the distinction I am drawing between the stability of a cultural community and its character at a particular moment.... Liberalizing the homosexuality laws in England changed the character *of the cultural structure, without jeopardizing its existence*.... To reject the possibility of making this distinction is not simply to give up the possibility of defending minority rights within liberalism, it is to give up the possibility of defending liberalism itself. (169, LCC)

In the first place, it seems reasonably apparent that when read in context, even with the introduction of 'stability', Kymlicka's *prior* concern is indeed with the existence - the "survival" - of the cultural structure. And, as we shall see, not just physical existence per se of a viable community but of a particular mode of existence that relates to the rationality feature of Rawlsian self-respect.

This reading is supported by other textual evidence: While Kymlicka speaks of the "stability" of the cultural community as a mark for what constitutes protection of the good of structural existence he does not speak of it as the good itself. Words like "existence", "loss", "extinction" and "demise" in reference to the good of cultural structure all point to a reading that says the primary good *is* structural existence, while a necessary condition of such existence is stability.

For example, on p. 169: "It is the *existence* of a cultural community viewed as a context of choice that is a primary good, and a legitimate concern of liberals". Again, on p. 168, "...'culture' is defined, as I think it should be defined for these purposes, in terms of *the existence* of a viable community of individuals with a shared heritage (language, history etc.)."<sup>70</sup> On p. 165, it is the *loss* of cultural membership which qualifies as a social condition which undermines self-respect and therefore a condition which we would most want to avoid under Rawlsian theory. At p. 167, Kymlicka writes about the Quiet Revolution as an example of how cultural structure exists apart from its character. While the Quiet Revolution represented a change in the traditional choices being made by Quebecers the *existence* of the structure was never "threatened with an unwanted *extinction* or *assimilation*."<sup>71</sup> It was for this reason that there was no undermining of the self-respect relevant to pursuing individual choice. Again, on p. 167, Kymlicka states that it is only danger to the *existence* of cultural structure *as a context* that he is concerned with.

It is also clear from these statements that it is not just "loss" of cultural context per se, that Kymlicka is concerned with, but with *unwanted* loss. The "potentially

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<sup>70</sup> Italics mine.

<sup>71</sup> Italics mine.

devastating problem faced by aboriginal people...[is] the *loss* of cultural membership" due to "the vulnerability of aboriginal communities to the decisions of the non-aboriginal majority (151, LCC). The "*demise*" of the character of the Quebec culture in the quiet revolution is not of concern to Kymlicka because it is a demise according to the choices of Quebeckers.<sup>72</sup> But the demise of the aboriginal culture *is* of concern to Kymlicka because in spite of their choices there is a danger to their ability examine the options made meaningful by their cultural structure.

◆ **Character of Cultural Structure v. Character of a Culture**

It seems clear from these examples that 'stability' is no more an intrinsic good for the revisionist than is 'freedom' per se for the traditional liberal.

Part of the confusion, I think, derives from the fact that Kymlicka uses the notion of 'stability' without defining in any detail exactly what *component* of the cultural structure must remain stable in order to provide the individual with the means to make meaningful individual choice. Hence, Tomasi's assumption that it must be the *entire* structure that needs to be secured. I would like to question this assumption.

I think we can go a ways towards understanding Kymlicka's intentions, if we consider his arguments in the context of a Webbarian interpretation of structure, and particularly in view of his explicitly stated value of culture as a condition for the primary good of rationality.

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<sup>72</sup> Italics mine.

Some of what I perceive to be confusion in Tomasi's argument stems, I think, from his conflating two different referents of the word 'change' used in these two paragraphs from which he took his quote. What Tomasi fails to recognize is that in the first paragraph Kymlicka is referring to a change in the character of the culture - the norms or values of a culture - as an example of the kind of change which holds no interest for Kymlickean liberalism.

The problem as Dworkin notes, is that Devlin takes the preferences of those who dislike *change* as sufficient grounds for thinking that the *survival* of a society is at stake (Dworkin 1977, ch. 10),

While in the second paragraph Kymlicka is referring to the "...changed character of the cultural *structure*" which, in respect of the case in point, poses no jeopardy to the real concern of Kymlickean liberalism - the *survival* of the cultural structure:

Dworkin's response to Devlin requires just the distinction I am drawing between the stability of a cultural community and its character at a particular moment.... Liberalizing the homosexuality laws in England *changed the character of the cultural structure, without jeopardizing its existence*.... To reject the possibility of making this distinction is not simply to give up the possibility of defending minority rights within liberalism, it is to give up the possibility of defending liberalism itself. (169, LCC)

Where Tomasi identifies only two distinct concepts operating here (the cultural character and the cultural structure) I am arguing that there are three: The first is cultural structure, the second is cultural character, and the third is the character of the cultural structure. The important distinction being drawn is between two different kinds of character: the character of a culture (its content, its norms, its values) and the character of a cultural structure. This last concept is explicit: "England changed the *character* of the cultural *structure*" not "England changed the character of the *culture*".

What follows from this third concept? Kymlicka is saying in the first instance, that any change in the character of a *culture* is permissible on the revisionist account. In the second instance he is saying that change in the character of its *structure* may also be permissible - *if* it does not jeopardize the prior thing that *is* of concern to the Kymlickean liberal: the *existence* of cultural structure.

If we put a Webbarian interpretation on the character of cultural structure as being the unique nature of the way in which content is worked out and given rational meaning, which varies from culture to culture, then we might reasonably conclude that when Kymlicka says that "...liberalizing the homosexuality laws in England changed the character of the cultural structure, without jeopardizing its existence...", he is saying that not only is change in the character of a culture uninteresting for the revisionist liberal, but so are certain changes in the character of a cultural structure uninteresting for that same liberal. Indeed, the *only* kind of change that the revisionist liberal *is* concerned with are those changes in the character of the cultural *structure* that threaten the very survival of that structure; and that such survival is defined in very particular terms that are closely bound to the good of rationality.

Now, if my reading is correct then, using Webber's metaphor, we can assume that Kymlicka finds acceptable - indeed *counts on* - the possibility of a paradigmatic shift to the actual framework of the cultural discussion itself, *without* threatening the survival of the structure, even though as a result of the shift, both the content of the culture and the character of the structure will have changed. This shift could occur, perhaps as a result of expanding or modifying the method of cultural discussion, say by introducing an analytic epistemology to a holistic or visionary one. If my argument here is acceptable, then it would follow that the very quote that Tomasi points to as evidencing a "stability interpretation" structure in the sense that Kymlicka "tells us to avoid differential degrees

of instability in the cultural structure" is, in fact, clearly evidence to the contrary. Instead, what Kymlicka is arguing is that neither character of culture *nor* character of structure need *have* to be stable. Only that the survival of the cultural structure (with the object of 'survival' yet to be defined) must be secured.

The idea of a flexible structure is also consistent with the Webbarian metaphor. Indeed, according to Webber "...even modes of discussion can evolve as the discussion proceeds, although if a culture is robust, change occurs in a way that continues to draw, at least in part, upon what has gone before" (137, Webber). It is this possibility of structural "evolution", and its nature and process, that I suggest Kymlicka has failed to flush out in clear terms, even though the current of his argument seems to pull him in this direction. This is perhaps why Tomasi has failed to consider it even as a possibility. However, it is my view that it is precisely this notion of the flexibility of the character of cultural structure that needs expression in order to clarify the importance of Kymlicka's character/structure distinction in his defense for collective rights.

