

Rawlsian Liberalism and Its Moral Support for Gay Rights

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I. Introduction

The issue of gay rights in American society has been a prevalent one for years. The issue, however, became more important than ever before in 2004. President George Bush endorsed a Constitutional amendment which would prohibit same-sex marriages from being formally recognized under the law. The president supported this ban in an attempt to uphold a moral standard for his nation. He claimed “marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society” (www.cnn.com). George Bush used his religious background as a basis for a cultural morality. Bush attempted to make a moral argument stemming from his beliefs about the proper moral structure of society. Moral arguments, including those based in religion, are used rampantly in arguing against gay rights. Morality, however, is rarely cited to counter these arguments. Morality is less likely to be alluded to when defending the rights of homosexuals. This can be problematic when attempting to defeat a moral argument. A moral defense for gay rights is the only feasible way in which to defeat a moral attack. In this paper, I will examine the various objections to same-sex marriage and homosexuality. I will include traditional moral arguments against rights to homosexual marriage and other family rights denied to homosexuals. Then, I will outline philosopher Carlos Ball’s theory of a moral defense for gay rights. Next, the paper will examine Ball’s criticism of John Rawls and his theory of liberalism. Ball asserts that Rawls’ liberalism does not morally support the rights of homosexuals in society. I will then critique Ball’s arguments against Rawls by examining the ways in which gay rights fit into a Rawlsian system of liberalism. Finally, the paper will examine Martha

Nussbaum's theory of "moral liberalism," which Ball claims to be the only form of liberalism to adequately support gay rights from a moral stance.

II. History of Objections to Same-Sex Marriage

A. An Objection to Homosexuality

At the heart of objections to same-sex marriage is not an attack against marriage, but rather an attack against homosexuality. Same-sex marriage is a legal structure which people fear will condone and even encourage homosexual behavior. When homosexuality began to surface in the United States, many believed it to be a curable problem within individuals. If it truly were a sickness, then it could not be something Americans support. Opponents fear that "state recognition of same-sex marriage would constitute state approval of such marriages, or even of homosexuality in general" (Eskridge, 88). American culture has labeled homosexuality as an evil or bad practice. As Americans, we make a practice of preventing bad behavior. Children are taught by parents and society that stealing is bad. Homosexuality is bad as well, thus we should not condone such a bad act (104). Based on the belief that homosexuality is an immoral practice, it must be outlawed. It is a private "immorality," but this private immorality must be prohibited in order to protect the public morality (Ball, 2).

A further, related objection relates to activities associated with homosexuality. Americans ascribe to a number of beliefs about homosexuals. Many believe that homosexuals are more likely to engage in other immoral behavior such as child abuse, domestic violence, and pedophilia (Cahill, 32). Not only is homosexuality immoral, but

homosexuals engage in other forms of harmful immorality. Condoning homosexuality would be condoning a plethora of immoral acts.

While conservative religious beliefs lie at the heart of the moral attack against same-sex marriage, some claim moral tradition as their basis for a critique of gay rights. It is not directly religion which impacts their views of morality, but rather it is a morality instilled in them by American culture. Advocates of this morality know not of the religious basis for these beliefs, but only that it is a shared American value which they must share to hold American values. Same-sex marriage seems an immoral concept as “it runs counter to historical tradition, moral order, and the best interests of children and society at large” (Jost, 723). To threaten these instilled values would be to threaten American culture in its entirety. Thomas Caramagno cites Colonel Ronald Ray as stating “for over 3,000 years, the Western world remained united in its condemnation of homosexuality as an abomination” (23). There is no inherent moral justification in this claim; there is simply an adherence to cultural tradition.

Built on top of this “moral” tradition, is a fear of disrupting cultural traditions which have maintained society thus far. This tradition of morality is not only ingrained as the only form of morality, but it is also ingrained as the only tradition through which society can function. A disruption of this tradition would mean a disruption of society, which leads to a belief that same-sex marriage must be problematic. People who subscribe to this line of thinking believe that if same-sex marriage as an institution were an inherently moral right, it would not cause such a disruption in its implementation.

They believe that if same-sex marriage was a moral right, it would be universally accepted without any question.

B. The Legal and Moral Institution of Marriage

Not only does the moral tradition of heterosexual marriage cause an objection to same-sex marriage, but there is also a legal tradition. Legal structures have a profound ability to determine what people view as right and wrong behavior. Legally, same-sex marriage is prohibited from being recognized. The law prescribes that marriage occurs between a man and a woman. Any deviation from this is a deviation from the law and therefore wrong. Opponents of same-sex marriage believe not only that the law dictates what is right and wrong in a society, but also anyone who acts against the law is acting inappropriately.

A similar thinking dictates that if a legal body can change the definition of an institution with multiple moral implications, it might have greater power than people are comfortable with. One notable same-sex marriage critic stated “it’s a risky business for courts or legislatures to get into the business of changing the definition of a word” (Jost, 723).

