

# Striking the balance on Rawls: a reflection on position and equilibrium



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## Chapter 1: Introduction

“Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”<sup>1</sup> This quote by philosopher John Rawls has its focus on justice: a much debated concept which remains a trending topic to this day. What is justice? What does it actually mean, when does it apply, are there different types of justice? When we think about justice, a lot of things come to mind. Justice might be about fairness or equality, or it is about what we deserve or what we need. Maybe justice is about striking some sort of balance, maybe not. But what we can agree upon is that justice is one of the most fundamental and moral principles of our time. What justice means to you personally defines how you think society should work. Looking at the news today, we see justice everywhere. Justice for George Floyd, as his death activated the protests by the Black Lives Matter movement. Climate justice, as the first climate change case is now presented at the European Court of Human Rights. Justice for Belarusian journalist and activist Raman Pratasevich, as freedom of speech and the right to protest must be honored, not punished.

Justice plays a big role within society, and some might even say that a society itself must be just to begin with. In structuring society, the social contract theory comes to mind. This theory presents the view that political and moral obligations are dependent upon a contract, which forms the society in which we live.<sup>2</sup> Modern social contract theory began with Thomas Hobbes, followed by John Locke and Jean-Jacques Rousseau. Hobbes described the state of nature, which is a miserable state of violence and war. Hobbes claimed there is a need for an absolute authority, in the form of a sovereign (the Leviathan), as people are willing to submit themselves in order to escape the intolerable state of nature.<sup>3</sup> Locke also referred to the state of nature, but in a very different way than Hobbes. For Locke, the state of nature is the natural condition of mankind, which is a state of complete and perfect liberty, ‘to conduct one’s life as one best sees fit, free from the interference of others.’<sup>4</sup> Locke’s state of nature lacks civil authority, which leads to the conclusion that men do have to abandon the state of nature by forming a civil government. Rousseau focused on how men could live free and live together at the same time. He distinguished between our individual wills and the general will (*volonté générale*). By submitting our individual wills to the collective general will, a collective body is formed, which then will act as the sovereign. The general will is focused on the common good, and each individual is committed to the good of the whole.<sup>5</sup>

After Hobbes, Locke and Rousseau, political and moral philosophy was shaken up by the very influential work of John Rawls: *A Theory of Justice*. Rawls stated that justice is fairness. He thought that any inequalities that exist within a social system should favor the least advantaged, because this

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<sup>1</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), 3.

<sup>2</sup> “Social Contract Theory,” Internet Encyclopedia of Philosophy, accessed May 26, 2021, <https://iep.utm.edu/soc-cont/>.

<sup>3</sup> “Social Contract Theory.”

<sup>4</sup> “Social Contract Theory.”

<sup>5</sup> “Social Contract Theory.”

levels the playing field of society. The kind of justice he describes here is need-based justice, which is a type of distributive justice. This form of justice has its focus on making sure that everyone in society is in a position to achieve their basic needs. In short, his theory of justice as fairness describes 'a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system.'<sup>6</sup>

According to Rawls, justice is the first virtue of social institutions, and it denies that the loss of freedom for some is made right by a greater good for others.<sup>7</sup> In other words, rights that are secured by justice are 'not subject to political bargaining or the calculus of social interests.'<sup>8</sup> When it comes to injustice, this is only tolerable if it is necessary to prevent even bigger injustice. Through his *magnum opus*, Rawls's ultimate goal is to establish a theory of justice that generalizes social contract theory, which can provide a workable alternative to doctrines like that of utilitarianism and intuitionism. Justice of course has to do with (how to structure) society, and for Rawls a society is well-ordered when it is focused on advancing the good of its members, as well as being regulated by a public conception of justice.<sup>9</sup> Then there is also a thing as social justice: 'the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'<sup>10</sup> The principles of social justice apply to the great inequalities that can be found within society. Rawls's guiding idea in the theory is that there are principles of justice that serve as the foundation for the basic structure of society, and are the object of an original agreement. These principles then are to regulate all further agreements, which Rawls defines as justice as fairness.<sup>11</sup>

### 1.1 Thesis: main- and sub-questions

This thesis zooms in on certain concepts from Rawls's *A Theory of Justice*. This is done in order to understand and explain the theory better, but what is most important is that hopefully it can contribute to the development of the theory in terms of improvement. The thesis focuses on Rawls's thought experiment and the original position, considered judgements and the reflective equilibrium. The main question of this thesis is as follows:

*How should Rawls's considered convictions of justice be adjusted in order to reach a state of reflective equilibrium that respects the premises of the original position?*

This main question will be supported by various sub-questions, listed below:

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<sup>6</sup> "John Rawls," Stanford Encyclopedia of Philosophy, last modified April 12, 2021, <https://plato.stanford.edu/entries/rawls/>.

<sup>7</sup> Rawls, *A Theory of Justice*, 3.

<sup>8</sup> Rawls, *A Theory of Justice*, 4.

<sup>9</sup> Rawls, *A Theory of Justice*, 4.

<sup>10</sup> Rawls, *A Theory of Justice*, 6.

<sup>11</sup> Rawls, *A Theory of Justice*, 10.

1. How can Rawls' thought experiment and the concept of the original position be explained?
2. What do critics say about Rawls's thought experiment and the original position?
3. How should Rawls's reflective equilibrium be interpreted and how plausible is this concept?
4. Is it possible to find a methodology for changing considered convictions of justice in order to come to a morally just conclusion?

In answering the sub-questions first, a well-founded conclusion can be reached that can serve as a reply to the main question of the thesis.

## 1.2 Methodology

For answering the sub- as well as the main question(s), this thesis will employ multiple methods of research. Through analyzing the theory of Rawls as well as other literature on the subject, important insights can be gained, which are of crucial importance in answering the questions and getting to a conclusion of the thesis. By not only looking at Rawls, but also his critics, the development of *A Theory of Justice* comes into play. Search engines like the Stanford Encyclopedia of Philosophy, the Internet Encyclopedia of Philosophy, and the database of the Erasmus University Library have been consulted in writing this thesis. Multiple books, journal articles and other sources have helped building the structure and contents of the thesis.