Given this new reading of the primary good of cultural structure we need to ask "What kind of change *would* constitute a threat to the survival of a cultural structure?" The answer, I suggest, must be tightly fastened to the good of individual choice and the feature of rationality which is an essential precondition of Rawlsian self-respect. Moreover, it must be the kind of change which goes to the heart of the personal identity of each individual and his or her ability to exercise the capacities which form her coherent plans of life.

In order to give this question adequate attention, we need to return to the situation of the Inuit girl who from age two to eighteen experienced the rapid and disorienting transition of her culture from Inuit to White ways. Tomasi argues that it cannot be said

that she had *no* cultural structure within which to make her choices. While she may have grown up in a society that was transitionally bilingual and bicultural "(jarringly so)" and while some options may have become unavailable and other new ones created, she still made choices within *a* cultural structure (588, KLRCM) But I ask: Was it a cultural structure that could be understood by her as a rational model for individual thought and behavior? Did she grow up partaking in a mode of discussion that drew upon frames of reference and ways of speaking that characterized the world to her in intelligible terms?

I suggest that this is the deeper question that Tomasi could have asked, and if he had have asked it I suggest that it would have led him to the component of the cultural structure that the revisionist liberal needs to isolate and preserve.

But before we can begin to understand what may have actually happened to the Inuit girl we have to know something about the unique Aboriginal mode of discussion and about the underlying assumptions of the language. We need to know how these differ from the assumptions and experiences of European settlers and the way in which the two cultures experienced one another. While it would be simplistic to generalize about Aboriginal cultures as conversations<sup>73</sup>, there nevertheless seems to be some widely agreed upon characterizations of Aboriginal ways of "speaking" which I propose to make the focus of the next chapter.<sup>74</sup>

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<sup>73</sup> Aboriginal cultures are often as or more different from each other as those of the countries of Europe." Giokas p. 184, 1993, Royal Commission Round Table Discussion.

<sup>74</sup> See Dumont "Justice and Aboriginal People", Royal Commission *Report of the National Round Table on Aboriginal Justice Issues*, 1992; Ottawa, Ont. Cat No. Z1-1991/1-11-2E; ISBN 0-660-14932-X.

*Chapter V*◆ **Aboriginal Naming and Internal Disintegration**(1) **Aboriginal Naming**

If we consider the physical object referred to by the words 'etinohah' and 'land', we would probably find both the Aboriginal and the European individual pointing to the same thing: a stretch of earth. And, for this reason, one might assume that they mean the same thing when using that word. Moreover, one might assume that the two individuals - the Aboriginal and the European - could converse about this thing, make agreements and such about it, and understand one another. But this assumption is easily challenged in view of the divergent experiences implicitly associated with this word.

For Europeans, intrinsic to the idea of land is 'property', 'ownership' and alienable property 'rights'. This is an idea largely inherited from the experience of living in relative isolation on a small island, under a system of feudalism in which non-royal individuals were able to use and hold land only in exchange for servitude. While the peasant or serf's person was theoretically free under the feudal system, his land was not, and his labour and his socio-economic status was tied to the land which in turn was subject to the will of its royal owners. Hence private property ownership became equated with personal freedom: freedom from serfdom, oppression and abuse of authority. Given the feudal background of European settlers it is not surprising that land was conceived as the most basic form of property, other than one's own body. This response to feudalism is pervasive in the reasoning of John Locke who posited property rights as a right founded on the notion of owning one's labour and mixing one's labour with the land. Private

property became integral to the individual's freedom to promote his own individual interests in a system of competition with other individuals.

In contrast to the European, the experience of Aboriginal people led them to characterize the concept of land in a wholly different way. For thousands of years, Aboriginal peoples were the sole occupants of the vast lands of North America where survival was governed by the laws of nature and reciprocal relationships. The economy was based upon the land and its capacity to provide a continuous supply of natural, renewable resources. While rich renewable land in certain areas of Canada allowed some tribes to practice forms of agriculture, most Aboriginal tribes resorted to a nomadic existence in order to ensure that scarce resources were replenished (61, 62, SH).<sup>75</sup>

Since survival was dependent upon a renewable land base, 'land' itself was inseparable from the notions of caretaking and of sharing. The benefits of sharing with other forms of life had long term consequences for the survival of the Aboriginal and produced a view in which everything in existence was understood as relational. The land itself was perceived as a living, organic whole to whom one was personally related and ethically responsible and was considered the maternal sustenance of life: 'Etinohah' - "the earth we call our mother". The bears, the deer, and the other animals were considered family members. To conceive of the land in terms of ownership would be to ignore the natural balance of life and so, for the Aboriginal peoples, the idea of private ownership was inconceivable (34, QJ, Plain). Land couldn't be owned, it could only be used, looked after, and then returned to future generations for their use (34, QJ). In addressing the

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<sup>75</sup> Lester Lafond; "Historical Use of Land and Resources"; *Sharing the Harvest: The Road to Self-Reliance*; Royal Commission on Aboriginal Peoples; 1993.

question of the Aboriginal right, Fred Plain attempts to explain the nature of the Aboriginal concept of the land.

The faces of our future generations are looking up to us from the earth; and we step with great care not to disturb our grandchildren....the natural law says that the earth belongs to our children who will suffer and pay for our ignorance and our greed. The natural law says that the earth belongs to our children - seven generations into the future - and we are the caretakers who must understand, respect and protect 'Etinohah' for all life.<sup>76</sup>

Before introduction of White culture, 'Etinohah' was the sole concept of Land. And 'natural law' - the balance of nature - was the only authority, from whence came the Aboriginal 'right'.

This relationship between the land, the authority of natural law and the Aboriginal right remains central in current Aboriginal society. In addressing the contemporary question of Aboriginal rights Oren Lyons<sup>77</sup> writes:

"When our white brother can go to his highest tribunal and gain from it (by an act of Parliament) the right to never have to drink water again, then I will respect their legal version of our aboriginal rights" (p. 19, Plain, QJ).

This comment captures not only the difference in how the concept of land is understood by Aboriginal people, as compared with European thought, but also the

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<sup>76</sup> This is an excerpt from an address given by the elders of the Turtle Clan of the Iroquois nation when asked by representatives of the United Nations to respond to the question 'If you were ruling the earth, what would you do?'. Orens writes that "Indians don't think in terms of ruling the earth, but understood what was being asked of them" (21, QJ).

<sup>77</sup> Oren Lyons is a peace-keeper of the Turtle Clan of the Iroquois Nation. He is also a professor of American studies at the State University of New York at Buffalo. Educated at the State University of New York at Oneonta, he focuses his research on treaty rights, land rights, and Indian sovereignty.

difference in the notion of a 'right'. Unlike the negative Nozickean notion of a right as an inviolability of person that demands respect even if the result is an increase in violations, Aboriginal 'right' is really a duty by natural law, to look after all life on this earth...including all animals and everything that lives on land (19, Lyons, QJ).<sup>78</sup> 'Right' in the Indian context is therefore better understood as a 'sacred responsibility'. Each individual was instilled with a respect for and a relationship with, the Land as a living, organic whole to whom individual humans are personally related and ethically responsible. This was the Aboriginal 'right' granted to the Aboriginal people by the Creator (52, JAP) (19, Lyons, QJ) Aboriginal people believe that no individual or group can own the land. Rather, the land was given to them collectively by the Creator to use, not to own, and they have a sacred obligation to protect the land and use its resources wisely (34, Plain, QJ).

