THE INTERNATIONAL LIBRARY OF ESSAYS IN LAW & LEGAL THEORY

SECOND SERIES

JUSTICE

Wojciech Sadurski

Justice

Edited by

Wojciech Sadurski

European University Institute, Florence

Ashgate

DARTMOUTH

Aldershot • Burlington USA • Singapore • Sydney

Published by
Dartmouth Publishing Company
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
131 Main Street
Burlington, VT 05401-5600 USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Justice. – (International library of essays in law and
legal theory. Second series)
1. Justice
I. Sadurski, Wojciech, 1950–
340.1'1

Library of Congress Cataloging-in-Publication Data
Justice / edited by Wojciech Sadurski.
p. cm. — (International library of essays in law and legal theory. Second series)
Includes bibliographical references.
ISBN 0-7546-2088-3
1. Justice. 2. Social justice. I. Sadurski, Wojciech, 1950– II. Series.

K246 .J793 2001
303.3'72—dc21 00-036221

ISBN 0 7546 2088 3

The International Library of Essays in Law and Legal Theory

Second Series

Series Editor: Tom D. Campbell

Titles in the Series:

Freedom of Speech, Volumes I and II
Larry Alexander

Privacy
Eric M. Barendt

Comparative Legal Cultures
John Bell

Contract Law, Volumes I and II
Brian Bix

Corporate Law
William W. Bratton

Law and Democracy
Tom D. Campbell

Legal Positivism
Tom D. Campbell

Administrative Law
Peter Cane

International Trade Law
Ronald A. Cass and Michael S. Knoll

Sociological Perspectives on Law, Volumes I and II
Roger Cotterrell

Intellectual Property
Peter Drahos

Family, State and Law, Volumes I and II
Michael D. Freeman

Natural Law
Robert P. George

Commercial Law
Clayton P. Gillette

Competition Law
Rosa Greaves

Chinese Law and Legal Theory
Perry Keller

International Law, Volumes I and II
Martti Koskenniemi and David Kennedy

Constitutional Law
Ian D. Loveland

Interpretation of Law
D. Neil MacCormick and Fernando Atria

Human Rights
Robert McCorquodale

Anti-Discrimination Law
Christopher McCrudden

Medical Law and Ethics
Sheila McLean

Mediation
Carrie Menkel-Meadow

Environmental Law
Peter Menell

Criminal Law
Thomas Morawetz

Law and Language
Thomas Morawetz

Law and Anthropology
Martha Mundy

Gender and Justice
Ngaire Naffine

Law and Economics
Eric A. Posner

Japanese Law
J. Mark Ramseyer

Justice
Wojciech Sadurski

The Rule of Law
Frederick Schauer

Regulation
Colin Scott

Restitution
Lionel D. Smith

Company Law
David Sugarman

Freedom of Information
Robert G. Vaughn

Tort Law
Ernest J. Weinrib

Rights
Robin West

Welfare Law
Lucy A. Williams

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

Blackwell Publishers for the essays: Phillip Montague (1980), 'Comparative and Non-comparative Justice', *Philosophical Quarterly*, **30**, pp. 131–40; Julian Lamont (1995), 'Problems for Effort-Based Distribution Principles', *Journal of Applied Philosophy*, **12**, pp. 215–29. Copyright © 1995 Society for Applied Philosophy; Deborah Kearns (1983), 'A Theory of Justice – and Love; Rawls on the Family', *Politics*, **18**, pp. 36–42.

Cambridge University Press for the essays: T.D. Campbell (1974), 'Humanity before Justice', *British Journal of Political Science*, **4**, pp. 1–16; Loren E. Lomasky (1995), 'Justice to Charity', *Social Philosophy and Policy*, **12**, pp. 32–53. Copyright © 1995 Social Philosophy and Policy Foundation.

Harvard Law Review Association for the essay: Michael J. Sandel (1994), 'Political Liberalism', *Harvard Law Review*, **107**, pp. 1765–94. Copyright © 1994 Harvard Law Review Association.

The Philosophical Review for the essay: Joel Feinberg (1974), 'Noncomparative Justice', *Philosophical Review*, **83**, pp. 297–338. Copyright © 1974 Cornell University. Reprinted by permission of the publisher.

New York University Law Review for the essay: John Rawls (1989), 'The Domain of the Political and Overlapping Consensus', *New York University Law Review*, **64**, pp. 233–55.