Marriage is a longstanding cultural institution. Its institutionalization has always remained contingent on its being a union between a man and a woman. It is the general view that marriage has been a stable constant in family life. Dismantling this stability strikes a fear that society will no longer have strong family units. Without the strong family unit, people fear there will be no value-instilling institutions. They believe that

the family itself helps to instill values into society. People of this school of thought hold the family to be the strongest moral structure and challenge any threat to marriage as an immoral danger. They assert that a legalization of same-sex marriage would “hurt traditional families at a time when marriage is already suffering from divorce and other social trends” (Jost, 721). This view holds that only traditional families will support the moral values we adhere to as a nation. They assert that non-traditional families will impose immorality on a nation which already appears to be weakening.

In addition to this fear of destruction of marriage is a fear that sanctioning homosexual unions will condone other behaviors which run counter to the institution of marriage as culturally conceived. The thought behind this is that if we allow two persons of the same sex to marry, this will lessen the importance and sacredness associated with marriage. This might increase divorce rates or decrease people’s willingness to formally marry. There is a belief that homosexuals do not carry the same values, including values associated with child rearing and family. Some believe that homosexual relationships can even harm society through the spread of disease and domestic violence (Cahill, 28, 29). Because these negative effects can harm all of society, many opponents also believe that homosexuals are a “drain on the economy” (Cahill, 30). This belief stems from facts about domestic violence and disease among homosexual couples. This belief also stems from myths surrounding homosexuals and pedophilia and child abuse. It seems illogical to support a practice which harms the economy and has other unsafe effects on society.

C. Value Based Objections

Both of these objections associate specific values with the moral tradition of heterosexual marriage. These values are integral to the moral state of our nation. As a result of the cultural and traditional histories of our nation, there is a belief that the values of the society cannot be separated from the institution of marriage. Without this sacred institution, we will face a valueless society. Law professor Lynn Wardle claims “marriage is the most preferred institution in the law, and for good reason. It contributes to a society in which rights, values, and cultures are passed on, and liberties are protected. It is critical to our way of life” (Jost, 728). These critics of same-sex marriage believe procreation and child-rearing to be the ultimate purpose of marriage. Without the ability to procreate, which homosexuals do not have, marriage serves no function.

The first value believed to be a result of heterosexual marriage is the upholding of morality. People believe that thus far, our society has remained morally stable. This stability has been maintained through the institution of heterosexual marriage. Thus, the conclusion is that same-sex marriage must devalue morality. The second value prioritized is the continuation of our society. Human beings must procreate in order for the species to continue. The ability to procreate is highly valued. In same-sex marriages, it is impossible to naturally procreate. The conclusion is that there can be no inherent value in the marriage because of this inability and therefore, the marriage must be immoral.

The value of procreation not only guarantees that society will flourish, but it also prevents sex for reasons outside of procreation. Premarital sex and sex for pleasure are

not morally condoned. As homosexuals cannot procreate, there is no reason for their intercourse other than pleasure. William Eskridge cites that opponents of same-sex marriage claim “homosexuality is shameful because it is sex divorced from procreative possibility” (88). This value is not limited, however, to only biological procreation. A marriage is thought to have moral value only if children can be raised by the union. This includes children from adoptions or other means. Eskridge asserts “people have a legal or moral claim to marry only insofar as the marriage can be linked with ‘the fundamental rights of procreation, childbirth, adoption, and childrearing,’ for marriage ‘is simply the logical predicate of the others” (96). People who follow this line of thought believe that the definition of a marriage lies not only in the union of a man and a woman, but it also maintains that the man and woman will assume childrearing responsibilities.

An even more radical opposition to same-sex marriage claims that procreation is only one condition for two people to be legally bound in a marriage. Ron Crews, the president of the Massachusetts Family Institute, asserts that the presence of children is not what defines a marriage. Marriage should be defined biologically, using no cultural definitions. He claims it is the biological chromosomal make-up of the two distinct sexes which allows them to marry. Crews stated, “Only the union of a woman and a man, with immutable XX and XY chromosomes in every cell of their bodies, representing the two halves of the human race, can make a marriage and produce the next generation” (Jost, 739). Crews relates his sense of morality to terms of science in an attempt to make his argument more concrete.

There are anti-family repercussions carried with homosexuality as mentioned previously. Earlier, I mentioned that some opponents fear that homosexuality will hurt the institution of family in society. If sexual immorality leads to the destruction of marriage as a critical social institution, it can eventually harm society as a whole. I mentioned that marriage can be an institution which fosters values. Some thinkers not only believe that the destruction of marriage will harm society, but also believe that any homosexual behavior can negatively affect the morality of our nation. Conservative thinkers already fear that the morality of the nation is being threatened through many outlets. Sexuality is simply another way in which morality can be corrupted.

While there are some attempts to claim that same-sex marriages are harmful to society's economy, there is little other basis for opposition outside of the moral realm. These claims, however, can be countered. The forthcoming sections will examine a moral case for gay rights.