This reading of a 'right' can be understood in the context of the Indian belief in the natural law as absolute. According to the Aboriginal way of thinking the natural law - the balance of nature - dictates that "...each generation must fulfill its responsibility" (19,20 QJ). The natural law has absolute and final government over 'Etinohah', "with retribution in direct ratio to violations" (21, QJ). The notion of 'right' as responsibility comes from a holistic perception of the world. To experience the interdependent relationship between forms of life - human, animal, plants and objects - (64, QJ) and the land, is to recognize the balance of nature and one's place within it:

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<sup>78</sup> One might object to this use of the word 'right', however, it is notable that the Aboriginal use of the word 'right', as in the term 'Aboriginal right', is apparently inseparable from the notion of duty or responsibility, which seems consistent with the frequent claims (see Dumont: "Justice and Aboriginal People", Royal Commission *Report of the National Round Table on Aboriginal Justice Issues*, 1992; Ottawa, Ont. Cat No. Z1-1991/1-11-2E; ISBN 0-660-14932-X) that the Aboriginal conception of individual is inseparable from the whole. The Aboriginal constitutinal 'right' seems to be a right of the Aboriginal people hold against non-aboriginal society to fulfill their responsibility as, among other things, caretakers of the earth and its life forms.

The law is timeless and cannot be measured by the standards of mankind. All life is subject, absolutely, to this authority. Water *is* our bodies; water *is* life. Fresh water is maintained by the thundering grandfathers, who bring rain to renew the springs, streams, rivers, lakes and oceans. We are nourished by our mother - the earth - from whom all life springs. We must understand our dependence on her and protect her with our love, respect and ceremonies" (21, QJ).<sup>79</sup>

The differences in the perception of one single object, 'land', are rooted in, as Kymlicka says, experience (or history) which shape only one of the myriad of reference points of cultural conversation. The need in western societies to protect the individual against the powers of the state and various forms of personal authority caused a response in Euro-Canadians to make the reference point of 'land' *homocentric*, with the self-interested individual or an aggregate of individuals at its centre (165, 166 QJ). Conversely, the experiences of North American Indians was one in which power and authority could not be delegated to any individual or subset of the tribe. Rather it was vested in the tribe as a whole and in the unreserved acquiescence to custom which was dictated by the balance of nature itself (168, QJ). Because authority was not vested in any individual or sovereign, individuals had no need of protection from the authority of others (168, QJ).<sup>80</sup> For the Indian, the reference point that came out of experience was *cosmocentric* with not the individual but the 'whole' cosmic order at its centre, and 'land' (Etinohah') the stage upon which order was enacted.

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<sup>79</sup> This is an excerpt from an address given by the elders of the Turtle Clan of the Iroquois nation when asked by representatives of the United Nations to respond to the question 'If you were ruling the earth, what would you do?'. Orens writes that "Indians don't think in terms of ruling the earth, but understood what was being asked of them" (21, QJ).

<sup>80</sup> Not all Indian societies were egalitarian in nature. For instance the Tsimshian on the Pacific were different from the egalitarian east coast Algonkian people such as the Montagnais or Maliseet. The Tsimshian political structure resembled a caste system in which individuals were treated differently depending on their status within the tribe.

This difference in the understanding of the meaning of one mere word - 'land' - has far reaching implications for how individuals, both European and Aboriginal, see themselves in relation to the rest of the world.

The contrast between the cultural conversation of Europeans and Aborigines is even more remarkable with the analysis of other words and related experiences central to individual rational understanding of the world. Consider, for example, words like 'individual', 'person', 'time' and 'truth'. While personal dignity is at the heart of both the European and Aboriginal conceptions of 'personhood' the expression of this value vastly differs according to the history of the different cultures. For example, for Europeans the sort of things considered deserving of respect in the form of an inviolable right were human beings with certain rational and emotional capacities<sup>81</sup> although this train of thought is becoming more difficult to defend.<sup>82</sup> Moreover, the significance of personal dignity is generally expressed in the form of negative rights which prevent individuals from being treated in certain unacceptable ways and otherwise ensure complete individual freedom to act and think according to his own independent choice in accordance with his own beliefs about the good.

Aboriginal people, on the other hand, predominantly see other living things as 'persons' and, in particular, as relations to humans. Both human persons and other living beings qualify as the kinds of things deserving of respect. From the Aboriginal perspective, animals, plants and objects were regarded as having souls or spirits and were treated as 'persons' with human qualities of thinking, feeling, understanding and volition

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<sup>81</sup> See Nozick and Kant as examples.

<sup>82</sup> See Rachels, James ; *Created from Animals*; Oxford University Press; 1990.

(166.QJ). Social interaction is seen as taking place between human beings and other than human 'persons' involving reciprocal relations and mutual obligations.

This view of social relations as something beyond what is maintained among human beings has implications for the way the individual Aboriginal sees herself in relation to all else. Rights and dignity exist only in measure to which each person performs her obligations in the cosmic order (166, QJ). This viewpoint is perhaps the most enduring and unique characteristic of the Aboriginal culture: the capacity for holistic, "total" or "circular" vision. In contrast to western epistemology where discovery of truth depends on an objective, analytical approach to problem solving and detached judgment based on verifiability and credibility, the "total vision" capacity is considered to be primal and spiritual in nature and involves searching beyond the boundaries of the physical for an all-around completeness in understanding. Instead of intellectually dissecting concepts in isolation, for the Aboriginal each part can only be understood in relation to the whole and remains incomplete until viewed in the light of this context. In this large scheme of things, time is relative and judgment flexible and qualified by respect and circumstance (62, JAP).

Rooted in the spiritual foundations of this epistemology the individual is propelled by the primary motivation of 'respect': "respect for creation, respect for knowledge and wisdom, respect for the dignity and freedom of others, respect for the quality of life and spirit in all things, respect for relationships, respect for the mysterious" (p. 54, JAP). The 'truth' involves recognizing the inseparable wholeness of creation and its endowment with the same inherent qualities of autonomy, dignity, freedom and equality. If there is a constant in the aboriginal perception of reality it is this notion of

respect. It is the psychology and epistemology upon which the Aboriginal culture is built and is the primary motivator of behavior.<sup>83</sup>

Naturally, from this holistic viewpoint of the world *nothing* exists in isolation. *Everything* is understood in terms of relationship, belonging, identity and circularity. It is not surprising, then,, that self-interest is inextricably bound with tribal survival which in turn takes its place within the balance of the cosmic order (167, QJ). The largeness of this view shapes aboriginal notions of 'time' and 'individuality'. Since everything is understood in terms of relations, 'time' is cyclically and rhythmically oriented. Aboriginal peoples have a saying that they "walk backwards into the future". This means that the present is understood in terms of the past and both the past and the present will guide individuals into the future. Since time is relative, patience in the aboriginal people abound. Problem solving focuses on the detailed, practical and immediate concerns of the now, rather than advance planning to avoid difficulties (51, JAP).