## 1.3 Relevance

The relevance of this thesis consists of a clarifying explanation of Rawls's theory and concepts. In particular the concepts of his thought experiment and the original position, considered judgements and the reflective equilibrium. Rawls has proven his school of thought to be very influential, as his theory is still being discussed to this day. Thinking of political philosophy, people think of Rawls. Thinking of justice, *A Theory of Justice* will undoubtedly come to mind. Rawls has earned his stripes within this field of philosophy, and therefore the discussion of his theory and most prestigious work remains relevant today.

## Chapter 2: Theory of Justice

In defining the basic structure of society, principles of justice are needed. According to Rawls, these are the principles that 'free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.'<sup>12</sup> In order to determine the principles of justice, rational men have to make a choice within a hypothetical situation of equal liberty: the original position.

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<sup>12</sup> Rawls, *A Theory of Justice*, 10.

## 2.1 The original position

This original position corresponds to an important concept of social contract theory (as described by Hobbes, Locke and Rousseau), namely the state of nature.<sup>13</sup> This is no surprise as Rawls's aim was to present a conception of justice that generalizes the traditional social contract theory. The original position describes a hypothetical situation that leads to this certain conception of justice.<sup>14</sup> What is important to know, is that the principles of justice are chosen within this hypothetical situation, and they are chosen behind the so called veil of ignorance. Everyone in the original position is unaware of his place in society, his intelligence or strength, his social status or class position and so on. Rawls created this veil of ignorance to make sure that no one is advantaged or disadvantaged in choosing the principles of justice. Therefore the principles of justice are the result of a fair agreement. For Rawls, justice is fairness: the principles of justice are agreed upon in an initial situation (the original position) that is fair.<sup>15</sup>

## 2.2 Justice as fairness

An important feature of justice as fairness is that the parties in the original position are rational beings, as well as mutually disinterested beings. This means that they are thought of as not taking interest in one another's interest.<sup>16</sup> Justice as fairness consists of two parts: an interpretation of the initial situation (which is the original position) and the choice rational men have to make whilst in that situation, plus a set of principles that those rational men would agree to. According to Rawls, this situation will lead to the principles of justice. Justice as fairness itself is then some sort of contract theory, and also part of the theory of rational choice.<sup>17</sup>

## 2.3 Principles of justice

The people in the original position have to make a choice: they have to decide on the principles of justice. Rawls claims that they would not choose the principle of utility, as a rational man would not accept a structure for society only because it maximizes the sum of advantages, in disregard of the effect this has on his own basic rights and interests. In the original position, two principles will be chosen:

1. Equality in the assignment of basic rights and duties
2. Social and economic inequalities are just, only if they result in compensating advantages for everyone, especially for the members of society that are least well-off.<sup>18</sup>

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<sup>13</sup> Rawls, *A Theory of Justice*, 11.

<sup>14</sup> Rawls, *A Theory of Justice*, 11.

<sup>15</sup> Rawls, *A Theory of Justice*, 11.

<sup>16</sup> Rawls, *A Theory of Justice*, 12.

<sup>17</sup> Rawls, *A Theory of Justice*, 15.

<sup>18</sup> Rawls, *A Theory of Justice*, 13.

## 2.4 Justification of the original position

The original position is the initial situation, in which rational men come to an agreement that is fair. The justification of this original position has to do with deliberation: which principles would be rational to adopt in this initial situation? Rawls assumes that there exists general agreement that principles of justice should be chosen under certain conditions.<sup>19</sup> All persons in the original position should be equal and have the same rights. Rawls wants these conditions to 'represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice.'<sup>20</sup> In combination with the veil of ignorance, the conditions of the original position define the principles of justice as those which rational beings would agree to.

After this brief sketch of Rawls's theory of justice and its fundamental concepts (the original position, justice as fairness and the two principles of justice), I will now elaborate on some of the most pressing critiques of Rawls's theory and concepts. The next chapter will first explain more on the original position in Rawls's own terms, including clarifications on the veil of ignorance, the rationality of the parties in the original position, and the reasoning behind the two principles of justice. After that, the criticism of Rawls's most firmest opponent, Michael Sandel, will be discussed in order to gain perspective on the concept of the original position and the veil of ignorance.

## Chapter 3: Critique

### 3.1 Rawls on the original position

In the third chapter of the theory of justice, Rawls elaborates on his concept of the original position. He describes the original position as the most favored philosophical interpretation of the initial situation, and tries to show that the features chosen in the original position are reasonable from a 'philosophical point of view.'<sup>21</sup> Rawls's overall idea is of course justice as fairness, where the first principles of justice are the object of the original agreement. These principles are the ones that rational persons would accept in a position of equality, as these principles best secure each person's ends. As the original position presents a (choice) problem, Rawls claims that the conception of justice is the solution to this problem.<sup>22</sup> In equilibrium, a moral assessment takes place, and it is at this point that the original position demonstrates features of moral theory. Rawls's aim is to 'characterize the situation so that the principles that would be chosen, are acceptable from a moral point of view.'<sup>23</sup>

The original position is constructed in such a way that the agreements reached in it are fair. There exist many interpretations of the initial situation, so Rawls explains the most favored interpretation: reasonable conditions that are imposed on the choice of principles, which lead to a conception of justice that matches our considered judgements in reflective equilibrium. Furthermore, the persons in

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<sup>19</sup> Rawls, *A Theory of Justice*, 16.

<sup>20</sup> Rawls, *A Theory of Justice*, 17.

<sup>21</sup> Rawls, *A Theory of Justice*, 102.

<sup>22</sup> Rawls, *A Theory of Justice*, 103.

<sup>23</sup> Rawls, *A Theory of Justice*, 104.

the original position are presented with alternatives. These alternatives taken together form a list of traditional conceptions of justice, where Rawls then claims that his two principles of justice would prove to be superior.<sup>24</sup> His two principles consist of the principle of greatest equal liberty, and the principle of equality of opportunity plus the difference principle. Rawls does admit that there actually is an appeal to intuition at the very basis of the theory of justice, and then begins to explain the circumstances of justice. These conditions can be divided into two categories: objective (which make human cooperation possible) and subjective (represent the relevant aspects of the subjects of cooperation) circumstances. These circumstances can be described as circumstances of justice, which obtain 'whenever persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity.'<sup>25</sup> Rawls thus assumes that the persons in the original position are aware of the fact that the circumstances of justice obtain.