III Carlos Ball's Argument for a Moral Support for Gay Rights

Carlos Ball examines the question of gay rights in his book The Morality of Gay Rights. Ball asserts that the issue of morality has been excluded from the argument in support of these rights. He writes that political philosophy has refrained from taking an active stance on these rights because of an inherent desire to remain neutral on issues of morality. Neutrality, however, is often not satisfying enough for those demanding the rights. Gay rights advocates argue that a neutral moral position in political philosophy will hinder their rights. Gay rights are defined as access to equal rights. This means that

as heterosexuals enjoy the rights to marriage and adoption, homosexuals should be granted these rights as well. These rights should be supported by all members of society. As the current norm is (questionably) non-interference, homosexual couples are often denied their full rights. Access to marriage and adoption is not guaranteed because these couples would create non-traditional families were they to have children. If the political sphere fails to interfere by declaring a moral stance on these rights, the rights may never be guaranteed. Ball concurs with this view. He believes that a neutral society will fail to guarantee equal rights for all citizens, including homosexuals. He makes the bold claim that public policy must include “notions of morality and the good” (ix).

To support his claims, Ball examines several philosophers’ conceptions of social justice. His assertion is that most social philosophers use a tactic referred to as “moral bracketing” (1). This tactic avoids positively using morality to stand for equal rights. Moral “bracketers” instead refer to equality and privacy to support their ultimate goals of equal rights. These neutral references fail to adequately support rights. If a philosopher brackets morality, he does not support moral rights. According to Ball, he only supports tolerance and equality, which simply are not enough. He writes that the neutral liberal theory of John Rawls and pragmatic liberal theory of Richard Rorty are insufficient in guaranteeing rights. These two philosophers are the guiltiest of moral bracketing. Ball believes that at first glance the two philosophers’ theories encompass gay rights. Upon further examination, however, their neutrality creates inequality for homosexuals (6). Tolerance and equality are not enough. Homosexuals need moral support, and neutrality does not offer the same moral support given to heterosexual relationships. Ball offers

one theory of liberalism which he believes is successful in granting rights. That is the moral liberalism of Martha Nussbaum. I will discuss Nussbaum's liberalism in a later section.

Ball, himself, relies on a theory of universalism to adequately grant rights to homosexuals. He writes that "human beings share fundamental attributes that distinguish them from other animals and that impose moral and political obligations on society" (8). Ball believes there are rights essential to humanity and that social morality is the only way to achieve these basic rights. These rights essential to humanity include rights relating to relationships with other people. Ball's argument for these necessary rights is especially interesting regarding his views on sexuality in general. While he does not make a direct statement about his view on the origins of sexuality, he identifies three current theories on the origins of sexuality. He defines the theory of soft, moderate, and strict social constructionists. Soft social constructionists subscribe to a belief that homosexuality is "independent of society." Moderate social constructionists believe homosexuality to be both a product of society and inherent in nature. Finally, strict social constructionists believe homosexuality to be a product of our society. Without certain social institutions, homosexuality would not exist. Ball states that this last theory, even if true, does not "undermine a deeper kind of universality which recognizes that all human beings have certain basic needs and capabilities associated with sexual intimacy" (8).

The final point Ball makes in his introduction is an interesting one in light of critics of gay rights. Opponents of gay rights often use an argument which states that condoning homosexuality leads to a demise of morality for all citizens. As homosexual

behavior is immoral, allowing it contributes to an overall immorality. This type of defense attempts to impose a universal moral stance onto all citizens. The government has the ability to choose its' citizens view of morality. Ball suggests a different type of morality for citizens. He writes that his system of morality is one of evaluation. He wants to morally evaluate the basic needs of citizens. The other type of morality is one of judgement. This type evaluates individuals' life decisions and judges them from a moral perspective. Regarding the difference between the two types of morality, he states

The kind of morality that I advocate in this book is very different from a morality that seeks to instill private virtue (however defined) through public policy. Instead, the morality that I articulate and defend is grounded on individual autonomy and choice in the leading of lives that are fully human. It also speaks of the moral respect that we owe others as human beings, a respect that must be reflected in the actions of public institutions and in the content of public policies (11).

Ball's version of morality is a non-intrusive, equal-rights based sense of morality. He asserts that part of living in an equitable society is ensuring that all citizens have the ability to live fully human lives. That is, they must have their basic rights and needs. Henry Shue writes that one must be granted certain basic rights and liberties to achieve any other non-basic rights and liberties. While Shue and Ball disagree with what these basic rights are, they do agree that they are necessary to achieve any other rights. Ball declares that there are certain basic sexual needs. Without access to these needs, citizens are unable to live "fully human lives" (11). Ball believes that all humans have certain needs that relate to their associations with others. There are needs of support and intimacy. If homosexuals are denied the right to homosexual marriage, they are denied a

right to adequately engage with other human beings. As society does not support their choices, others cannot. As a result, it is the responsibility of the governing body to ensure access to these needs and rights.

Ball does not want to claim that gay couples must engage in certain behaviors in order to lead full human lives. Rather, his claim is that they should have the ability to engage in these behaviors. It is this ability that is inherent to living a full human life. A right is only a true right if a person has the ability to exercise it.

A. Ball and Liberalism

Prior to discussing Ball's criticism of John Rawls' theory of liberalism, I would like to point out Ball's stance on the role of liberalism. First, it should be made clear that Ball believes that liberalism, in one of its forms, is in fact the best societal formation for homosexual rights. As the tenets of liberalism are "freedom, autonomy, and equality," this system is the most accommodating (16). He writes that "liberalism must continue to protect the ability of individuals to engage in consensual sexual conduct of their choosing" (12). In light of this statement, it seems Ball is too critical of Rawls' neutral liberalism as I will elaborate in this section.