Princeton University Press for the essays: Michael A. Slote (1973), 'Desert, Consent, and Justice', *Philosophy & Public Affairs*, **2**, pp. 323–47. Copyright © 1973 Princeton University Press; Christopher Ake (1975), 'Justice as Equality', *Philosophy & Public Affairs*, **5**, pp. 69–89. Copyright © 1975 Princeton University Press.

Sage Publications, Inc. for the essay: Robert E. Goodin (1985), 'Negating Positive Desert Claims', *Political Theory*, **13**, pp. 575–98. Copyright © 1985 Sage Publications, Inc. Reprinted by permission of Sage Publications, Inc.

University of Calgary Press for the essays: Francis Snare (1986), 'Misfortune and Injustice: On Being Disadvantaged', *Canadian Journal of Philosophy*, **16**, pp. 39–61; Alan H. Goldman (1987), 'Real People (Natural Differences and the Scope of Justice)', *Canadian Journal of Philosophy*, **17**, pp. 377–93.

Preface to the Second Series

The first series of the International Library of Essays in Law and Legal Theory has established itself as a major research resource with fifty-eight volumes of the most significant theoretical essays in contemporary legal studies. Each volume contains essays of central theoretical importance in its subject area and the series as a whole makes available an extensive range of valuable material of considerable interest to those involved in research, teaching and the study of law.

The rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given. It also affords the opportunity to extend the areas of law covered in the first series.

The new series follows the successful pattern of reproducing entire essays with the original page numbers as an aid to comprehensive research and accurate referencing. Editors have selected not only the most influential essays but also those which they consider to be of greatest continuing importance. The objective of the second series is to enlarge the scope of the library, include significant recent work and reflect a variety of editorial perspectives.

Each volume is edited by an expert in the specific area who makes the selection on the basis of the quality, influence and significance of the essays, taking care to include essays which are not readily available. Each volume contains a substantial introduction explaining the context and significance of the essays selected.

I am most grateful for the care which volume editors have taken in carrying out the complex task of selecting and presenting essays which meet the exacting criteria set for the series.

TOM CAMPBELL
Series Editor
The Faculty of Law
The Australian National University

Introduction

The Concept of Justice

By the end of his essay, 'What Is Justice?', Hans Kelsen confesses his inability to give a satisfactory answer to the question posed in the title:

> I cannot say what justice is, the absolute justice for which mankind is longing. . . . I can only say what justice is to me. Since science is my profession, and hence the most important thing in my life, justice, to me, is that social order under whose protection the search for truth can prosper. 'My' justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance. (Kelsen, 1971, p. 24)

As this passage indicates, justice occupies a very special and cherished place in the pantheon of liberal social, legal and political values. Justice is also, at least in some of its uses, a nebulous concept which requires a degree of fine-tuning if it is to play a distinct role in political and legal argument and if it is to be saved from collapsing into an undifferentiated, positive praise of that which is considered 'just'. Yet even the most cursory reflection on our linguistic intuitions suggests that not all that is good is so by virtue of being just. And not all just rules, characteristics of persons or states of affairs are optimal, all things considered. Thus John Rawls, the most influential contemporary philosopher of justice, emphasizes 'the limits of a theory of justice' and reminds us that, in such a theory, 'many aspects of morality [are] left aside' (Rawls, 1971, p. 512).

It is therefore important to precede more substantive reflections about the normative standards of justice with a preliminary consideration of what 'justice' is about. It has become customary in contemporary literature (and not only in literature about *justice*), to characterize these two levels of discourse as referring, respectively, to 'conceptions' and 'concepts' where a normative 'conception' is discussed within a definitional framework provided by the 'concept' of justice. As Ronald Dworkin helpfully put it many years ago, the distinction between a 'concept' and 'conception' corresponds to the distinction between posing a moral issue and trying to answer it (Dworkin, 1978, p. 135). It is the distinction between what justice *is about* and what it *requires* – between the conceptual borders of the term and the substantive content of one's ideas about what a just person, society and law would look like.

While this distinction is helpful in promoting clarity in discussions about justice, one should be aware that such clarity comes at a price. Such a distinction may encourage an illusion that the concept of justice is value-neutral, as opposed to conceptions of justice which are undoubtedly value-laden. In fact, statements about *concepts* of justice are morally meaningful, and hence controversial, though in a different way to the inevitably ideological and normative discourse about *conceptions* of justice. To identify a particular domain of moral discourse as belonging to the sphere of justice is, at the very least, tantamount to attributing to it a high moral value: judgements about justice (whatever they are) are not trivial. Most contemporary writers about justice suggest that 'justice' is principally about the way in which benefits and burdens are