Another assumption in the original position is that the persons will try to improve their conception of the good, and in doing so they are not bound by moral ties to each other.<sup>26</sup> One of the most central features of the original position is the mutually disinterestedness of the parties, as they are not willing to sacrifice their interest to others.<sup>27</sup> They are also under certain constraints in the original position, which Rawls refers to as 'constraints of the concept of right' (alternatives are open to them and their knowledge is limited). Rawls explains that there are five formal conditions on the conceptions of justice. First of all, principles should be general, which means that it must be possible to define them without using proper names. Second, principles must be universal in application. They are ought to be applicable to everyone in virtue of their being moral persons. The third condition is publicity, as the parties in the original position assume that they choose principles of justice for a public conception of justice. The fourth condition prescribes that a conception of a right must demand an ordering on conflicting claims, which should be of a transitive order. The fifth condition is that of finality, as the principles chosen in the original position are final. Taken together, the conditions on conceptions of right come to this: 'a conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons.'<sup>28</sup>

### 3.2 The veil of ignorance

The original position is meant to resemble a fair procedure, so that the principles agreed to in this position will be just. Rawls's aim is to use the notion of 'pure procedural justice' as a basis of the theory.<sup>29</sup> The veil of ignorance is needed in the original position as this veil revokes the effect of contingencies that put the persons at odds and tempt them to employ natural and social circumstances to their own advantage. The persons in the original position do not know their class

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<sup>24</sup> Rawls, *A Theory of Justice*, 106.

<sup>25</sup> Rawls, *A Theory of Justice*, 110.

<sup>26</sup> Rawls, *A Theory of Justice*, 111.

<sup>27</sup> Rawls, *A Theory of Justice*, 112.

<sup>28</sup> Rawls, *A Theory of Justice*, 117.

<sup>29</sup> Rawls, *A Theory of Justice*, 118.



position, place in society, social status and so on. No one knows their conception of the good or the particulars of their society. They do know about the general facts of human society, such as principles of economic theory and political affairs. The persons in the original position know about the laws of human psychology and the basis of social organization.<sup>30</sup>

Rawls also responds to the most obvious objection to the veil of ignorance: that exclusion of all this important knowledge might make it very difficult to choose principles of justice and thereby determine the structure of society. He responds by saying that we must keep in mind that anyone can enter the original position at any time, simply through reasoning in conformity with the applicable restrictions. Rawls does want to make clear that the original position is hypothetical, it is not an actual gathering of actual persons. One can at any time adopt the perspective of the original position, and the veil of ignorance insures that the restrictions provide the same principles to be chosen each time people enter the original position. Another common remark about the veil of ignorance is that it might be an irrational concept. Rawls explains that because the parties are unaware of the differences between them, they are equally rational and thus persuaded by the same arguments. As no one can adjust their position to tailor the principles to his or her advantage, the persons in the original position have no basis for bargaining.<sup>31</sup> The only exception to this conclusion is that of the concept of saving. The persons in the original position are aware of the fact that they are contemporaries, and that they have the possibility to favor their own generation by refusing to make sacrifices for their successors. That is why Rawls adds another constraint: 'no generation is able to formulate principles especially designed to advance its own cause, and some significant limits on savings principles can be derived.'<sup>32</sup>

The veil of ignorance is fundamental as it makes the choice of a particular conception of justice possible. Without restrictions on information in the original position, a definite theory of justice cannot be defined, according to Rawls. The formal constraints on the conception of right are not enough to reach the purpose of the original position. The veil of ignorance ensures that we get to the desired solution.<sup>33</sup>

### 3.3 The parties and their rationality

Rawls assumes that the parties in the original positions are rational beings, but he also assumes that they do not know their own conception of the good. Their rational plan of life is known to them, but they are not aware of the particular details of this plan. The question is then, how can they decide on conceptions of justice that will work in their advantage? Rawls explains that the persons in the original position assume that they will prefer more primary social goods, rather than less. Therefore it is rational for the parties to suppose that they 'do want a larger share, since in any case they are not compelled to accept more if they do not wish to.'<sup>34</sup> In the ordinary sense, it is accepted that the

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<sup>30</sup> Rawls, *A Theory of Justice*, 119.

<sup>31</sup> Rawls, *A Theory of Justice*, 120.

<sup>32</sup> Rawls, *A Theory of Justice*, 121.

<sup>33</sup> Rawls, *A Theory of Justice*, 122.

<sup>34</sup> Rawls, *A Theory of Justice*, 123.

persons in the original position can make a rational decision. The persons in the original position are thus rational themselves, and they are ought to have a logical set of preferences between the options open to them. They rank these options to how well they will advance their goals. Rawls also makes a special assumption, as he assumes that rational individuals do not suffer from envy.<sup>35</sup> The perception of justice can ignore these kinds of feelings because the principles of justice are derived on the presumption that envy does not exist. Rawls notes that envy is disadvantageous as it tends to make everyone worse off.

As Rawls assumes mutually disinterested rationality, the persons in the original position want to choose the principles that advance their ends as much as possible. They will go for the highest number of primary social goods, as this facilitates them to promote their conception of the good.<sup>36</sup> The rationality of the parties expresses itself in the fact that they will not enter into agreements they cannot keep, as the conceptions of justice chosen by the persons in the original position are the ones that they will strictly comply with.<sup>37</sup>

### 3.4 The two principles of justice and their reasoning

As the persons in the original position are equal and cannot gain special advantages for themselves, Rawls claims that the most sensible thing to do is to 'acknowledge as the first step a principle of justice requiring an equal distribution.'<sup>38</sup> The parties start with the principle requiring equal basic liberties, and then move on to the principle of fair equality and the opportunity and equal division of income and health.<sup>39</sup> The structure of the original position allows for inequalities, provided that these improve everyone's situation, and as long as they are consistent with the principles of justice. Rawls also addresses the question (supposing that the persons know very little about themselves, others and the world around them) on how it would be possible for them to make a decision at all? Rawls states that the persons in the original position must not hesitate in making the choice of the principles of justice, as these presuppose a 'certain theory of social institutions.'<sup>40</sup> Moral conditions are essential for the argument of the first principles of justice, and in the contract doctrine, these moral conditions take the form of an explanation of the original position. If the agreement made in the original position wants to be valid, there must exist a rational assurance that everyone will comply with this agreement. The agreement and the principles of justice chosen in the original position are final, and thus stable. Rawls concludes this section with the following statement: 'when the two principles are satisfied, each person's basic liberties are secured and there is a sense defined by the difference principle in which everyone is benefited by social cooperation.'<sup>41</sup>

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<sup>35</sup> Rawls, *A Theory of Justice*, 124.