Ball writes that Rawls is a neutral liberalist. This means that he simply calls for tolerance of homosexuality. Ball asserts that this simple tolerance will not justify the non-basic rights of homosexuals, such as marital status. His argument relies on the separation of the good from the right in neutral liberalism such as that of John Rawls. Rawls differentiates between the right and the good, and this is insufficient for Ball's

conception of a supportive society of gay rights. Ball believes that to recognize homosexual marriage, one must recognize the good inherent in that relationship. Ball's main focus is to criticize Rawls' theory outlined in Political Liberalism. Rawls wrote this work after A Theory of Justice, and several of his assertions in the first work remain relevant in the later work. Some of these assertions are based in morality and, thus, it seems there is a place for morality in Political Liberalism. While Political Liberalism, does eliminate many of the moral references that are present in A Theory of Justice, many are still relevant.

Before examining Ball's criticisms, I will begin by describing Rawls' theory of liberalism in A Theory of Justice. The most salient aspect of Rawlsian liberalism is his focus on justice. On his first page, he writes "justice is the first virtue of social institutions, as truth is of systems of thought" (3). According to Rawls, it is the obligation of the institutions of society to respect and ensure this justice. He defines social justice as distribution of rights by the society's institutions. Rawls suggests that he takes his theory from the works of Locke, Rousseau and Kant (10). This is because his ideal society finds its sense of justice through a system of social contract. He ensures that the social contract is a fair one through his concept of "the original position."

The original position is a hypothetical state in which the actors are unaware of any personal characteristics such as social position. These actors are to be rational agents "mutually disinterested" (12). As the actors have no vested interest in their personal interests or those of the other actors, they approach their conception of justice with no

inherent bias. Rawls writes that persons in the original position would rationally choose the following two principles of justice.

The first statement of the two principles reads as follows.

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (53).

The first principle has priority over the second as the establishment of equal liberties is more important than the established fair inequalities. Rawls' priority rule specifically states that "liberty can only be restricted for the sake of liberty" (Rawls, *Theory of Justice*, 220). Justice is only achieved in a society where there is a proper balance between the two principles.

B Ball's Critique of John Rawls

On initial read that gay rights would necessarily be granted in a society based on Rawls' concept of justice. This is because of Rawls' allusions to equality achieved through the original position. Carlos Ball, however, disagrees with this. He argues that Rawls' conception is incomplete for complete gay rights. Ball criticizes Rawls and gay rights from three types of critical perspectives, the ontological critique, the communitarian critique, and the perfectionist critique.

The first critique, the ontological critique, evaluates Rawls' work Political Liberalism. In this work, Rawls states that humans share "two capabilities that define

their moral personhood” (Ball, 22). These two capabilities include the ability to choose the ends which a person should pursue and the ability to comprehend a system of justice. Ball asserts that humans also have other important capabilities which include loving others and being loved by them. As Rawls leaves these capabilities out of his conception of justice, his notion is incomplete.

The second critique is the Communitarian Critique. This critique argues from a sense of communities. In our society, the community has a powerful effect on the person’s conception of the right and good. This argument states that the self cannot be separated from social ties. These ties are what create the self and therefore, create the personal sense of justice (23). Rawls fails to include these “necessary” ties, and thus, his argument of justice is incomplete.

Ball’s final critique is the perfectionist critique. This critique hinges on Rawls’ notion that the good is separate from the right. Ball cites Michael Sandel as a critic of Rawls’ neutrality regarding the good. The good does not need to be addressed because equality and tolerance are and these values allow for gay rights. This argument criticizes Rawls’ liberalism as it cannot account for any non-basic rights, such as marriage. This is because of his exclusion of morality. Principles of equality and tolerance require those in society to allow homosexuality, even though some might still view these acts as immoral. If they are, in fact, immoral, then they might find no need to “encourage or reward” them (26). Marriage and adoption could be encouragement. Ball wants a liberal society to allow gay rights because of the rights of gays and lesbians to “physical and emotional intimacy” (27). Also within this critique, Ball states that while Rawls’ conception of the

family appears to support homosexual families, it is not enough. He believes that Rawls separates values and goodness from families. He relies on the family as a solely political institution.

While I appreciate Ball's criticism of Rawls, I think he fails to portray Rawls' liberalism as one which does not support gay rights, even from a moral standpoint. Ball's main focus is the inability of Rawlsian liberalism to capture the moral support for human needs relating to sexuality, emotional intimacy and the association of family. I find him to be incorrect on his claims about all three of these needs. Furthermore, I find Rawls to support the kind of morality he is concerned that he omits regarding the family.

IV. A Theory of Justice and Gay Rights

There are numerous aspects of Rawls' theory that not only allow for, but also, encourage and foster gay rights. Ball is too quick to dismiss these characteristics of Rawlsian liberalism as overly simplistic and too reliant upon equality and tolerance. Inherent in his arguments for equality and tolerance are steps toward individual morality which can encompass the morality Ball is so concerned with.