distributed in a society, and such a *concept* of justice presupposes that the distribution of benefits and burdens is near, or at the top of, moral concerns. But this is not a morally neutral statement, nor is it uncontroversial. Indeed, Marx's theory can be interpreted as being not based on disapproval for the *injustices* of capitalism, or on a positive proposal for a *just* society, precisely because the matters of distribution were, for Marx, of a secondary and derivative character (Brenkert, 1979; Buchanan, 1982, pp. 50–85; Wood, 1972). Under this interpretation – which is just *one* interpretation, and one not shared by all commentators on Marx (for example, Cohen, 1981; Husami, 1978; Ryan, 1980) – Marx's critique and positive visions are imbued with a strong moral content, but this content should not be characterized in terms of 'justice'.

This immediately suggests that an attempt to coin a concept of justice that is not coextensive with a conclusive positive judgement about a rule or state of affairs produces the problem of how to rank justice vis-à-vis other legal and political values. If justice is an important, but specific, value which encompasses only part of the field of social morality, it becomes inevitable that justice will sometimes be balanced against, and perhaps subordinated to, other values. This theme permeates the texts by Tom Campbell and Loren Lomasky in Part I of this collection, and their essays contain good examples of arguments by philosophers who take seriously the idea that the concept of justice must have relatively clear and distinctive limits. They demonstrate that we must carefully consider situations in which an insistence on 'doing justice', no matter what, is morally unappealing and/or fails to capture the nature of the moral and political claims at stake.

Campbell's essay (Chapter 1) does not explicitly refer to the concept/conception distinction, but he suggests right at the start that 'justice in the narrow and specific sense' is primarily concerned with distribution according to desert (or merit), thereby implying that different conceptions of justice are yielded by different understandings of the grounds for desert (or merit). There is no doubt that the idea of desert is central to many – and perhaps most, though certainly not all – theories of justice; this is a topic to which we will return below, and which is covered by a range of essays reproduced in Part II. What is particularly interesting about Campbell's essay is that, consistent with his assumption about a 'narrow and specific' concept of justice, he 'downgrades' the role of justice in many significant social contexts, and does so quite dramatically: 'Justice as one amongst other moral values may quite properly be required to give way to other considerations' (p. 6). And so it does, in Campbell's discussion. His chief concern in this essay is to delineate the distinction between the requirements of justice and those of humanity, or 'the obligation to work for the relief of suffering'.

Some might not agree with Campbell's confinement of justice considerations to those related to desert or merit. And some will probably argue that his notion of the relationship between needs and merit is in fact more far-reaching than he suggests: that the degree of needs-satisfaction required to create conditions of genuine equal opportunity, which is central to his 'meritorian' vision, would probably absorb more need-satisfaction interventions into the realm of justice than his call for a 'narrow and specific' concept of justice would allow. But these are contingent and controversial points. What is important about his essay is that it is a good illustration of a conscious attempt to articulate the concept of justice as relatively narrow and not necessarily paramount.

It will become immediately apparent to readers that Campbell and Loren Lomasky (whose essay is reproduced as Chapter 2) come from widely distant ideological perspectives. Campbell is a social democrat committed to welfare rights while Lomasky is a free-market libertarian.

But the latter, like the former, insists on the importance of keeping considerations of justice distinct and separate from other moral demands. In his complaint about the dominance of a 'jurisprudential paradigm' of morality (which he understands as a tendency to identify all morality with the language of rights and duties), he seems to be indirectly confirming Campbell's suggestion that perhaps 'justice is an inherently legalistic concept which cannot function usefully outside a legal or quasi-legal context' (Campbell, 1988, p. 5).[1] Like Campbell, Lomasky believes that we should alleviate other people's misfortune and distress, but he is not prepared to characterize our 'ought' as a matter of duty with a correlative right belonging to the person who is distressed. Indeed, the main thrust of Lomasky's essay is to oppose what he calls the 'social-justice conception' and to carve out a sphere of morality which is controlled by virtues rather than by justice. Naturally, the reason for such a claim is not terminological or conceptual, and one important factor of Lomasky's text is that he makes his reasons for such a proposal explicit; his fundamental concern is about 'the preservation of a realm of discretion in which individuals are able to pursue various ideals of moral excellence' (p. 39). Whether such a 'realm' is undermined by a 'social-justice conception' is a matter for substantive debate and some will certainly disagree with Lomasky. But what is important here is that his text illustrates both the distinctiveness of the notion of justice and the fact that such a concept must be defended on non-neutral moral reasons.