<sup>36</sup> Rawls, *A Theory of Justice*, 125.

<sup>37</sup> Rawls, *A Theory of Justice*, 126.

<sup>38</sup> Rawls, *A Theory of Justice*, 130.

<sup>39</sup> Rawls, *A Theory of Justice*, 131.

<sup>40</sup> Rawls, *A Theory of Justice*, 138.

<sup>41</sup> Rawls, *A Theory of Justice*, 154.

### 3.5 Sandel on the notions of the original position and the veil of ignorance

Philosopher Michael Sandel is one of the firmest opponents to Rawls, which is why it is only reasonable to discuss his point of view after Rawls's own explanations. According to Sandel, Rawls takes on a project in his theory of justice: the preservation of Kant's deontological teaching. Sandel straightaway argues that this attempt is unsuccessful, as 'deontological liberalism cannot be rescued from the difficulties associated with the Kantian subject.'<sup>42</sup> In the deontological sense, justice cannot be the primary goal, as we are not the beings that deontological ethic requires us to be. In answering Kant, Rawls responds with his original position. Sandel once again explains the assumption of the veil of ignorance in this position, as the parties do not have knowledge about their social class, status, sex, race, etcetera.<sup>43</sup> Whilst the parties are not familiar with their ends, they do know about primary goods. Rawls then introduces the thin theory of the good: 'the thin theory incorporates assumptions about the kinds of things likely to be useful to all particular conception of the good, and therefore likely to be shared by persons whatever their more specific interests.'<sup>44</sup> Sandel wants to know if the original position can support Rawls's claim for the primacy of justice, if his 'answer' to Kant is a suitable answer. Sandel claims that if Rawls wants to prove the primacy of justice, he has to show that the circumstances of justice triumph in every society, and that the virtue of justice is better matched than other virtues.<sup>45</sup> Justice is the first virtue of social institutions only in the conditional sense, says Sandel, and justice can even be a vice if 'an increase of justice does not necessarily imply an unqualified moral improvement.'<sup>46</sup> This is the reflexive dimension of the circumstances of justice. For Sandel, Rawls's account of the original position and its 'descriptive premises' are unclear, and thus the obstacles in explaining the position have to be overcome. Otherwise the whole concept of the original position will not succeed.<sup>47</sup> According to Sandel, it is key to see the original position as the guide of reflective equilibrium. But if the method of reflective equilibrium 'operates with the symmetry Rawls ascribes to it, then the original position must produce not only a moral theory but also a philosophical anthropology.'<sup>48</sup>

Furthermore, Sandel does not agree with the veil of ignorance, as he claims that it is not possible for individuals to leave out their identity in the real world. He argues that the notion of the Me is taken for granted in Rawls's theory, which is not desirable. Sandel claims that the notion of the Me is radically placed, as well as disembodied, which actually leads to a rebuttal of Rawls's theory.<sup>49</sup> Sandel feels that Rawls's conception of the person cannot support his theory, nor account for capacities of self-reflection.<sup>50</sup> According to Sandel, we need knowledge of the world in order to approve ethical norms

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<sup>42</sup> Sandel, *Liberalism and the Limits of Justice* (Cambridge: Harvard University Press, 1982), 14.

<sup>43</sup> Sandel, *Liberalism and the Limits of Justice*, 24.

<sup>44</sup> Sandel, *Liberalism and the Limits of Justice*, 25.

<sup>45</sup> Sandel, *Liberalism and the Limits of Justice*, 30.

<sup>46</sup> Sandel, *Liberalism and the Limits of Justice*, 34.

<sup>47</sup> Sandel, *Liberalism and the Limits of Justice*, 46.

<sup>48</sup> Sandel, *Liberalism and the Limits of Justice*, 47.

<sup>49</sup> Enrico Cipriani, "A Modal Account of The Initial Position," *Austrian Journal of Humanities and Social Sciences* 9, no. 10 (September 2015): 55.

<sup>50</sup> Sandel, *Liberalism and the Limits of Justice*, 65.

and values. We need knowledge on our point of view in order to make such decisions. What is also noted, is that no bargaining can take place in the original position, there is no room for any discussion between the parties. As they are assumed to all reason the same way, and choose the same arguments, it is likely that no discussion will take place. For discussion, differences are needed: there are none in the original position. Sandel states that 'if there is no basis for bargaining or discussion, it is doubtful that there can be any basis for agreement, even an unanimous agreement.'<sup>51</sup>

After this discussion of the original position and its critiques, I now turn to an extensive analysis of reflective equilibrium. Rawls's own explanation of this concept will come first, and second the different perspectives of other authors will be examined.

## Chapter 4: Reflective Equilibrium

### 4.1 Reflective equilibrium explained

Rawls starts his explanation of reflective equilibrium by saying that it serves as a justification of the original position. Justifying the original position results in the assessment of whether the principles which would be chosen in the original position, match our considered convictions of justice (or extend them in a justifiable way).<sup>52</sup> The convictions are 'provisional fixed points which we presume any conception of justice must fit.'<sup>53</sup> We may have our doubts about these convictions, but by going 'back and forth' (changing the conditions of the circumstances in the contractual situation), we eventually find an interpretation of the initial situation that expresses reasonable conditions and produces principles that match our considered judgements.<sup>54</sup> This is what Rawls refers to as reflective equilibrium. It is an equilibrium because our judgements and principles eventually harmonize, and it is reflective because we know to what principles our judgements conform, as well as the premises of their inference. For Rawls, a conception of justice must be justified through mutual support of all sorts of considerations, 'of everything fitting together into one coherent view.'<sup>55</sup> The initial situation is one of equality, and therefore the principles of justice chosen in it are justified. The conditions in the initial situation are the ones that we accept, or, in case we do not accept them, we may be persuaded to do so by philosophical reflection.<sup>56</sup> The conception of justice that Rawls is trying to formulate, is the one which tends to make our considered judgements of justice unite. Through reflective equilibrium, we are able to get to this point, and from the standpoint of the original position, it would then be reasonable to accept this conception.<sup>57</sup>

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<sup>51</sup> Sandel, *Liberalism and the Limits of Justice*, 129.