While there has been much criticism of Rawls' original position, I find that it supports justice for all people. Behind the veil of ignorance, all parties are equal and thus respect and establish equal rights for all. Sexual orientation would be one of the characteristics hidden behind the veil of ignorance. It follows that sexual orientation would be unknown because natural ability and characteristics are unknown. Just as gender is hidden, sexual orientation would be hidden as well. Thus, all rights established

would be established for all persons regardless of sexual orientation. Ball would agree with this also. His problem lies more in the fact that Rawls never directly addresses the issue of the moral necessity for recognizing gay rights. While I do not believe Ball's criticism of moral neutrality is as pertinent to A Theory of Justice, it is notable that he does include capacity for moral reasoning in the original position. This is relevant because Rawls includes the original position in his later work, Political Liberalism. He states "it might be thought that the original position is meant to be morally neutral. Rather, it is intended to be fair between individuals conceived as moral persons with a right to equal respect and consideration in the design of their common institutions" ("Fairness to Goodness," 270).

He only recognizes it through his belief in tolerance. Rawls, however, devotes an entire section of A Theory of Justice to moral development of the individual. Rawls' moral development addresses Ball's communitarian and perfectionist critique.

A. Moral Development in John Rawls' A Theory of Justice

In his section entitled "A Well-Ordered Society," Rawls writes that acting justly and supporting the just institutions of our society is part of a person's good. He asserts that his theory is in line with human's "moral psychology" (399). Rawls includes three steps in his process of moral development. He states the steps as morality of authority, morality of association, and finally morality of principles. Rawls' stages of moral development seem to address the moral arguments against gay families as they support

any form of family which can help children develop morally. This directly contradicts viewing gay marriage as an institution which promotes immorality.

The morality of authority is the most primitive form of the moral developmental process. This is the stage occupied by children. He states that it is the responsibility of the older generations to impart moral knowledge to the children of the society. He states that the family is a societal institution which helps promote stability. He writes “the basic structure of a well-ordered society includes the family in some form” (405). As a result, the family must play a crucial role in the moral development of children. Rawls writes “the succession of generations and the necessity to teach moral attitudes to children is one of the conditions of human life” (405). Parents love their children and through their love, they teach their children the basic principles of morality. They have an obligation to teach the children fairness and justice because the child is unable to judge his parents’ words. He must accept them unconditionally.

Rawls clearly places a lot of moral social responsibility on families. As he never specifies the structure of the family and places importance on justice being developed behind the veil of ignorance, he writes nothing that would prohibit homosexual families. Ball concedes that Rawls would probably allow for these families, but does not support them from a moral stance. Rawls’ position on families seems to support gay rights from a moral standpoint as well. He writes of the importance of teaching morality to children via the institution of the family. He directly acknowledges that humans’ moral development is crucial for a fair and just society. He goes even further to put the responsibility for this development in the family, in any form, homosexual or

heterosexual. Rawls not only acknowledges that he allows for gay marriage but he goes even farther to give gay couples moral responsibility. In his later writing "The Idea of Public Reason Revisited," Rawls specifically addresses the question of the composition of the family. In a footnote, he writes that,

No particular form of the family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill these tasks effectively and doesn't run afoul of other political values. Note that this observation sets the way in which justice as fairness deals with the question of gay and lesbian rights and duties, and how they affect the family. If these rights and duties are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible ("The Idea of Public Reason Revisited", 596)

Furthermore, Rawls concedes that the family might not be the most preferable arrangement. This statement suggests that Rawls' priority is morality. He cares not about family as an institution in any form, but more about the family's responsibility of instilling morality into children. Thus, he simply wants any type of family institution to be one which supports morality. He not only acknowledges the moral reasoning behind a homosexual union, but he essentially requires it. While this type of moral reasoning is different than Ball's claim that a society must allow gay rights because of moral obligation to fill certain needs, this is a prime example of a moral reason for gay rights. This moral reasoning comes directly from Rawls' "neutral" liberalism.

There is a feminist critique of the Rawls' conception of the family which some theorists might use as well, claiming the Rawlsian conception of family does not support homosexual families. When describing the way in which families teach children

morality, Rawls writes, the family is “a small association, normally characterized by a definite hierarchy, in which each member has certain rights and duties” (Theory of Justice, 409). Some accuse this hierarchy of creating one head of household, which in traditional thought would suppose a male figure head with his wife below him in the hierarchy. This criticism is invalid in that the only subordination the hierarchy assumes is that of the children to their parents. The hierarchy is one of the few requirements Rawls actually has for the family. Thus, there is no reason homosexual unions would be impermissible.

Rawls’ conception of the family directly addresses one of the arguments against gay marriage presented in the beginning of the paper. Some critics see same-sex marriage as destroying the institution of family in society. They view families as a tool for instilling values and believe same-sex marriage would destroy this tool. It is interesting to note that Rawls argues too that families instill value and morality into society. His conception of the family responds to the fear that the institution of the family might be dismantled which would leave society without value-instilling institutions.