It is pertinent at this point to ask what it is that is specific about justice, which allows us to distinguish it from other important values, and which therefore informs the contours of the concept of justice. Common responses suggest that all rules of justice employ a form of the principle of equal treatment of equal cases, *or* that they are rules about the distribution of goods (or 'bads', as in the case of punishment), *or* that they are comparative in nature. Let us put to one side the first of these answers: as many writers have suggested, it is too thin a basis for identifying the concept of justice because it corresponds to a principle of conduct according to general rules and may therefore apply to the types of conduct which we do not normally associate with judgements about justice. However, the two latter answers seem to be more fruitful. Judgements about justice are often found to be fundamentally comparative, in that their application necessarily seems to involve a comparison of the treatment meted out on one person with the treatment of some other person(s) (Frankena, 1962, p. 9); and also distributive, in that they regulate the distribution of benefits and burdens. As Rawls famously stated: 'the primary subject of justice is . . . the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation' (Rawls, 1971, p. 7).

It is important not to conflate the theses that justice is necessarily comparative and that it is necessarily distributive. Some writers suggest that it can be the latter without being the former. Brian Barry, for example, claimed that justice belongs to a category of distributive political principles (as contrasted to aggregative ones), but that it can be either comparative or absolute (Barry, 1965, pp. 43–44). In contrast, Joel Feinberg believes that some principles of justice may be non-distributive and non-comparative. His discussion of cases of 'non-comparative justice' is included in Part I of this book, as is a thoughtful critical analysis of this discussion by Phillip Montague.

In Chapter 3 Feinberg claims that practices such as unfair punishments and rewards, 'merit grading' and derogatory judgements are examples of non-comparative injustice because, to ascertain the injustice of a practice, we do not need to compare the treatment given to one

person with the treatment of other persons. It is an important, though not uncontroversial, point. Is 'merit grading' indeed as non-comparative as Feinberg suggests it is? Or does the standard against which a person is measured incorporate comparative considerations? If the latter is the case, can we still claim that it is possible to judge a person 'on her merits' regardless of how others are judged in this context? Consider, for example, the practice of grading student exams or essays. If an essay is given a particular grade, doesn't it already presuppose a particular ranking? And isn't it done against a background supposition about a predictable, typical range of quality of essays and exams? Further, not everybody will agree that some of Feinberg's examples of 'non-comparative' even belong to the realm of justice. When he suggests that broken promises are typically unfair because they are forms of 'one party taking advantage of another' (though it is important to stress that Feinberg notes that not *all* broken promises constitute instances of injustice), one wonders whether he perhaps overextends the concept of justice beyond its intuitively plausible borders. As Kurt Baier suggests in an essay reproduced in Part III of this volume:

> If I have undertaken to get you to the church on time, then that is what is due to you from me and if I get you there on time, I have given you that due. But I have not exhibited the virtue of justice, I have not been just to you or done you justice. . . . I would not have been unjust to you if I had not got you there on time either, though I would have failed in my duty, and so on. This is simply not a case in which either justice or injustice is applicable, as we commonly conceive of it. (p. 325)

Justice – Desert – Redistribution

I have referred earlier to Campbell's endorsement of a conception of justice based essentially on the notion of 'merit' or 'desert', and it is now time to consider this view more closely. Indeed, the idea that justice is fundamentally and primarily a matter of giving to each what they 'deserve' is perhaps the most traditional, strongly established view in our thinking about justice. But how much mileage can we get from the notion of 'desert' in developing a substantive 'conception' (as opposed to a 'concept') of justice? Very little, if 'desert' is considered to be a mere equivalent of an entitlement. If by 'she deserves this reward' all we mean is that she should be given a reward according to the accepted rules of distribution (whatever they are), then the relationship between justice and desert is merely tautological. We may well accept a terminological convention, whereby a desert is a proxy for an all-things-considered entitlement to a distributive share but such a notion of 'desert' merely marks the beginning of a moral argument about the real grounds for a just distribution. It does not provide a conclusion to such an argument.