<sup>52</sup> Rawls, *A Theory of Justice*, 17.

<sup>53</sup> Rawls, *A Theory of Justice*, 18.

<sup>54</sup> Rawls, *A Theory of Justice*, 18.

<sup>55</sup> Rawls, *A Theory of Justice*, 19.

<sup>56</sup> Rawls, *A Theory of Justice*, 19.

<sup>57</sup> Rawls, *A Theory of Justice*, 40.

Our considered judgements enter as the judgements that will most likely display our moral capacities without deformity.<sup>58</sup> The conditions needed for the exercise of the sense of justice, allow for considered judgements. Rawls claims that the sense of justice is a mental capacity, and the relevant judgements can be given when the conditions provide for judgement in general, as well as for deliberation.<sup>59</sup> Rawls also involves moral theory: 'the best account of a person's sense of justice is not the one which fits his judgements prior to his examining any conception of justice, but rather the one which matches his judgements in reflective equilibrium.'<sup>60</sup> The state of reflective equilibrium is then achieved after weighing different conceptions, and either its judgements will be revised, or the judgements remain the same as the initial convictions. The framework of circumstances that determine the reflective equilibrium, also provide the moral assessment of the equilibrium. This is why Rawls sees his conception of the original position as embodying features of moral theory.<sup>61</sup> His theory of justice as fairness is thus about moral thoughts, manifested through our considered judgements in reflective equilibrium. Justification of the original position rests upon our considered convictions in reflective equilibrium, which a matter of mutual support of different considerations, coming together into one coherent view.<sup>62</sup>

#### 4.2 Why reflective equilibrium?

Rawls's concept of reflective equilibrium was received in many ways by different authors. Svein Eng, Norwegian professor of philosophy of law, dedicated three articles to the discussion of the concept of reflective equilibrium. According to Eng, the most important question should be: why reflective equilibrium? More particularly put: 'is the method of reflective equilibrium applicable to the choice of this method itself?'<sup>63</sup> Eng addresses this question to Rawls's theory because of a central issue within philosophy: how can we actually know what we claim to know? The choice for a certain method is reflected itself within the answer, and this is what he calls the 'critical reflexive turn.'<sup>64</sup> Eng further states that the reflective equilibrium is given a very central place within Rawls's theory, as it takes on the responsibility of keeping together the construction of the original position, our considered judgements and the principles of justice (which proceed from the original position). Eng confronts Rawls's reflective equilibrium with the problem of reflexivity of justification, as he wants to know how the choice of reflective equilibrium is or can be justified within the framework of the theory.<sup>65</sup>

The principles of justice are justified through the contract justification, which is part of the structure in reflective equilibrium. Together, these justifications form an essential part of Rawls's theory, as the outcome of the contract justification depends on the original position and its characterizations. Rawls

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<sup>58</sup> Rawls, *A Theory of Justice*, 42.

<sup>59</sup> Rawls, *A Theory of Justice*, 42.

<sup>60</sup> Rawls, *A Theory of Justice*, 43.

<sup>61</sup> Rawls, *A Theory of Justice*, 104.

<sup>62</sup> Rawls, *A Theory of Justice*, 507.

<sup>63</sup> Svein Eng, "Why Reflective Equilibrium? I: Reflexivity of Justification," *Ratio Juris* 27, no. 1 (March 2014): 138.

<sup>64</sup> Eng, "Why Reflexive Equilibrium? I," 139.

<sup>65</sup> Eng, "Why Reflexive Equilibrium? I," 142.

must justify these characterizations and does so by making use of reflective equilibrium.<sup>66</sup> As Rawls himself does not elaborate on whether reflective equilibrium (which is a method) is applicable to the choice of this method itself, Eng claims that it can be doubted whether the 'reflexive question' is or can be integrated into the theory.<sup>67</sup> According to Eng, there is an 'inherent tension between moral realism in relation to our considered judgements and the accompanying degree of immunity against revision accorded to these judgements, and on the other hand the method of reflective equilibrium.'<sup>68</sup> For Eng, the dilemma in the interpretation of reflective equilibrium, is that it must either be interpreted as liberal (by which the method would be just a reference to what we thought was a systematic theory), or as being interesting (in that it differs from other philosophical modes of justification). These interpretations are both in disharmony with Rawls's belief in reflective equilibrium. Eng asks why reflective equilibrium should be accepted as the prevalent mode of justification, and if it is even feasible to ask whether there is a 'philosophically proper' justification for the choice of reflective equilibrium.<sup>69</sup> He declares that we confront a circle, in which the appropriateness of reflective equilibrium as the criterion of validity is being assumed within the justificatory activity itself.<sup>70</sup> Eng concludes that applying the method of reflective equilibrium to the choice of this method itself will lead to a justificatory impasse, as the circle cannot be escaped.<sup>71</sup>

#### 4.3 Paradigmatic alternative: the Kantian approach

Eng therefore suggests a Kantian approach that can serve as a paradigmatic alternative to Rawls. The choice of mode of justification in Kant is connected to the nature of the justification itself, the subject (the one who performs the justification) and the action (justification is a type of action).<sup>72</sup> Eng states that by approaching Kant's opinion on justification, we see that every justification presupposes and rests on normativity, and that normativity can have no other source than the reason of the subject itself. 'It is a fundamental conclusion in Kant that normativity cannot be thought to have its ground of validity, its binding force, independently of the reason of the subject.'<sup>73</sup> This normativity aspect, as well as the fact that justification itself is an act, leads to the reason of the justifying subject. Reason (*Vernunft*) requires that every validation, every determination, every judgement takes place through reason itself.<sup>74</sup> Eng explains that for Kant, an act of declaring demonstrates that the person in question (the person that is declaring) is free. 'In the act of declaring itself, within the exercise of the power of judgement, we cannot think otherwise than that the power of judgement and the judgement are our own.'<sup>75</sup> We have a so-called action-consciousness, which means that the act we undertake is our act,

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<sup>66</sup> Eng, "Why Reflexive Equilibrium? I," 144.

<sup>67</sup> Eng, "Why Reflexive Equilibrium? I," 145.

<sup>68</sup> Eng, "Why Reflexive Equilibrium? I," 147.