B. Morality of Association

Carlos Ball critiques Rawls’ focus on individual autonomy. His communitarian critique states that Rawls ignores the necessary dependencies humans have on other human beings. Ball writes, “there are a myriad of social, religious, familial, and affectionate ties that form our identity and character...those ties and connections play no important role in

Rawls' theorizing on justice" (23). I disagree with Ball's claim that Rawls pays no attention to these human relationships. He specifically addresses these ties in his section on the morality of association, which is his second stage of moral development.

This stage of moral development relates to the moral standards of the different institutions of society. This stage is achieved when people grow older and they learn what is morally acceptable from those around them. Rawls claims that we learn moral standards through these associations and that we continue to maintain these standards because of our connections to people in the associations. These associations would include the "social, religious, familial and affectional" ties that Ball mentions. Rawls does not ignore these associations at all. Rather, he asserts their importance for moral formation.

The first two steps of morality of association are as follows. First, a person realizes that there are other points of view among different people. In order to understand other points of view, individuals should work to gather the facts and motives behind others' points of view (Rawls, Theory of Justice, 410). Rawls claims that this gives us a better understanding of those around us and their actions. Humans have to look to others to have fully developed moral standards. An individual cannot do it alone; he needs the differing views of those around him. Ball might respond to this by claiming that some in the society will believe homosexuality immoral and as a result, these associations do not foster morality. My response is that the veil of ignorance and original position would ensure a common belief that homosexuality is not immoral and gay rights should exist.

Rawls goes one step further in describing his morality of association. He addresses the fact that after association or ties have been created, people do their part to uphold the morals and justice of those within the association. He states "thus if those engaged in a system of social cooperation regularly act with evident intention to uphold its just (or fair) rules, bonds of friendship and mutual trust tend to develop among them" (Rawls, Theory of Justice, 412). As a result of these bonds or ties, people feel morally obligated to uphold the justice for everyone in the situation. In this section, Rawls not only admits that people can learn a sense of morality from those around them, but they also have a moral obligation to support justice for those in the association. Thus, people will support gay rights because they support the people within that association. Because of their respect for their gay peers, they will undoubtedly act in any way which would uphold justice for them. Essentially, it is the obligation, not a recommendation to, of the citizen to encourage and support the rights of others in the society.

Finally in his section on the morality of principles, Rawls emphasizes the true importance of community and associations with others that Ball feels so strongly about. Ball writes about the importance of the community for gays and lesbians. Ball critiques Rawls because he claims Rawlsian liberalism prioritizes the self before anything else. This isolates gays and lesbians because of their dependency on community. Rawls does, in fact, encourage individualism when acting upon justice. He, however, also asserts that people should act in ways that support justice for those around them. This seems to contradict Ball's point.

While Rawls' sections on morality directly address Ball's critiques, there are other theories in A Theory of Justice which undoubtedly support gay rights. I have clearly addressed that the Rawlsian conception of family supports gay rights, including marriage and parenting. An argument, however, against the Rawlsian conception of family from the anti-gay rights side might suggest that homosexual families would create a societal instability. Just as President Bush stated that homosexual unions would weaken our society, critics might claim that condoning and endorsing a type of "deviance" such as homosexuality might wreak havoc on the moral standing of society. There is a very simple response to this criticism. Rawls makes it very clear that while he supports a stable society, justice is his ultimate priority. Thus, his retaliation to this criticism would be that a just society supports gay rights, and gay rights supersede the necessity for stability.

C. Rawls' Equal Liberty of Conscience

Rawls' equal liberty of conscience is another aspect of his theory which fully supports gay rights, and even includes a moral aspect. While the parties in the original position are ignorant of any specific personal characteristics, they are aware that they will have personal convictions. These convictions will differ from person to person and will include religious, moral, and political beliefs. It is then in their interest to create a system of justice which supports their beliefs. As they do not know their beliefs, the system must be one that will protect all different philosophies. Rawls states, "it seems evident that the parties must choose principles that secure the integrity of their religious and

moral freedom" (Theory of Justice, 181). Furthermore, he indicates that while people acknowledge that they will have differing interests, they do not know if their interests will belong to the majority or the minority. Thus, they must make sure that people are free to believe what they wish regardless of whether it belongs to the majority or minority. The parties in the original position will ensure that no one doctrine will dominate any other. Everyone will be free to believe what they wish both religiously and morally. This liberty for different systems of beliefs not only indicates a tolerance of gay rights, but it indicates a support. While parties may not morally or religiously believe in gay rights, they will support them unnecessarily in the name of justice. Rawls clearly states,

A person may indeed think that others ought to recognize the same beliefs and first principles that he does, and that by not doing so they are grievously in error and miss the way to their salvation. But an understanding of religious obligation and of philosophical and moral first principles shows that we cannot expect others to acquiesce in an inferior liberty. Much less can we ask them to recognize us as the proper interpreter of their religious duties or moral obligations (Theory of Justice, 182-3).

This version of tolerance supports a moral obligation to uphold the liberty of others. While people's specific moral obligations differ, there is one shared overall moral obligation, and that is to uphold liberty and justice for all people regardless of their differing beliefs.