The notion of desert can, however, be used in a thicker sense, in which it provides not merely a proxy for other moral arguments about just distribution but also a moral ground for such a distribution. To perform this role, 'desert' must be seen as having a more specific meaning than 'entitlement': it must be regarded as the basis for an entitlement. Elsewhere, I have suggested that such a substantive notion of desert must, at a minimum, have these three characteristics (Sadurski, 1985, pp. 116–22). First, desert considerations are related strictly to a person whose desert we consider. This is not trivial: the criteria of desert must identify and discard those putative grounds of distribution which are based on facts or characteristics over which a person has no control. It makes no moral sense to say that *X* deserves *Y* on the basis of *Z*, if there is

nothing that *X* can do about (having or not having) *Z*. Second, desert considerations are intrinsically value-laden in the sense that a postulated basis for desert must be an object of moral admiration by the person who makes a judgement about desert. This, among other things, distinguishes judgements about desert from those based on needs (the basis of a legitimate need is, *per se*, not something that we evaluate highly) and from those based on entitlements ('entitlement' here being understood in a quasi-institutional sense, as the grounds for a distribution according to announced rules). This, incidentally, is a different approach to Robert Goodin's attempt to debunk desert-based discourse in his essay reproduced in Part II. Goodin adopts a notion of 'desert' which is indistinguishable from any entitlement based on a valid rule. Third, desert considerations are past-oriented: the basis of desert is related to something that has already happened – to past actions or characteristics. This serves to distinguish desert judgements from those based on the expected consequences of a proposed reward.

The essays by Michael Slote and Christopher Ake, reproduced in Part II of this volume (Chapters 5 and 6), are good illustrations of the use of a thick notion of desert employed in the service of a broader, egalitarian theory of justice (see also Milne, 1986; Sadurski, 1985, ch. 5). It is interesting that, for all the differences between their approaches (as indicated by Ake in his essay), they converge on a number of important points. First, they both agree that a conception of justice is but a part of a broader ideal of a good society. Second, they both believe that the notion of desert is crucial to a conception of justice (although Ake introduces the notion of desert indirectly, through the role it will inevitably play in his idea of justice as the balance of social benefits and burdens). Third, they both emphasize that the most relevant aspect of 'desert' is a socially beneficial effort undertaken by an individual, and they largely dismiss contribution-based conceptions of desert. Understood as the objective worth of the success of one's actions, 'contribution' is at best an imperfect measure of the effort actually undertaken. Fourth, both Slote and Ake factor into their notion of desert the laudable intentions of the person whose effort we choose to reward.

To recite these features of desert-based conceptions is also to immediately indicate some of the problems raised by these theories. If desert is based purely on those characteristics for which a person can claim moral credit (and this seems to be the main reason why both Slote and Ake discard 'contribution'-based desert), can we meaningfully distinguish between those elements of effort-*cum*-intentions which *are* subject to a person's conscious decisions (or, in Ake's framework, which correspond to the burdens on a person's life) and those which are fortuitous? After all, one's predisposition to undertake socially beneficial burdens may be due to factors for which a person cannot, or can only partly, take credit, such as upbringing, familial stimulation and genetic endowments. As John Rawls noted:

> The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is . . . problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. (Rawls, 1971, p. 104)

As a matter of fact, some would deny that the desert-for-effort theory is egalitarian at all: different people exert widely varying amounts of socially beneficial effort in society, and it may be that these differences 'depend heavily on the social–genetic lottery, in which different people receive different amounts of effort-inclining characteristics' (Zaitchik, 1977, p. 384). Should a desert-for-effort theory therefore be supplemented by the further proviso that those

effortful actions which are largely determined by 'social-genetic' conditions be disqualified from affecting a just distribution?

Further, even if, in principle, we can draw a line between those putative grounds for desert which *do* correspond to effort and those which attach to an actual contribution, can we draw such a distinction in real life? Slote anticipates such an objection and suggests that the impracticality of a moral ideal is not a good argument against the moral attractiveness of the ideal, and all that the impracticality objection to his notion of desert shows is that 'it is difficult to decide what is just and to recompense people accordingly' (p. 109). This answer might be fair enough from the perspective of a philosopher but, for those who believe that the demands of moral or political philosophy should be capable of implementation, it might count as a fatal argument against that notion of desert. They are more likely to be convinced by the arguments in Julian Lamont's essay (Chapter 7), which insist that there are no clear and sharp distinctions between effort-based and productivity-based principles of just distribution, if the proponents of the former principles are committed (as they must be) to increasing the social product. Lamont also lucidly lists some of the main problems with implementing policies based on individual effort and concludes that productivity (or actual 'contribution') may be a better measure of a just distribution after all. If accepted, this conclusion naturally reduces much of the moral weight of rationales for desert-based theories of justice.