This large and interrelated view of reality also shapes the Aboriginal notion of the 'individual'. The reality of a cosmic world is that the individual good collapses into the good of the community. Indeed, when viewed too closely the idea of the 'individual' turns out to be empty; in fact little more than a succession of group oriented attributes right down to the centre of the self.<sup>84</sup> This notion of the individual is reinforced by the experience that comes from living in a face-to-face society where each member's

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<sup>83</sup> In his report to the National Round Table on Aboriginal Justice, in 1992, James Dumont compiles a series of anthropological studies across aboriginal cultures to discover certain core values are held in common among aboriginal cultures. Central to these values in all cultures is the notion of total vision and the epistemology that stems from it. This central value is found to be strongly resistant to acculturation, time and change.

<sup>84</sup> See Peter Loslett's onion skin analogy, p. 167, "Tribal Philosophies and the Charter of Rights and Freedoms"; *Quest for Justice Aboriginal Peoples and Aboriginal Rights*; University of Toronto Press 1985.

experience is shared with other members. It is a society that began with tribal society and continues on the territories reserved for contemporary Aboriginal peoples. The very structure of these communities inhibits the development of an individualistic self-conscience and the ability to even conceive of rights in individualistic terms (167, QJ). This vastly different reality is surely what is meant by Kymlicka when he writes that the context of choice that is culture - marked by the peculiar characteristics of language and experience - is the only psychologically possible context available to the individual.

The conceptual inability to conceive of the individual in isolation has a distinct effect on the Aboriginal notion of 'personal dignity'. Where the European notion of dignity is equated with the self-worth of an independent, autonomous chooser, capable of forming and acting on her own rational life plans, the Aboriginal experience dictated a notion of 'dignity' and 'autonomy' that became associated with the ideas of 'responsibility', 'pride', 'honour'. Contrary to the western meaning of 'autonomy', the Aboriginal understanding of this word is expressed as: "deciding for oneself by following advice" (46, JAP). Such advice is represented by the wisdom of elders and their knowledge of Aboriginal custom. Free will is equated with an ability to voluntarily mould one's own responses in the shape of survival in the largest sense. Personal dignity is maintained by the Aboriginal people through voluntary self-mastery and self-control with an emphasis on repression of the emotions. Individual personal dignity is closely bound with respecting the rightful dignity of others (including all living and innate forms), through co-operation, honesty and integrity (61, JAP). This inner cultivation of attitude is accomplished by the voluntarily internalization of custom and conventions which foster an individual awareness of the responsibility for the survival of all living things (60, JAP). Responsibility - responding to circumstances on one's own terms, in accordance with custom and tradition - requires a high level of individual will to conform.

Consequently, to respect oneself from the Aboriginal perspective is to understand oneself and others, not as claimants of rights, but as repositories of responsibility (166, QJ).

◆ **Internal Disintegration and the Inuit**

This relatively superficial look at the profound differences in experience and meaning associated with such fundamental words as 'land', 'right', 'dignity' 'person', 'individual', 'truth', and 'time' is meant to help us to imagine just how powerful and pervasive the effect of an abrupt, aggressive and paternalistic imposition of European culture and language might have on an individual Inuit girl living within the conceptual and experiential context touched on in the foregoing. But as it turns out, the Inuit girl is a rather ironic example of the effect of cultural insecurity on the individual. Peter Ittinuar, a former member of Parliament for Nunatsiag, Northwest Territories and professor of Inuktituk linguistics and Inuit culture at the University of Ottawa, remarks that "unlike other native groups, the Inuit are a majority in their region and expect to remain so for a long time to come" (51, Ittinuar, QJ). He believes that this position provides options to the Inuit that other native groups do not have. Indeed, in comparison to other Aboriginal peoples, Ittinuar claims that the Inuit have been left relatively free to carry on their lives as they traditionally have, with their ties to the land still relatively intact. Unlike other aboriginal groups, who have now experienced a century of control under the Indian Act, the Inuit have not felt the impact of European culture and institutions until relatively recently - indeed, not until this generation (48, Ittinuar, QJ).

But if the Inuit girl is not the best example of the individual impact of cultural insecurity, we can easily imagine the experience of a typical Aboriginal member living under the authority of the Indian Act in the last century. Perhaps the most appropriate period to consider would be near the turn of the century, about 1879, when officials under

the MacDonald government and Indians alike were forced to look at the realities of the virtual disappearance of the buffalo, the fact of living in peace time and the effects of the absorption of the North West Company by the Hudson's Bay Company in the 1820's (66, 100 SV). These three factors permanently changed the life styles of individual Indians and the way Europeans saw them. The near extinction of the buffalo and the onslaught of relentless immigration dispossessed Plains Indians of land, its resources and a hunting economy and for the first time there was no where to retreat into more remote lands. Existing peaceful conditions made obsolete their skills as warriors and guides. And the fur trade employees drastically reduced after the Hudson's Bay took over the North West Company crippled the fur trade economy as an economic alternative to Indians. From the government's perspective, the warriors, traders and guides who were to be respected in their own right became dependents requiring guidance, education, training and financial support through a transition to the 'civilized' way of the Whites.

Given this context, consider the Aboriginal girl's encounter with White culture. In the first place, this culture dispossessed her father and mother of the land she understood could not be owned and for whom she was responsible. She was confined to a small reserve area and forbidden by coercive measures from speaking the language that reflected all that she knew through her own experience and the experience of her people. She was forbidden to practice the traditions that fostered her unique notion of self-respect and personal dignity. Her community's social conventions of sharing and generosity (e.g. the potlatch ceremony) were outlawed. Her "family" - the land, the animals, her biological mother, father, sister and brothers were systematically spoiled, slaughtered and disbanded. She looked to her family to help her understand, but instead white individuals who spoke too fast, too loud and too "tense" and asked too many questions, too many times physically took her away against her will and against the will of her mother and father (47, JAP). The white people told her that her mother, Etinohah, her brothers and

her sisters were no longer her relations and she had no obligation to love or protect them anymore. They took her away from her parents and her community to live in a residential school, where everyone was in a state of extreme hurry and aggravated agitation. The freedom of her informal but carefully monitored native education, through childhood games, and the traditional practice of 'the three Ls' - looking, listening and learning - was halted and substituted with strict regimens of course work and study schedules. Unstructured and non-interfering Indian practices of teaching socialization through embarrassment, humiliation and self-discovery was replaced with practices of direct corporeal punishment and harsh words.<sup>85</sup> Carefully considered replies to missionary demands were treated with disdain and physical punishment. Since euro-canadian missionaries seldom thought it necessary to understand Indian ways, the passivity that comes with self-restraint and humility was treated, with condescension, as stupidity and backwardness. White individuals treated the Aboriginal girl and each other with extreme displays of disrespect with the issuance of directives, backslapping, vigorous handshaking and other encroachments upon the private territory of the self. Aggressive acts of prolonged eye contact at close quarters challenged her already highly developed capacity for self-restraint. She was forced to betray the truth of her "total" vision by trying to comply with demands to solve problems by reducing them to incomplete parts. She was physically punished, instead of counseled by elders (a gross affront to her autonomy and dignity), for her inability to conceptualize and perform analytical tasks.

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<sup>85</sup> Native discipline was more often administered by ridicule and warning than with blows and deprivation. Miller (SV) writes that "A Plains Cree boy who was in the habit of throwing himself on his back and hollering if dissatisfied with his food soon found himself broken the habit by his parents who arranged to embarrass rather than punish him directly. His parents placed a container of water behind him at mealtime, and when the youngster flung himself backward in a fit of pique, he drenched himself and precipitated laughter at his own expense from everyone around him. Not dissimilar in spirit was the use of storytelling to reprove disobedient children indirectly. Carrier children who misbehaved during the day would probably find their offensive conduct ignored at the time [but later, in the dark night when the house was settled the elders would tell stories of such acts resembling those of the children, in which great shame and humiliation was put upon those who offended customary law]. (18, SV)

She was forced to honour a God who dictated through wrath, fear and the promise of eternal punishment. And there was the pervasive death and sickness of the wretched White small pox.