D. Toleration and the Common Interest

Rawls' section entitled "Toleration and the Common Interest" directly addresses Ball's criticism that questions of morality and the good are separated from the political sphere, which he criticizes. First, on the most basic level, Rawls rejects any conception of a union between religion and the state. Thus, there can be no public political religious argument for a rejection of gay rights. Rawls continues by arguing that liberty might at times be limited by "the common interest in public order and security" (Theory of Justice, 186). He directly follows this statement by ensuring that this does not mean that the public interest is in any way more important than moral and religious interests. Ball's criticism of Rawls is that he prioritizes the common good over individual moral doctrines. He states, "it (the state) does not concern itself with philosophical and religious doctrine but regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality" (Theory of Justice, 186). Rawls sees the state as the association of people with differing doctrines. Thus, it is the obligation of the state to support these different doctrines. Any limitations the government enacts upon its citizens are only enacted to further support all differing moral, religious, and philosophical views. According to this section, not only must a state separate itself from the church, but the state is obligated to uphold freedom for different moral theories.

E. Self-Respect as a Primary Good

Rawls addresses the claims that there are certain primary goods which rational human beings want above all other things. These goods are taken into consideration when

making decisions in the original position. While the parties in the original position are ignorant of specific characteristics, they are fully aware of the primary goods which they share with all other persons. Primary goods consist of “rights, liberties, and opportunities, and income and wealth” (Theory of Justice, 79). Rawls later expands on his definition of primary goods, explaining that the most important one is self-respect. He defines his sense of self respect as a person’s sense that “his conception of good, his plan of life, is worth carrying out” (Theory of Justice, 386). Additionally, he adds that “self-respect implies a confidence in one’s ability, so far as it is within one’s power, to fulfill one’s intentions” (386). This sounds remarkably similar to Ball’s definition of leading a “full human life.”

As mentioned earlier, Ball claims there are certain needs and capabilities necessary for individuals to lead fully human lives. Rawls claims this same thing in his definition of self-respect as a primary good. Ball writes that sexuality and intimacy are included as necessities to lead fully human lives. If this is true, then these intimate needs can be incorporated into self-respect. Self-respect requires “a confidence in one’s ability to fulfill one’s intentions.” If one’s intentions are those of homosexual intimacy, then it would follow that institutions would promote gay rights in order to promote the self-respect of all persons, including homosexuals. This is because the parties in the original position make all of their decisions in light of primary goods. They do not want to take any action to undermine these goods. Thus, they would not want to undermine self-respect in any way. Rawls’ primary good of self-respect seems to perfectly address Ball’s concern about persons’ inability to lead fully human lives.

F. The Idea of an Overlapping Consensus

One of Ball's major criticisms of Rawls and his potential for allowing gay rights is that Rawls removes morality from the political sphere. Rawls' paper "The Idea of an Overlapping Consensus" addresses this very issue. He clarifies that it is not that a political system is completely void of morals. It simply does not encompass one overall moral theory. He writes, "the first feature of a political conception of justice is that, while such a conception is, of course a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions" (Rawls, 423). Ideally this foundation, isolated from one overarching moral theory, will be able to encompass varying moral doctrines.

As Rawls continues describing his system of political justice, he addresses certain criticisms which he predicts critics will present. One of these criticisms regards the truth of the justice in such a conception. In response, he writes that this political justice need not be indifferent to moral or religious truths (Rawls, 435). Since the political conception should be aligned with people's moral and religious truths, they will find the political justice true as well. Thus, tolerance for gay rights will be accepted as truth and promoted by society and the varying belief groups among citizens.

V. Rawls' Political Liberalism

John Rawls received criticism for much of his writing in A Theory of Justice. He admitted that some of his work in the book was problematic and followed it with Political Liberalism. While he makes changes regarding the political sphere as separate from a moral sphere, much of the moral basis from A Theory of Justice is the same. In his introduction, he writes, “these lectures take the structure and content of *Theory* to remain substantially the same” (Political Liberalism, xviii). This newer work acknowledges the way in which a society can function when its citizens hold numerous, differing religious, moral, and philosophical beliefs.

To answer the question of how a society can function with these differing belief systems, Rawls strives to find a society that can come to a consensus regarding these differences. This overlapping consensus does not involve any specific scheme of morality, hence Ball’s term “neutral liberalism.” The consensus, however, does not disallow morality. In fact, it acknowledges the morality ingrained in the associations and persons included in the consensus. Furthermore, Rawls writes that people view the political system in play as “congruent with” their other values (Political Liberalism, 11). While the political system itself is morally neutral, it coincides with the overlapping moral consensus of the people. If one of the conditions of the original position is that of tolerance and desire to promote others’ liberty and needs, it would follow that people would include the tolerance of gay rights in their system of values.

A further consideration is that parties in the original position are also unaware of their “conceptions of the good” (“Fairness to Goodness”, 267). This means that they devise a conception of society independently of these differing conceptions. Thus, even

if one's personal value system might later contradict one that supports gay rights, he has already created a system of justice which supports these rights.

While people's views differ and while the political body can take no moral stance, the people in a society are inextricably linked to the political system of that society. They support the body because it promotes justice for them and their fellow citizens. This being said, it is important to recognize Rawls' point that these citizens are moral agents. They have a "capacity for a sense of justice and for a conception of the good" (Political Liberalism, 19). This conception of good Rawls describes relates closely to two of Ball's criticisms.