The arguments of desert theorists, as exemplified by the essays by Ake and Slote, attach great importance to the relationship between the grounds of just reward and something that can be traced to a conscious, deliberate and valuable fact about an individual, in particular, to her effortful actions. This presupposes that we can draw a line between those characteristics which are 'arbitrary from a moral point of view' and those for which we can properly claim moral credit. Socially caused inequalities (that is, those which are attributable to difference in wealth inheritance, upbringing and various other socially fortuitous circumstances) are often, and rightly, represented as belonging to a category of morally arbitrary factors. However, it is clear that many 'natural' differences which *also* affect our place in the social distribution of resources are 'undeserved' insofar as they are affected by our inherited superior natural abilities, skills or talents. If the role of justice is to be a means of redress for those characteristics that are arbitrary from a moral point of view,[2] then there seem to be no good moral reasons to treat natural and social 'fortuitous' factors differently.

This is the position of Francis Snare (Chapter 9) who considers the relationship between luck and justice. Snare believes that '[b]oth natural and social contingencies will present barriers to opportunity which provide some basis for rectification' (p. 194) because both these categories of 'contingencies' are equally arbitrary.[3] In this, Snare is a good representative of a line of thought in our thinking about justice, the *locus classicus* of which can be found in a famous and oft-quoted article by Herbert Spiegelberg. Spiegelberg's argument has a form of a syllogism: '(1) undeserved discriminations call for redress, (2) all inequalities of birth constitute undeserved discriminations. . . . (3) all inequalities of birth call for redress' (Spiegelberg, 1944, p. 113). The operative is, of course, the first premise, which is taken by Spiegelberg to be self-evident. The same conclusion is reached in Rawls's 'difference principle'[4] (with acknowledgement to Spiegelberg), which is characterized by its author as representing 'an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be' (Rawls, 1971, p. 101). Rawls clearly assigns an equal standing to natural and social contingencies. He believes, for instance, that 'when the principles of fraternity

and redress are allowed their appropriate weight, the natural distribution of assets and the contingencies of social circumstances can more easily be accepted' (ibid., p. 512). The equal moral arbitrariness of the natural *and* social 'lotteries' serves as a basis for equally justified redistributive action in egalitarian conceptions of a 'common pool' of benefits deriving from natural and social assets (ibid., pp. 100–8), in Ronald Dworkin's (1981) conception of 'equality of resources' which is not 'endowment-sensitive', in Campbell's (1974–75) 'meritorian' or 'handicapped' theory of equality of opportunity and so on.

This view is not unopposed in contemporary theories of justice, and not all of its opponents necessarily reject the very idea of justice as a system of countering the adverse effects of bad luck and misfortune in general, although some certainly do: Richard Epstein's statement that '[i]n general the effort to use coercion to counter the adverse effects of luck tends only to make matters worse' (Epstein, 1988, p. 17) and Milton Friedman's laconic 'Life is not fair' (Friedman, 1980, p. 168) belong to a category which rejects wholeheartedly a societal duty to redress for inequalities which result from social and natural contingencies alike. Incidentally, it is significant that Friedman explicitly endorses the moral equivalence of natural and social contingencies by saying:

> The inheritance of property can be interfered with more readily than the inheritance of talent. But from an ethical point of view, is there any difference between the two? Yet many people resent the inheritance of property but not the inheritance of talent. (Ibid.)

In this, he seems to agree with Spiegelberg, Snare and Rawls, but he draws the opposite normative conclusions from this equivalence.

There have also been those who claim that there is *no* moral equivalence between natural and social inequalities, and that the relevant difference between these two sorts of inequality suggests that, while a just society has a duty to remove the benefits of undeserved social inequalities, no such duty applies to unequal natural talents, skills and capacities. This view is expressed and defended in an essay by Alan H. Goldman which is reproduced as Chapter 10. Goldman's central claim is that the morally relevant difference is between natural differences, which 'derive from, or rather equate with, the distinctness of physically embodied persons' and, on the other hand, social advantages which do 'not affect the basic identities of persons' (p. 208).

Goldman's main appeal is to the idea of respect for the separate identities of particular persons. The appeal is certainly very weighty. The charge that one's opponents do not respect individuals' separate identities has been used often and effectively in modern theories of justice.[5] It is, however, uncertain how useful this appeal can be in drawing the line between natural and social assets in order to perform the job it is assigned in Goldman's essay.[6] Goldman's proposition about a strong link between natural inequalities and individual identity is backed by a claim about a strong link between a person and her body. But some may believe that this is a *non sequitur* – that a right to keep the products of one's differential native skills and capacities (a right which has to be asserted in order to deny a social duty to redress for those 'contingencies') does not follow from a set of rights over one's body. As Anthony Kronman argues: 'Although a person obviously possesses his own attributes, it does not necessarily follow that he is also their owner, with the right to exploit them, within limits, for his own benefits' (Kronman, 1981, p. 65).