When the Aboriginal girl learned the English word for 'Etinohah' she didn't recognize the absence of 'relation' and 'obligation' and familial love and respect. And she literally could not make sense of the implication of exploitation, power, hierarchy and ownership.<sup>86</sup> She didn't understand how the English word for 'right' didn't entail communal responsibility and couldn't make sense of 'dignity' in the absence of self-constraint. Likewise, she learned the English words for 'person', 'individual' and 'truth' and 'time' but was unable to rationalize their English meanings within the context of her own experience. She wasn't even sure that these words had different meanings, but only that White people responded differently to their use than what she expected when she used them. Finally, abruptly, she was returned to the reserve after only a few years. Residential schools did not go to the secondary level. There was no further opportunity to apply the strange tools that she had learned.

The Aboriginal girl and her family, recognized and understood that their way of life had ended. They requested many times of the Whites to bring their education to the reserves to teach in the context of their own culture and ways. They were refused. They became dependents, wards, of the federal government and were told that neither she, nor her father and mother, who had participated equally in the democratic consensus decision

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<sup>86</sup> The vast majority of Indian nations governed by a political system of complete community consensus (although a few Pacific coast bands followed and class and caste system which imposed strict limits on the freedom of some)(19, SV). While leaders, such as chiefs and elders were granted leadership, their authority lasted only as long as respect from individual community members existed. There was no obligation on any individual member to follow the advice or actions of the leaders. Leadership existed solely on the basis of respect from individual community members and lasted only as long as those members were willing to follow.

making of the tribe, could in future participate in the decisions involving her life and the lives of her fellow community members. Their lives became a manifestation of bureaucratic control. The Native application of justice through counseling, mediation, restitution to victims and re-integration into the community were outlawed. Instead, Indian offenders were brought before White courts to be confronted with their offenses, with the expectation that they would argue in their own defense. Whites didn't realize that giving testimony face to face and becoming involved in direct confrontation was simply morally wrong and taken as an act of aggression (67, JAP). An adversarial trial system required the Indian witness to breach customs of respect, by saying critical and implicitly angry things about the accused in their presence, which to the Aboriginal eye was offensive in the extreme. When the Indian accused exhibited bravery and self-restraint, and honesty in admitting his guilt, the behavior was interpreted as remorseless and lacking a desire to rehabilitate and lawyers and judges couldn't understand why they wouldn't stand up for their 'rights' when Indians thought they were doing just this by acquiescing to their own guilt, or refusing to testify as a witness.

The Aboriginal girl's parents tried to help her understand the inconsistencies of this new world, but since they did not themselves understand, they were paralyzed to make sense of her experiences for her. Her parents and other members of the tribe were introduced to alcohol and poverty. They began to forget who they were. They lost respect for themselves and each other. The girl's world became incoherent. She became listless. Friends committed suicide. What had happened to her and her people? She didn't understand. She just did not *understand*.<sup>87</sup>

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<sup>87</sup> It should be noted here that this story is not just fiction based on historical research of a people and their ways. While attending the "Making Peace and Sharing Power" conference on Aboriginal Peoples and Dispute Resolution, at Victoria, British Columbia in May, 1996, a native from the Bella Coola reserve stood at the microphone during question period and with tears damp against his face, told a story. The story was very much like the one told above. But it was his story and it was real.

◆ **The Incoherence Condition**

Tomasi has argued that Aboriginal members cannot be disadvantaged in the sense that they had *no* cultural structure within which to make choices . And he argues that any structural interpretation of culture as the primary good requires that the character of the culture be secured in order to prevent unwanted differential degrees of insecurity in the structure. I hope that the foregoing account of the Aboriginal girl will begin to suggest how both Tomasi's existential argument and his structure argument fail to make a deeper but necessary enquiry into what might constitute 'existence' of a cultural structure given its specific function as a liberal context of choice. And, likewise, what kind of threat would qualify as one which individual members must be protected against.

(1) Cultural Identity and Rationality

Part of what I see to be Tomasi's oversight is in not defining cultural 'existence' in relation to the Kymlickean account of the particular relationship that individual members have with their culture, that binds them in ways that go to the root of their personal identity, capacity and efficacy and that are, in turn, instrumental to the Rawlsian good of rationality. Since the primary good of culture gains its significance in Kymlickean theory *solely* from this relationship it should be the standard by which 'existence' or 'non-existence' in the relevant sense, holds or does not hold. So the question to be asked with respect to this point, is not "Did the Aboriginal culture exist 'per se' in the form of a language and a history?" but rather, "Did the Aboriginal culture exist as a language, a history and a *viable and functional* community? In other words, was it a community that

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was able to make the experience of the Aboriginal girl *intelligible* for her. Dispossessed of land, language and intelligible frames of reference; and, lacking any concept of economic individualism or a cash economy, her father and mother and other adult band members were unemployed and unoccupied and without tools (conceptual and practical) for coping with an alien existence. And, I suggest that the Aboriginal girl living in the midst of this was not merely confused by the disappearance of old options and the sudden appearance of new ones, she was rendered *incapable* of sorting out and making sense of her reality in a way that allowed her to identify in a coherent manner the choices and options available to her.

Tomasi's answer to the questions just posed might still be: "Yes, the Aboriginal girl did grow up in a culture that was hers"; but only if he thought that the transition to the Aboriginal culture was one in which intelligibility was retained for its members in some sort of hybrid state at the time of the girl's growing up. In other words, Tomasi might hold that the girl perhaps became confused and uncertain about which options to choose because she experienced the world with one foot in either culture - so to speak - with conflicting values at either end, but those options were nevertheless capable of being understood. On such an account, the Aboriginal girl's experience might be one of a jarring bicultural and bilingual transition that is still had within *a* culture, but only because of the retention of the identifying feature of rationality.

But this would be to assume that a transition took place in a manner that allowed her to make sense of the new options that replaced the old ones taken away from her. It would be to assume that she was part of a cultural conversation that had integrated into its mode of reference an ability to explain and put into context an 'analytical epistemology' or a 'competitive' or 'capitalistic economy' or 'economic individualism' or a negative 'right'. It would somehow be to assume that somewhere in the abrupt and bald imposition

of White cultural values there existed the time, the means, and the opportunity for the community to express these concepts with an Aboriginal face.

Referring back to the Webberian metaphor of cultural structure as modes of discussion, we are reminded that even though modes of discussion can evolve as the discussion proceeds (i.e. cultural structures change), for the sake of coherence and continuity of identity the "change must occur in a way that continues to draw, *at least in part*, upon what has gone before" (137, Webber).

I am arguing that in order to accept Tomasi's claim that the Aboriginal girl has grown up in a culture that is *hers*, the transition *between* cultures must be one that is intelligible (as opposed to agreeable, or certain) to its members and it must be one that retains enough of the original culture to build *that particular* culture into a changed one.