First, Rawls describes the personal conception of good as relating to a scheme of ends for the person himself, and for those around him to whom he is attached via the community. This is relevant to gay rights as they would be part of the "scheme of final ends" for homosexuals (Political Liberalism, 19). People's conception of the good automatically consists of the good for others. Furthermore, Ball criticizes Rawls for failing to include the importance of attachments to other persons and community when addressing personal systems of values. Rawls explicitly states that "the flourishing of the persons and associations who are the objects of these sentiments (devotions and affections) is also part of our conception of the good" (19). This statement indicates that it is difficult or impossible to separate our conception of the good from those connected to us externally.

The most important aspect of Political Liberalism that remains the same from Rawls' earlier work is his focus on primary goods. I discussed primary goods and the

importance of self-respect earlier and their role in A Theory of Justice. Rawls maintains his assertion that self-esteem is one of the most important primary goods. Thus, he still would support gay rights from a needs-based perspective. Furthermore, citizens still maintain all of the other primary goods. So, while their independent moral theories may differ, they still refer to the same basic needs and capabilities when creating a system of justice. Ball writes that Rawls ignores issues of the body when addressing needs and capabilities. Needs regarding self-respect and esteem are very much interrelated to needs of the body and sexuality. I argue that Rawls' focus on self-esteem is also a focus on these capabilities Ball feels so strongly about.

VI. Carlos Ball on Moral Liberalism

A. Ball's Support of Martha Nussbaum's Theory

While Ball is highly critical of a neutral liberalism such as Rawls, he strongly supports a system of moral liberalism. This term Ball uses, moral liberalism, is characterized by two principles. He states "first, it recognizes that human beings share basic needs and capabilities, the meeting of which (in the case of needs) and the exercise of which (in the case of capabilities) are indispensable for the leading of full human lives" (75). His criticism of Rawlsian liberalism was partially based on his failure to acknowledge all capabilities and needs. The second facet of this moral liberalism is a community acknowledgement. Ball claimed that neutral liberalism was far too individualistic to support the community base that gays and lesbians often need. Moral liberalism acknowledges that humans operate in a network with others. Rather than a focus upon

individual autonomy, moral liberalism embraces a theory that claims that autonomy occurs after a strong support network of other individuals (76).

Ball selects Martha Nussbaum as the finest example of a moral liberalist theorist. He claims that her moral liberalism creates the most adequate state for supporting gay rights. Nussbaum goes a step beyond philosophers such as Rawls because her definition of “what it means to be human” (Ball, 78). Rawls and other philosophers limit this definition to the ability to reason. Ball writes that Nussbaum acknowledges that emotions and relationships are necessarily linked to humanity and the ability to lead “full human lives” (78).

While Rawls does define human beings by their ability to reason, he does not omit humans’ ability to lead full human lives. His inclusion of self-respect in his list of primary goods directly addresses this. Emotions and relationships are certainly intertwined with one’s self-respect in Rawlsian terms. One cannot have self-respect in its entirety without the emotional support of those around him. While not entirely dependent on others, self-respect is undoubtedly related to others.

Nussbaum writes about capabilities and needs. Her definition of needs includes the most obvious basic needs including shelter and nourishment, she also includes the need for companionship and sexuality. Ball cites Nussbaum as stating “sexual need and desire are features of more or less every human life” (79).

Ball, while correct in noting that Nussbaum addresses sexuality, omits the line directly prior to the line he cites. She directly states that these needs, while part of human life, are less important than other basic needs (HFS, 217). Thus, these needs are not the

most important priority when forming a system of liberalism for a society. They take a back seat to the more important needs. In this sense, Nussbaum's moral liberalism does not differ that greatly from the neutral liberalism of Rawls. Rawlsian liberalism would certainly allow for these needs, but they are simply not directly accounted for. The reason for this is that they need not be explicitly accounted for. His goal is to ensure justice when accounting for basic needs and goods. As, these are not basic needs (as Nussbaum herself even claims), they need not be accounted for initially.

Nussbaum's moral liberalism is not dramatically different from Rawls'. The differences Ball cites exist, but they do not preclude a moral support for gay rights in Rawls' work.

VII. Conclusion

Carlos Ball makes an interesting statement about the need for morality in a system of liberalism. His criticism of John Rawls, however, falls short of its goal. First, Ball criticizes Rawls' political liberalism for failing to include an overall system of morality. The citizens in the liberal society, however, are moral agents who make decisions to increase justice for all other citizens. Thus, the system of liberalism is agreed upon by moral agents. This means that it will allow for numerous different systems of morality. Moral agents would necessarily agree upon gay rights as not doing so would be to limit the liberty of their fellow citizens. Furthermore, Rawlsian liberalism is more community based than Ball gives him credit for. Ball repeatedly argues that one cannot separate his system of values from the network of individuals around him. These individuals shape

the person he is. Rawls readily admits this through his stages of moral development and his statements relating justice to an overall conception of justice for all persons in a society. If one looks at the moral standards established in A Theory of Justice and then the political system created in Political Liberalism, it is evident that a society based on Rawlsian principles would necessarily allow for gay rights.

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