Even if one grants, *arguendo*, Goldman's equating of one's identity with one's body, and even with the product of one's labour, it may still seem question-begging to say that redressing for the differential *effects* of human abilities reaches the abilities (and hence, identities) themselves. In order to uphold a morally relevant distinction between natural and social contingencies, Goldman would need to show that differential rewards for higher skills, capacities and talents belong to that sphere of individual identity which must not be nullified without risking a violation of the human self. A critic might claim that this identification of the products of one's labour with one's identity assumes that which is in question: what should be subject to redistribution. Ultimately, it may collapse into a debate about the boundaries between the natural and the social – whether what is 'the fruit of one's labor' is socially constructed and affected by legal and social norms of property, taxation, inheritance and so on or whether it belongs to a pre-political, 'natural' order of things.

Political Liberalism and Justice

It is impossible to overestimate the importance of John Rawls for the theory of justice. Indeed his book under this title has rightly become a modern classic, and hardly any writer who considers the problems of justice can fail to relate, either approvingly or critically, to his work. *A Theory of Justice* has become so well known and so widely discussed since its publication 30 years ago that it would probably be redundant to include essays devoted to it in this book. However, more recently Rawls published a second book, *Political Liberalism* (preceded, as was *A Theory of Justice*, by a number of essays that foreshadowed its main themes), which has also become the subject of an important philosophical debate. Part III of this book attempts to reflect some of the most interesting features of this debate by reproducing two of Rawls's articles which came before *Political Liberalism* and three important critical commentaries about this new stage of development of Rawls's thought.

The relationship between *A Theory of Justice* and the later work by Rawls, which culminated in *Political Liberalism*, has been the object of disagreement and a cause of a degree of perplexity, among Rawls's commentators who disagreed about whether *Political Liberalism* develops and extends *A Theory of Justice*, or whether it marks a major change in Rawls's theory. However, rather than attempting to identify aspects of continuity and change in Rawls's theory, it is perhaps more useful to see *Political Liberalism* as addressing a fundamentally different set of issues to his first book.[7] While *A Theory of Justice* was concerned mainly with articulating and defending a conception of justice for an ideal society, *Political Liberalism* can be seen to identify the terms on which the proponents of such an 'ideal' conception may live together, and agree to common arrangements, with the proponents of other (including the non-liberal) theories. As John Rawls insists in *Political Liberalism*, the fundamental question which his second book addresses is: 'how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?' (Rawls, 1993, p. 4). So perhaps it is useful to see *Political Liberalism* as an inquiry into a second-order theory of justice – a theory about how to reconcile, in one society, on just and equal terms, proponents of different first-order theories, including the theory espoused in Rawls's first book.

'Only ideologues and visionaries fail to experience deep conflicts of political values and conflicts between these and nonpolitical values' (ibid., p. 44). Rawls is neither an 'ideologue' nor a 'visionary' in this sense that he describes, and his later work clearly points to the need for a 'political' solution to the problem of conflicts of various first-order theories of justice. Jeremy Waldron's characterization is apposite. The aim of *Political Liberalism*, Waldron says, is 'to put the "political" back into "political philosophy" ' by inquiring about the role that a theory of justice 'could be expected to play in the life of a society whose members disagreed radically in their cultural, religious and philosophical beliefs' (Waldron, 1993, p. 5). Rawls himself, in the last two paragraphs of the essay reproduced as Chapter 12, 'The Idea of Public Reason Revisited', explains the 'fundamental difference' between his two books precisely along these lines: while *A Theory of Justice* is presented as a 'comprehensive liberal doctrine', *Political Liberalism* is about a vision of a society in which 'public reason is a way of reasoning about political values shared by free and equal citizens [and it] does not trespass on citizens' comprehensive doctrines so long as those doctrines are consistent with a democratic polity' (p. 293).

The idea of a theory of justice belonging to the 'political, not metaphysical' realm constitutes one of the main themes of *Political Liberalism,* and it has been expounded by Rawls in his essay 'The Domain of the Political and Overlapping Consensus' (Chapter 11). This essay also contains, as the title suggests, the idea of a stable constitutional regime resting as it is on the consensus of citizens who share an understanding of certain basic rights and liberties even though they may not agree on 'comprehensive' doctrines. This shared understanding occupies the space of 'an overlapping consensus'. In his second essay reproduced here, 'The Idea of Public Reason Revisited' (Chapter 12), Rawls discusses the other main pillar upon which the construction of *Political Liberalism* rests – namely, the idea of 'public reason' which he defined in *Political Liberalism* as 'the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution' (Rawls, 1993, p. 214). The concept of 'public reason' plays the important role in Rawls's theory of supporting a liberal principle of legitimacy which proclaims that the exercise of political power is legitimate only when exercised in accordance with a constitution, the essentials of which all citizens may reasonably be expected to endorse in the light of ideals acceptable to them.