Perhaps the well known Ship of Theseus metaphor will assist in making this point without distracting us too far with issues of identity. As the story goes, after the ship on which Theseus sailed to slay the mythical Minotaur, was returned in safety, it was preserved by the Athenians down to the time of Demetrius Phalereus [circa 310 B.C.]. Time took its toll on the ship's condition, and over many years old timbers were taken away and new sound ones were put in their place. Finally, not one original timber remained in place. If we reject that qualitative identity is required for a thing to retain its identity over time and change but also reject the overly relaxed standard of qualitative similarity then we are reasonably lead to a 'strengthened criterion of spatio-temporal continuity'. Using 'culture' in place of the 'object' this would mean that Culture2 at (Place2, Time2) is identical with Culture 1 at (P1, T1) if and only if there exists some space-time path connection (P2,T2) with (P1, T1) such that for every point (P<sub>i</sub>T<sub>i</sub>) along its path (including P2 and T2) there exists an object Culture<sub>i</sub>, which is qualitatively

similar to each of the objects in the neighborhood and which is the same type of thing.<sup>88</sup> Although the identity of culture is perhaps more in line with personal identity or physical assemblages rather than the identity of an object like the Ship of Theseus, I think the metaphor is a useful one in the limited sense that it expresses our intuitions that the rationality of a cultural conversation can only be sustained if there is some kind of spatio-temporal continuity between parts of earlier and later modes of the cultural discussion.

I hope that these last points help us to answer the question of when 'existence' of a culture is threatened, from the revisionist viewpoint and what kind of change in cultural structure must be resisted. It persuades, I hope, that Tomasi's analysis of 'existence' of culture is too superficial and that his analysis of Kymlickean structure as resisting differential changes in structure, is simply incorrect. Indeed, there is no reason not to understand Kymlicka's notion of structure as Webbarian in nature, with the coherence feature of cultural structure as the only feature of cultural structure that need be stabilized. Stabilizing this feature merely means *facilitating* change of structure over time as opposed to *preventing* it. It means securing meaningful change through adjustments as opposed to change that is a sudden and drastic interruption.

(2) However, there is still a problem in interpreting Kymlicka in the way that I propose. It will have become evident in the sections addressing "Aboriginal Naming" and in the story of the experience of the Aboriginal girl, that values and norms and language are the direct products of experience - the history - that is the cultural structure. If culture as a whole could be imagined as constituted in layers, it would seem that at its foundation would lie experience, next belief structures, and then values and behavioral norms that are responses to those experiences and beliefs, and at the top would be

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<sup>88</sup> Swartz, Norman; *Beyond Experience*; University of Toronto Press; p. 131.

language that formally organizes, assigns values and expresses the rationality part of all of what lies below it. What needs to be secured from the Kymlickean viewpoint is a coherent transition of the rational meaning part of the structure. That is, what needs to be controlled is the rate at which the beliefs and organization of those beliefs and their linguistic expression move - even though in a healthy community that part is always in motion. The rational meaning part of the structure can only be sustained in a *changing* culture - that is, a culture in which new experiences, alternatives or different interpretations of old alternatives are made available through the cultural structure - with the substantive introduction and integration of experiences and accompanying beliefs as the rational foundation to new alternatives. Without the accompaniment of stories and experiences of others to go hand in hand with alternative norms these new alternatives won't make sense to individual members of the culture to which they are being introduced. But the exchanging of experiences cannot be immediate nor forced. It takes time, patience and a willingness to listen and to learn; to compare, to experiment, to accept some new ideas and ways into the cultural weave and reject others.

In the case of the Aboriginal girl, and all of the members of her culture, I think we can accept that the existence of her cultural structure has disintegrated in the relevant way: that is, from the point of view that the reality of its members has become incoherent. Even if today's Aboriginal people are coming ever nearer to recapturing a coherent conception of themselves in relation to all else it is because in struggling against paternalism and oppression, some individuals have begun to "remember" the point where the conversation was so violently interrupted and replaced by foreign and meaningless words. To mix metaphors, in trying to get a sense of where any recognizable conversation left off, Aboriginal people have begun to feel for the familiar planks of a shipwrecked culture. They are searching for the junction from which to carry on a conversation they can understand. I would suggest that it is just passed this groping point

at which contemporary Aboriginal people might now be living. Fingertips have brushed against old rotting board. There has been a glimmer of recognition and they have begun to talk. But here's the problem. In order to become a culture capable of changing in the way described above, with a responsive rationality; the newly discovered "old plank" must be brushed off and re-examined; it must be strengthened and renewed before it can be fitted against the weight of a similar but different plank that is perhaps constituted in a slightly different way. To return again to the conversation metaphor, Aboriginal people must relive the last bit of meaningful conversation that they had. They must relearn what they already knew before they can bridge the gap between the old and the new and conduct meaningful new exchange of experiences and language and ideas.

But having said all of this, there is a problem with my interpretation: First, it requires that in correcting the disadvantage suffered by Aboriginal people in their loss of coherence and personal identity, they must be protected in their attempt to "rediscover" the Aboriginal conversation. This would require invoking special measures to bring alive for individual Aboriginal members the experience, norms, and resulting values that will restore the strength and capacity required for an exchange of ideas with the so-called dominant culture. This means, in effect, that the cultural *character* which, on Kymlicka's view should remain fluid, must, instead, be secured in order to save the cultural structure. This is the unhappy result that Tomasi arrived at in his 'structural' interpretation but by different route. The short term consequences to individual autonomy, in the liberal sense, seem very clear in this instance. The only way to reinstate the ability to make coherent choices, is to put strictures on the usual conditions for choice. But we need not say that special protective measures are anything but temporary in this situation. That is, special collective rights would be justified as an affirmative action plan until coherence provided to the cultural structure. But once the community becomes rationally healthy again, there is no longer a disadvantage suffered. Eventually, in the long term, the need for expansive

and undeveloped land for the Aboriginal will be a matter of choice rather than circumstance, and likewise, their traditions and practices.

But this result is problematic as well in two serious respects. While it gives Kymlicka more leverage than Tomasi allows him, it is inconsistent with Kymlicka's explicit claim that minority rights must be permanent and secondly, it would fail to lend *any* protection - even of a temporary nature - to claims for voting restrictions and mobility rights made by groups like the Inuit, who have apparently evaded the kind of incoherence suffered by their Aboriginal brothers and sisters living under the burden of The Indian Act. But Kymlicka specifically directs the focus of his defense in favour of the kind of claims being made by the Inuit people.

And so there must be another respect in which cultural structure is perceived as threatened even when coherence is in place. An argument given on page 196 of LCC may shed some light on what this other perceived threat may be. In arguing against the claim that it would disadvantage Pueblo members to practice any religion other than a particular one, Kymlicka cites the criterion by which he rejects this claim: 1) practicing other religions would not prevent the ability of Pueblo members to live on reservation; 2) practicing other religions does not threaten to outbid or outvote the Pueblo band on "crucial issues" by non-Indian populations (unlike allowing full voting rights for non-Inuit in the North); 3) practicing other religions does not threaten the culture with internal disintegration (unlike the Indonesian population whose children jumped off cliffs after watching superman on newly acquired television). The internal disintegration disadvantage, I suggest, could be flushed out along the lines of the 'coherence' disadvantage I have just given.

With respect to condition number 2, I think the relevant question is: "Crucial to what"? On page 191 Kymlicka writes that "...minority rights need not be a tool for promoting particular choices, rather than a response to unequal circumstances" but if there is no inequality in terms of the rational health of the community in its role as a context of choice, then what could answer the question "Crucial to what?" other than the answer: "Crucial to our preferred way of life" or "crucial to our traditions, or our norms, or our values, or our beliefs"?