<sup>69</sup> Eng, "Why Reflexive Equilibrium? I," 148.

<sup>70</sup> Eng, "Why Reflexive Equilibrium? I," 149.

<sup>71</sup> Eng, "Why Reflexive Equilibrium? I," 152.

<sup>72</sup> Svein Eng, "Why Reflective Equilibrium? II: Following Up on Rawls's Comparison of His Own Approach with a Kantian Approach," *Ratio Juris* 27, no. 2 (June 2014): 290.

<sup>73</sup> Eng, "Why Reflective Equilibrium? II," 291.

<sup>74</sup> Eng, "Why Reflective Equilibrium? II," 292.

<sup>75</sup> Eng, "Why Reflective Equilibrium? II," 295.

and as such it is performed in freedom.<sup>76</sup> Freedom is needed for all action, including justification. To sum up, a justification must be normative and have an action character, and the justification must lead back to the subject itself.<sup>77</sup>

#### 4.4 Justification of reflective equilibrium: a Kantian escape?

Eng begins his third and final paper on Rawls's reflective equilibrium by making a firm statement: Rawls's reflective equilibrium cannot justify itself, as we cannot escape the metaphysical issues raised in Kant's approach.<sup>78</sup> He explains that Rawls presents model of the motivation structure of the agent, which is part of the theory of justice, as well as of the method of justification, which is the idea of the reflective equilibrium as such. Eng claims that reflective equilibrium cannot evade 'metaphysical issues in its modelling of the motivation structure of the agent without losing justificatory force.'<sup>79</sup> The first argument for this statement begins with looking back at reason: if validation does not take place through reason, then reason will observe the validation as an external object, as something that is not validated. The mode of justification in Rawls's theory is not bound to reflection, as the subject that justifies does not make the act of justifying part of its reflection.<sup>80</sup> By taking one's point of departure in the motivation structure and intentions of the individual, Rawls then filters out the elements that can lead to bias. This filter is the veil of ignorance, which he tailors in order to satisfy the reflective equilibrium. However, this does not reduce the dependence of Rawls's theory on its point of departure according to Eng, which is 'the picture of the individual as acting out of self-interest within the framework of a purely instrumental rationality.'<sup>81</sup> Furthermore, the choices made in the original position represent an instrumental and actual choice, and the veil of ignorance cannot change this basis of the individual's choice.<sup>82</sup> Eng feels that because Rawls focuses on the instrumental motivation structure of the individual, a reflection in which the justifying subject makes the act of justifying part of its reflection (Kantian reflection) does not take place. Therefore Rawls's theory is bound to the empirical motivation of the individual itself.<sup>83</sup> Reflective equilibrium itself cannot be a basis for normativity, it is nothing but the report of the individual as to how that individual perceives the justificatory balance. For Eng, reflective equilibrium cannot justify the choice for this method itself, as it is just another report on the view of the individual.<sup>84</sup>

The second argument for Eng's statement focuses on the possibility of the reflective equilibrium meeting the reflexive challenge though incorporation of a non-metaphysical model. According to Eng, reflective equilibrium can avoid metaphysical problems only at the risk of losing its justificatory force:

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<sup>76</sup> Eng, "Why Reflective Equilibrium? II," 296.

<sup>77</sup> Eng, "Why Reflective Equilibrium? II," 298.

<sup>78</sup> Svein Eng, "Why Reflective Equilibrium? III: Reflective Equilibrium as a Heuristic Tool," *Ratio Juris* 27, no. 3 (September 2014): 440.

<sup>79</sup> Eng, "Why Reflective Equilibrium? III," 441.

<sup>80</sup> Eng, "Why Reflective Equilibrium? III," 442.

<sup>81</sup> Eng, "Why Reflective Equilibrium? III," 444.

<sup>82</sup> Eng, "Why Reflective Equilibrium? III," 444.

<sup>83</sup> Eng, "Why Reflective Equilibrium? III," 445.

<sup>84</sup> Eng, "Why Reflective Equilibrium? III," 447.

'only at the risk of being empty, of being only a postulation, or of performing an inconsistency.'<sup>85</sup> Reflective equilibrium is then either interpreted as liberal (this is a non-testable and empty criterion), or interesting (then the choice of criteria that constitute reflective equilibrium itself must be justified). If all elements are revisable, and in principle not applied to the criteria that constitute reflective equilibrium, then equilibrium is left as a postulate. If all elements are revisable and applied to the criteria constituting reflective equilibrium, then 'the method of reflective equilibrium cannot be deployed as a criterion for the choice of itself in preference to any purported foundational view of justification, any *Letztbegründung*, that is, it cannot be deployed as a basis for rejecting such views in principle.'<sup>86</sup> This would be self-referentially inconsistent. Eng tries to explain that the choice of reflective equilibrium is difficult to justify, as such justification lies within the field of Kantian transcendental proofs: this field is a blind spot within Rawls's theory. The agent in *A Theory of Justice* is an individual acting out of self-interest and within instrumental rationality, there is no room for a reflexive first-person perspective in which the subject makes the act of justifying part of his reflection (which is a transcendental proof). Also, reflective equilibrium is unable to deal with the metaphysical condition of transcendental proof.<sup>87</sup> Rawls focuses on the individual and its choice, which is best realized by presupposed interest in reflective equilibrium. Eng explains that we are being assigned to an object that is external to reason, which is not validated and thus in need of justification. But Rawls does not discuss how the choice of reflective equilibrium can be justified. 'The possibility of applying the method of reflective equilibrium to the choice of this method itself falters on the fact that this would mean referring us to a fact, not to a standard, that is, it falters on a lack of normativity.'<sup>88</sup> According to Eng, the use of reflective equilibrium as a justification for this method itself, is going beyond the capacity of the method. Justification thus fails.

#### 4.5 Reflective equilibrium and the deliberative turn

It may also be said that Rawls's quest for a theory of justice has taken a specific turn: a deliberative turn, which represents one of the central tasks of a theory of justice (that is to define the terms by which the public deliberates).<sup>89</sup> Professor of political science Amit Ron reinterprets justice as fairness as a deliberative form of social engagement, which offers an alternative account of reflective equilibrium. Reflective equilibrium is then used as a device for critical purposes within the process of public deliberations. In reinterpreting reflective equilibrium, the goal is to avoid problems associated with Rawls's own interpretation. Reflective equilibrium is commonly understood as going back and forth between considered judgements and principles of justice. According to Ron, this is a process which is understood as 'an imminent criticism in which the movement is between the values used uncritically to claim legitimacy for existing institutional design and the institutional structure that can

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<sup>85</sup> Eng, "Why Reflective Equilibrium? III," 450.