All three ideas (justice as 'political not metaphysical', overlapping consensus and 'public reason') have been subjected to stringent critical scrutiny from political and legal philosophers. First, there have been a number of critics who pointed to the impossibility of separating 'metaphysical' from 'political' conceptions of justice, and who discerned certain 'metaphysical' presuppositions in Rawls's work as well. William Galston's essay (Chapter 13) is a good example of this sort of inquiry. He claims that it is impossible to divorce political philosophy from all metaphysical questions and, in any event, that Rawlsian liberalism rests on an idea of the 'divided self', composed as it is of one's specific aims and attachments on the one hand, and capacity for critical reflection on such aims on the other. Accordingly, Galston is not persuaded by liberalism's claim for neutrality among opposing 'comprehensive' doctrines: some doctrines will be privileged and others disadvantaged under Rawlsian 'political liberalism'.

Second, the conception of 'overlapping consensus' has been subjected to criticism. The criticism has taken at least two forms: that 'overlapping consensus' is unattainable, and that it is unnecessary to achieve the aims assigned to it by Rawls. The first claim is implied by Galston's critique: if Rawlsian 'political liberalism' indeed rests on specific and controversial metaphysical

foundations, such as certain controversial views about the self, then overlapping consensus is unlikely to be formed among the adherents to doctrines which reject those metaphysical premises. Galston's example of 'religious fundamentalists' who might find the Rawlsian conception of a self-critical personality 'a sophisticated, and therefore dangerous, brand of secular humanism' (p. 298) is a good case in point. But the 'overlapping consensus' with this degree of 'thickness', which is envisaged by Rawls, might also be *unnecessary* to provide a basis for a stable social unity. As Kurt Baier claims, in Chapter 14, all that is needed is a 'constitutional consensus', which consists of common commitment to established legal procedures 'which embody at least some (though perhaps confused or inconsistent) principles of substantive justice . . .' (p. 316).

Third, the Rawlsian conception of 'public reason' has also been criticized (for example, Scheffler, 1994, pp. 16–17), mainly on the basis that its rigorous implementation would lead to an excessive impoverishment of public discourse in a democratic state. If we were to rule out from public discourse (say, from views expressed publicly by citizens during electoral debates or from legislators' publicly stated motives for voting in favour of this or that law) all those arguments which cannot be accepted by all the adherents to divergent 'reasonable' doctrines, we would end up with an extremely bland public debate about the matters of common interest. As Waldron says, 'it is pretty clear that if people do hold their political principles for different reasons, they will naturally want to interpret them in the light of those reasons and thus disclose those reasons publicly in interpretive debate' (Waldron, 1993, p. 6), even if some of those reasons belong to more 'comprehensive' moral and religious doctrines not shared by all members of the society. This is one of the main themes of an essay by Michael Sandel reproduced here as Chapter 15. Sandel implies that the 'restrictive character of liberal public reason' would not only lead to highly counterintuitive results by ruling out much of the public discourse currently considered widely as legitimate, but it would also produce results which are not necessarily supportive of the value of toleration. This connects with other major themes of Sandel's criticism: that 'bracketing' grave moral questions is not always reasonable, and that a 'reasonable pluralism' of moral views in a democratic society applies not only to substantive moralities ('the good'), but also to conceptions of justice ('the right').

Feminist Critiques of Liberal Justice

Part IV provides a selection of critiques of liberal theories of justice and, in particular, of Rawlsian theory, which are much more fundamental than those included in Part III which could be seen as originating from the liberal 'mainstream'. In contrast, the essays included in the last Part of this volume subject liberal theories of justice to criticisms from the points of view of feminist theorists. Susan Moller Okin (Chapter 16) depicts what she considers to be ambiguity in *Political Liberalism* about the place of family with respect to political principles of justice: is family part of the 'basic structure' (and thus controlled by principles of justice), or does it belong to a 'private' realm, immune to justice-based control? She believes that Rawls's treatment of gender reveals an unstated assumption that families, in liberal–democratic societies as we know them, are just; and she also claims that the asymmetrical treatment of racial and gender inequalities, which she discovers in Rawls, is evidence of gender bias in his theory. The essays by Carole Pateman and Deborah Kearns (Chapters 17 and 18) constitute important