As to condition 1) the fear of overpopulation is based precisely on the community value and meaning that 'Etinohah' has for the Aboriginal people. If mobility rights didn't pose a threat to the land and the ways of its inhabitants it would be because no conflict existed in the ways or values which newcomers held toward the land and its uses. So, other than the internal incoherence condition, which I have argued at length, I see no way in which the Aboriginal disadvantage rests on anything other than preferred norms and values.

◆ **Aboriginal Concept of the Aboriginal Right**

In the final analysis, any right granted to the Aboriginal people that is *not* a protection of their preferred way of life is a right which fails to defend the concerns and the content of the actual proposed definitions of the Aboriginal Right that is constitutionally entrenched, but left undefined by section 35 of the Constitution Act.<sup>89</sup>

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<sup>89</sup> Section 35 of the Constitution Act (1982) says: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The definition of the content of this right is what is in dispute.

Kymlicka writes that the need for temporary illiberal measures "has no application to most cultures" and has "nothing to do with the long term goal...in which every individual has the full range of civil and political liberties..." (171, LCC). But this "long term goal" is precisely the ideal Aboriginal people are rejecting in their collective position on what constitutes the Aboriginal Right.

In a compilation of discussion papers on the Aboriginal Right, written primarily by contributors made up of members, chiefs, peace keepers and educators from various Canadian tribes, a common concern is expressed to formalize an Aboriginal definition of human rights designed to protect Indian philosophies and norms, that in turn have little conception of the individual outside of the community. Menno Boldt and Anthony Long<sup>90</sup> identify the predominant concern for most Aboriginal groups is the power "to define rights and status within their communities" precisely because this power is "fundamental to the protection of Indian group norms and hence to the [group] survival" (172, 177, QJ).

We have already observed that the universal reading of 'right' across Aboriginal cultures involves a concept of 'individual' that has little if any meaning outside of the collective. Their conception of the individual is one of voluntary subordination to the whole (166, QJ). In such a society there is no concept of inherent individual claims to inalienable right. Menno and Boldt's claim that the predominant view is that "Indians be allowed to define human rights consistent with their philosophies and aspirations" is

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<sup>90</sup> Boldt and Long are also the editors of *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*; University of Toronto Press, 1985. Menno Boldt is a professor of sociology at the University of Lethbridge. He was educated at the University of Alberta and Yale University. A specialist in minorities, he has published widely on the subjects of Indian leadership, politics and philosophy. J. Anthony Long is a professor of political science at the University of Lethbridge. Educated at the Universities of Montana and Missouri, he specializes in Canadian public policy. He has written on Indian self-government and traditional Indian philosophy.

reflected in the Aboriginal request to entrench in the Canadian Charter broad principles that would allow Indians to develop and enforce their own version of human rights and dignity. Indians will "thus be guaranteed the human dignity and freedom *"that are appropriate to their cultures and the wishes of their people"* (178, QJ). It is fully admitted that "these desires are based on a lack of a cultural heritage of individualism" (178, QJ). Indeed, it is recognition of this lack of individualistic thinking that Aboriginal people are fighting for in their constitutional battle. Contrary to Kymlicka's understanding of Aboriginal cultures, it is the *inappropriateness* of a "full range of political and civil liberties" which is being argued by most proponents of Aboriginal rights.

Of course, not all Indians consistently and uniformly practice the traditions of their cultural heritage. Boldt and Long note that "federal government coercion" has moved Canadian Indians a long way in the direction of differentiated and segmentary institutions. This may mean that in future Indians may become 'modernized' within their own societies and voluntarily choose impersonal hierarchical political systems on their reserves. If this happens, individual rights may take on meaning (169, QJ).

Nevertheless, in coming together on the Charter issues "Indians have embraced these traditions as their charter myth and as fundamental to their version of a good society as equality and individuality are to western democratic societies" (169, QJ).

This consensus on the Aboriginal charter myth was formalized in the Assembly of First Nations address to the parliamentary sub-committee on the Indian Act and Indian Women in 1982 (170, QJ):

"As Indian people we cannot afford to have individual rights override collective rights. Our societies have never been structured in that

way...that is where the clash comes. The charter of rights is based on equality. In other words, everybody is the same across the country...so the Charter of Rights automatically is in conflict with our philosophy and culture and organization of collective rights...We cannot accept the Charter of Rights as it is written because that would be contrary to our own system of government "( p. 170 Q.J).<sup>91</sup>

The inappropriateness of individual rights to Aboriginal ways of thinking has been made public not only in the formal addresses of Aboriginal nations to the question of the Aboriginal Right, but also in their attempts to define the content of the Aboriginal Right in the Canadian Justice system.

A case in point is the 1991 *Thomas v. Norris et al* Supreme Court of British Columbia case. The case concerned a member of the Coast Salish people who kidnapped another member of the community and forced him to undergo, against his will, a four day spirit dancing ceremony in the hope that it would solve the man's personal and marital problems.<sup>92</sup> The Plaintiff (the man kidnapped) charged the other members with assault, battery and false imprisonment. The defendants denied that intentional harm was caused to the Plaintiff and defended on the false imprisonment charge on the basis that the proper consent was obtained before the "grabbing" occurred, and that it was their constitutional protected right to carry on and exercise the Tradition of Coast Salish Spirit dancing (3 - 4 *Thomas v. Norris et al*, SCBC, 1991)

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<sup>91</sup> Assembly of First Nations "Memorandum Concerning the Rights of the First Nations of Canada and the Canadian Constitution; Ottawa, June 16, 1982.

<sup>92</sup> J.R. Miller gives a similar account of the Sun Dance or Thirst Dance of the Plains people. The ceremony involves tearing of the flesh of the chest and inflicting pain on the individual. Sometimes it involves isolation of the individual who searches for signs from the spirits that will provide guidance for the future. The signs are usually perceived through some kind of special revelation (usually produced through hallucination due to fasting) by dream, or vision. This vision quest was particularly important during a difficult point in an individual's life.

What is most notable in this case is the defendant's assumption that inherent in the Aboriginal tradition being defended is the perspective of the inseparability of the individual and the community. This perspective is illustrated in the Plaintiff's so-called "consent" which was given not by the Plaintiff himself but by the man's wife and either the Plaintiff's brother or aunt. Apparently, according to Aboriginal tradition, the individual cannot be captured against his will if it is not against the will of his relations (14, Thomas v. Norris et al, 1991) (hereafter the "Norris Case").

This 'layered' concept of the individual is recognizable again in the tradition of the Blood people in which the father arranges for another male tribal member to haul his sons out of bed in the early morning and throw them in a chilly stream to make them fit for a career in hunting and fighting (36, SV). Apparently, the decision of the father here is equated with the consent of the son.<sup>93</sup>

This relational interpretation of the individual is also consistent with Dumont's account of Aboriginal Justice in his cross Aboriginal culture study. In Dumont's discussion of the aboriginal aversion to retributive systems of criminal justice, he describes how Aboriginal courts instead focus on restitution of the victim or his family by way of compensation paid by the offender or the offender's family. What is implied here is that the family is responsible for the offender's actions and therefore has a substantial say on behalf of the individual as is also suggested by the Norris case.