<sup>86</sup> Eng, "Why Reflective Equilibrium? III," 451.

<sup>87</sup> Eng, "Why Reflective Equilibrium? III," 455.

<sup>88</sup> Eng, "Why Reflective Equilibrium? III," 456.

<sup>89</sup> Amit Ron, "Rawls as a critical theorist: Reflective equilibrium after the 'deliberative turn'," *Philosophy & Social Criticism* 32, no. 2 (March 2006): 173.



sincerely claim to be committed to these values.<sup>90</sup> As Rawls's two principles of justice are important components of the process of reflective equilibrium, Ron points out that the delineation of the institutional structure of society is part of the process of getting to reflective equilibrium. The institutional structure of society it thus a necessary device for a moral evaluation of existing institutions. Ron makes clear that it is not a model of a just society on its own.<sup>91</sup> A deliberative view of institutional construction may give way to a reinterpretation of the reflective equilibrium. In the deliberative view, reflective equilibrium is seen as a process of intrinsic criticism (not as a type of explication). The source of considered judgements will then exist of the values that are embedded within existing institutions. 'Reflective equilibrium can be seen as the process by which we critically examine our institutions against their own claims for justification.'<sup>92</sup> Ron describes four stages in equilibrium: current institutions, the values embedded in them, the principles of justice, and the institutions embedded in these principles. Through the deliberative process, a mirror is created which has the purpose to challenge institutions to become more like the ideal. Justice as fairness can thus be understood as idealizing mirrors that view the power dynamics in society, yet it is not a model for an ideal society.<sup>93</sup>

#### 4.6 Different models: interpretation of reflective equilibrium

Another important author that has something to say about Rawls's account of the reflective equilibrium is Ronald Dworkin. He distinguishes between a natural (assumes that a theory of justice describes a moral objective reality) and a constructive (assumes that women and men have a responsibility to fit particular judgements on which they act into a coherent model of action) model of reflective equilibrium. Dworkin himself rejects the natural model, and adopts the constructive model. Professor of Philosophy Wesley Cooper even suggests a third model, which is a Socratic model, that does not 'presuppose the existence of an objective moral order, and it does not countenance protecting a theory from data inconsistent with troublesome intuitions by ignoring, compromising or subordinating such data.'<sup>94</sup> He explains that Dworkin's constructive model is committed to choosing not to believe things, in order to get to reflective equilibrium. The scope of the model permits ignoring moral intuitions, which leads to the choice of disbelief or continuing to believe. This equals either bad or incoherent scientific method. Cooper states that in equilibrium, you believe the theory because it is the 'best explanation' of those beliefs, and not because you have had the choice to believe this theory, and thus edited your beliefs to match it. Arriving at equilibrium, you might have believed in a false theory until you figured out that it is inconsistent with a firmly held belief. 'The test for falsehood that such a troublesome belief affords is inexplicable on the constructive model.'<sup>95</sup> With the natural model already dismissed, the constructive model now also shows that this is not the way to interpret Rawls's

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<sup>90</sup> Amit, "Rawls as a critical theorist," 175.

<sup>91</sup> Amit, "Rawls as a critical theorist," 178.

<sup>92</sup> Amit, "Rawls as a critical theorist," 181.

<sup>93</sup> Amit, "Rawls as a critical theorist," 185.

<sup>94</sup> W.E. Cooper, "Taking Reflective Equilibrium Seriously," *Dialogue: Canadian Philosophical Review* 20, no. 3 (September 1981): 549.

<sup>95</sup> Cooper, "Taking," 550.

reflective equilibrium. Cooper emphasizes that reflective equilibrium is not about making a choice, it is about whether you believe. He claims that the constructive model does not take reflective equilibrium seriously, as it 'wrongly assimilates the impulsion to change in the process of reflective equilibrium, it treats reasoned changes in belief like responsibly chosen changes in apparel.'<sup>96</sup>

#### 4.7 Reflection without equilibrium, a possibility?

A recurring observation in the literature on reflective equilibrium, is that Rawls does not provide a very detailed account of this type of reflection. Going 'back and forth' between considered judgements and principles, adjusting them so that they come into harmony: how that does that work exactly? Also, does this process always lead to a state of equilibrium, is this state guaranteed? Rawls himself merely assumes that we come into equilibrium, therefore philosopher Daniel Bonevac argues that there is no reason to expect reflective equilibrium to emerge from the type of reflection Rawls has in mind. He envisages an alternative account of reflective equilibrium 'that can play much the same methodological role as reflective equilibrium without any commitment to termination of the process after a finite time.'<sup>97</sup> In order to get to this alternative, Bonevac proposes to transform Rawls's Kantian constructivism into pragmatic intuitionism. In *A Theory of Justice*, Rawls wants to find an alternative to doctrines like utilitarianism and intuitionism. Rawls also discusses the priority problem, which is the problem of determining the conclusions of value conflicts. Rawls's constructivism is meant to solve this problem, by getting our considered judgements into equilibrium with universal principles.<sup>98</sup> Bonevac labels these principles as 'stouthearted', but his original question remains: is the priority problem solvable and is it thus possible to reach a state of equilibrium?

Bonevac begins by looking at the process of reflection itself, and finds that Rawls has not much to say on how such revision is to be conducted. Without laying down the rules of revision procedures, the process of reflection remains undetermined, according to Bonevac.<sup>99</sup> What is also not clear, is the classification of a principle or judgement. Bonevac claims that 'choosing between principles and judgements, requires assessing the relative degrees of justification or vulnerability of those judgements and principles. But there is no consensus about how to represent such dynamic information in a belief revision procedure.'<sup>100</sup> Another uncertainty is the fixed point we want to reach in equilibrium, as we do not know when the process terminates and if there is a guarantee of getting to that point. Therefore Bonevac suggests an intuitionist model of reflection. This is a model in which our considered judgements are stable under reflection, and where we make ethical decisions on the basis of principle. It is a model in which we express our justifications for those decisions in terms of principles. We then define ethical truth as balance under due reflection. Bonevac adds that common law adjudication can serve as a model for ethical reasoning in general.<sup>101</sup> He concludes his argument

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<sup>96</sup> Cooper, "Taking," 554.