In his Royal Commission report on Aboriginal Justice, Jeremy Webber plays down so-called "anti-individualistic" tendencies of Aboriginal societies by pointing to inadequate institutional regulation as responsible for outcomes like the Norris case.

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Interestingly, however, Webber's proposal to reject the anti-individualistic interpretation of Aboriginal justice was found to be "unconvincing" by the majority of board members which were apparently made up primarily of native individuals.<sup>94</sup> While Webber's proposal called for a parallel system of Justice which would express a healthy concern for individualistic values but would differ in its unique Aboriginal procedures and methods, the majority of those in attendance rejected that proposal in favor of separate Justice systems for Aboriginal People, which recognize the foundational differences in Canadian and Aboriginal ideology.

The content of the Aboriginal Right has yet to be officially defined, but if the views expressed in the Norris Case and by the Royal Commission Hearings on Aboriginal Justice, and the representatives of the Assembly of First Nations are more or less typical of the Canadian Aboriginal perspective, then Kymlicka may be overly optimistic in his belief that the need for illiberal measures within Aboriginal communities has "no application" (171, LCC). That is, there seems to be good reason for believing that the class of Aboriginal communities which require the protection of illiberal measures might actually be typical rather than exceptional.

But if Kymlicka is mistaken in his assessment that most Aboriginal communities do not require that illiberal measures be permitted, this mistake need not be fatal to his theory. In the first place, Kymlicka could (and does) distinguish a *need* for illiberal measures (which is a temporary, transitional need justified on the basis of avoidance of harm) from a *desire* for illiberal measures (which would simply be unjustified). Accordingly, Kymlicka might address the problem by extending temporary special protection of

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<sup>94</sup> See pg. 489 Royal Commission; "Report from the Rapporteur" National Round Table on Aboriginal Justice Issues; Canada Communication Group - Publishing; 1992; Ottawa, Ont.

illiberal measures to those communities that would come to harm if introduced too quickly to liberalization; while at the same time denying special protection of illiberal measures to those communities who do not fall into the "need" category, on the grounds that these latter claims are unjust.

However, this approach assumes that the members of those Aboriginal cultures which fail to fall into the "need" category, are not inextricably attached in the relevant way to a cultural character and structure which is, itself, a stranger to individual rights based notions. In other words, if the personal identity, self-respect and personal efficacy of each member is bound up with the illiberal cultural character and structure then it might plausibly be argued that the typical Aboriginal community ought to be categorized under the "need" heading. This would dramatically widen the scope of Aboriginal communities whose survival depends on the protection of illiberal measures.

But even if this latter reasoning is correct, Kymlicka might still argue that the special protection of illiberal aboriginal communities need not conflict with the long term goal that collective rights lend protection to threatened cultural structures *while* striving to *liberalize* the character of those cultures. The long term goal is to ensure that, *ultimately*, everyone has her fair share of resources (i.e. resources being the unlimited possibilities of the modern world) and the freedom to live her life as she chooses within her cultural community (170, 171, 172, 177 LCC). Those communities under the "need" category, would receive temporary collective rights to protect their illiberal values during a transition toward a fully liberal community, during which the illiberal character of such communities would be extinguished and those communities not in the need category would be required to govern their communities within a individualistic rights based system of government.

However this response - that the character of illiberal cultures be extinguished over time - is also problematic for Kymlicka in two serious respects. In the first place, such a response flies in the face of Kymlicka's argument that the "tragic results" of enforced assimilation constitutes the kind of harm that liberals would always want to avoid (176, LCC). Kymlicka writes that "...respecting people's own cultural membership and facilitating their transition to another culture are not equally legitimate options. The affront minority groups feel at the latter proposal is grounded in the perception of real harm" (176, LCC). But if enforced transition from one culture to another is morally repugnant then coercive transport of the political and social ideology of the broader culture into the minority culture - with the extinction of cultural character as the goal - must be equally repugnant.

Moreover, Kymlicka has said himself that he does not even think that enforced assimilation works: "Facilitating assimilation not only doesn't work as well as protecting cultural membership, it often doesn't work at all" (176, LCC). This latter claim, is supported by Dumont's extensive study of universal persistent characteristics in Aboriginal cultures which have resisted aculturation since the first Aboriginal encounter with European culture. His study shows that the kinds of universal Aboriginal characteristics most resistant to change are those which conflict with individualistic and rights based ways of thinking (JAP). While a possible counter example to this study has already been noted in my discussion of Boldt and Long's observation that some Aboriginal communities *are* moving toward hierarchical democratic liberal tribal governments, it is not a strong counter example; particularly given that Boldt and Long have also observed that this movement toward liberalization is a consequence of *coercive* government measures which Kymlicka must, in principle, resist. Consequently, from a practical perspective, there is good reason to believe that non-coercive assimilation plans would continue to be resisted by Aboriginal cultures; and from a principle perspective,

Kymlicka must resist any coercive means of achieving the desired transition from an illiberal to a liberal Aboriginal culture.

The second problem arises when we consider the short term consequences of implementing temporary collective rights to protect illiberal measures within an Aboriginal community. Under such circumstances Kymlicka would be obliged by his own reasoning to implement his proposal to mitigate those individual rights violations permitted within the protected illiberal community during the transition period, by instituting an 'opting out' provision under which individual members of the protected culture could opt out of the culture and into the broader society. However, as I have already pointed out in the "Side Issues" section of Chapter II, the psychological boundaries of choice advocated by Kymlicka's revisionist argument are such that individual choice is limited by the perimeter of the cultural structure and the options *it* presents. But that means that if the cultural structure has resisted the penetration of alternative ideas and ways of living available in the broader society, then opting out could hardly be a psychologically realistic alternative. On the other hand, if our cultures *are* so easily 'opted out of' then participating in them would be a matter of choice rather than some condition of deep attachment to our personal identity which goes to the heart of our efficacy and ability to form rational life plans. But if Kymlicka were to admit this latter possibility then it would seem that the need for collective rights would dissolve, given the liberal requirement that special rights require a disadvantage due to circumstances rather than choices.

In any case, in light of the reasonably strong indication that the Aboriginal Right, as conceived by Aboriginal people generally, is a right which acknowledges the rejection and inapplicability of an individualistic, rights based value system we are led to at least one conclusion: that is, regardless of whether it is theoretically or practically possible to

protect cultural structure without securing the preferred norms and values of that culture, the Kymlickean solution does not address the real Aboriginal issue. What is actually being proposed by Aboriginal communities today as an expression of the Aboriginal Right is exactly contrary to what Kymlickean theory can allow. Aboriginal people do not require a defense that protects a cultural structure detached from its norms and values. On the contrary, they need a defense for their claim to constitutional recognition of their traditional values as incompatible with western value systems and the power to protect those values in a separate statement of human rights.

Aboriginal people are not asking for special rights protections so that their members are enabled the self-respect necessary to become full autonomous citizens. On the contrary, they are asking *not* to be treated as full liberal citizens. In a Rawlsian context, I suggest that Aboriginal people would want to argue that they do not want to participate in a fair system of social co-operation of the Rawlsian kind. Rather, they are asking to be put outside of the liberal system of values and the institutions of individual rights and freedoms that express them, so that they can develop institutions which express their own norms and values and comprehensive philosophies which have a wholly different concept of the individual. Consequently, it is my final conclusion that any defense which does not offer constitutional recognition and protection of the character of the aboriginal culture is not an interesting defense from the Aboriginal perspective.

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