<sup>97</sup> Daniel Bonevac, "Reflection Without Equilibrium," *The Journal of Philosophy* 101, no. 7 (July 2004): 364.

<sup>98</sup> Bonevac, "Reflection," 365.

<sup>99</sup> Bonevac, "Reflection," 368.

<sup>100</sup> Bonevac, "Reflection," 370.

<sup>101</sup> Bonevac, "Reflection," 380.

by saying that intuitionism is safer than stouthearted constructivism, and what he wants to show is that the best model is that of a pragmatic type of intuitionism. He claims that it is possible to combine constructivism with intuitionism, and a Rawls-inspired reflection can be maintained if we do not insist on stouthearted rules (instead, we focus on fainthearted rules). A Rawlsian process of revising judgements and principles, adjusting them to each other, can provide a justification of both.<sup>102</sup> 'The intuitionist can thus use Rawls's methodology to justify considered judgements and fainthearted principles with greater confidence than Rawls himself can use it to justify judgements and principles.'<sup>103</sup>

Having discussed the different perspectives on reflective equilibrium, I now turn to the relationship between the original position and reflective equilibrium. The next chapter will seek to find a methodology for the adjustment of our considered convictions in reflective equilibrium, that is able to respect the premises of the original position.

## Chapter 5: Finding methodology

### 5.2 Methodology: a possibility or delusion?

Rawls assumes that we all have a sense of justice, which expresses itself in our thoughts, judgements and attitude. Particular judgements can give rise to more general judgements, and in that way, a moral theory can come to life.<sup>104</sup> Such a moral theory must consist of considered convictions of justice (considered judgements). Our sense of justice can excel when we are unbiased, and it is at that moment that we can make considered judgements.<sup>105</sup> Only from an objective point of view, we can judge and make statements. If our senses of justice differ, we shall have to pick one over the other, or revise them, in order to get to reflective equilibrium in which our considered judgements form a moral theory.<sup>106</sup> We have to adjust our considered judgements and the structure of the theory, until a coherent view arises. The methodology for adjusting these considered convictions of justice, does need reflective equilibrium. By taking up criticism from the literature, a few adjustments can be made in this use of reflective equilibrium, as Rawls himself remains vague ('going back and forth'). The veil of ignorance in the original position might pose an issue when it comes to adjusting our considered convictions of justice, as one can not judge if one does not know all the relevant facts. Sandel's critique comes in handy here, and maybe with more knowledge, we can come to a more stable equilibrium in which our considered convictions of justice can be adjusted to each other in a satisfactory way. The right methodology for *A Theory of Justice* is thus that of reflective equilibrium, not of the original position. The original position cannot serve as a basis for the methodology, as a methodology is never

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<sup>102</sup> Bonevac, "Reflection," 387.

<sup>103</sup> Bonevac, "Reflection," 387.

<sup>104</sup> Hendrik Kaptein, "De Rechtvaardiging van Rechtvaardigheid. Het Belang van Rawls's Methodologie voor *A Theory of Justice*," *Tijdschrift voor Filosofie* 40, no. 2 (Juni 1978): 309.

<sup>105</sup> Kaptein, "De Rechtvaardiging," 310.

<sup>106</sup> Kaptein, "De Rechtvaardiging," 310.

part of the theory itself, and the original position is part of the normative theory of justice.<sup>107</sup> Rawls also states that the original position can be seen as an explanatory device, which can never be a methodology.<sup>108</sup> Justifying a theory is not the same as explaining a theory. The concept of the original position cannot be the methodology, as it presents normativity: a moral methodology is pointless if it assumes already existing norms.<sup>109</sup>

The original position and the principles of justice are in equilibrium, which then automatically is the right and final methodology for Rawls's theory of justice.<sup>110</sup> Reflective equilibrium can show that the point of view in the original position, is the 'moral point of view.'<sup>111</sup> The original position is merely a device, what is needed for a theory of justice is reflective equilibrium.

## Chapter 6: Conclusion

*A Theory of Justice* does not just portray Rawls's philosophical thoughts, it actually presents a theory of justice. This thesis started with an inquiry in to the original position and its main opponent. Rawls maintains that the original position is a hypothetical situation, and that it merely serves as an explanatory device. Sandel's anthropologist critique was right by stating that knowledge is needed to judge on ethical norms and values. Knowledge is needed in order to decide the structure of society and determine the principles of justice. But on the other hand, the original position and its veil of ignorance are important, as to without them Rawls probably could not have come to his theory of justice (in reflective equilibrium) in the first place.

The most important methodology in *A Theory of Justice* is that of reflective equilibrium. Svein Eng asked: why reflective equilibrium? Applying the method of reflective equilibrium to the choice of the method itself might not survive the critical reflexive turn, but by incorporating more of a Kantian approach to equilibrium, we can answer his question. When justification leads back to the subject itself, we can see that reflective equilibrium is the right methodology. Reflective equilibrium is not merely another report on the view of the individual, as now we can invoke the original position again. It represents a coherent view in which all considered convictions of justice come together (into the two principles of justice).

By acknowledging that reflective equilibrium has taken somewhat of a deliberative turn, we can conceive justice as fairness as a mirror that views the power dynamics in society. But because it also present two principles of justice, it can also serve a basis for a model of a just society. In interpreting reflective equilibrium, it is important to choose the right 'model' for doing so. In reflective equilibrium, you believe the theory because it is the best explanation, not because you have had the choice to

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<sup>107</sup> Kaptein, "De Rechtvaardiging," 319.

<sup>108</sup> Kaptein, "De Rechtvaardiging," 319.

<sup>109</sup> Kaptein, "De Rechtvaardiging," 320.

<sup>110</sup> Kaptein, "De Rechtvaardiging," 322.

<sup>111</sup> Kaptein, "De Rechtvaardiging," 323.

believe this theory (or not). Reflection without equilibrium is thus not possible, as I can now conclude that equilibrium actually is the right methodology for Rawls's theory of justice.

With the right adjustments to reflective equilibrium and less focus on the original position, *A Theory of Justice* still has a long life to live. Rawls's *magnum opus* is still relevant today and will not be forgotten any time soon.

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