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Rawls and Law

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
Series Editor
Centre for Applied Philosophy and Public Ethics
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Introduction

John Rawls (1921–2002) is widely held to be amongst the most important political philosophers for over a century. *Rawls and Law* is the first work of its kind to publish in one place the most influential essays in the field covering a number of topics, including constitutionalism, democratic theory, egalitarianism, feminism, global justice, political liberalism, the rule of law and public reason. The volume should help inform both scholars and students coming to the study of Rawls's work for the first time of both the importance and complexity of his ideas, as well as shed light on how they might be further improved and applied.

This Introduction will begin with a brief overview of Rawls's theory of justice to familiarize readers and then move on to discuss the essays contained in each Part of the book.

Rawlsian Justice

Rawls offers a new theory of justice. This was initially published in *A Theory of Justice*, but later revised, incorporating further ideas, in *Political Liberalism* (Rawls, 1971, 1996).[1] *Justice as Fairness* (2001) presents a summary of his later views. I will briefly offer an outline of Rawls's main arguments before turning attention to the contents of *Rawls and Law*. Rawls begins by considering political society as a fair system of cooperation over time from one generation to the next. What would such a political society look like? His theory of justice develops from this main organizing idea.

Several ideas readily appear. First, we would have a particular view of citizens. Citizens engaged in a fair system of cooperation would have to be free and equal. Otherwise, they would be unable to cooperate fairly, however understood over generations. Citizens are conceived as having an effective sense of justice. This permits them the ability to understand and apply principles of justice, as well as revise their views of justice with others over time. Citizens have a second capacity, or moral power, in addition to a sense of justice: this is the capacity for a conception of the good.

Second, we would have an idea of a well-ordered society. A fair system of cooperation would be a society that is effectively regulated by a public conception of justice. The well-ordered society would be acceptable to citizens and mutually recognized as such. One important aspect is the society's basic structure: this is the primary political and social institutions of the society that compose the system of fair cooperation. The basic structure assigns basic rights and duties and provides the background social framework within which the activities of associations and individuals take place (Rawls, 2001, p. 10). Thus, Rawls's theory of justice – or 'justice as fairness' – is a *political*, not general, conception of justice. Our concern is with the project of applying principles to the basic structure of society and working from there.

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[1] For more on Rawls's idea of political liberalism, see Brooks and Nussbaum (forthcoming).

The main idea is to develop a framework of how we might approach political questions and resolve disputes, but without saying exactly how all questions should be settled in advance.

One task is to determine principles of justice that will apply to the basic structure. Rawls argues that we should perform a hypothetical thought experiment. We specify fair agreement from within an original position. This is a non-historical setting. We join with others as parties to the original position and stand behind a veil of ignorance. This veil brackets morally arbitrary features from entering into our deliberations. We are to be ignorant of our ethnicity, sex, sexual orientation and native endowments. We then consider what principles of justice these parties would unanimously consent to.

Rawls argues that the parties to the original position would accept the following two principles:

1. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and, second, they are to be to the greatest benefit of the least-advantaged members of society (Rawls, 2001, pp. 42–3).

These two principles of justice may be understood in the following way. First, there is the principle of basic liberties. Second, there is the principle split into two parts of: (b1) fair equality of opportunity; and (b2) the difference principle.

These three parts have a lexical order: (a) > (b1) > (b2). Ideally, there would be no potential clash between the principles. However, where there is conflict we give priority in this way for the following reasons. Basic liberties take lexical priority over the second principle. This is because the justification of social and economic inequalities should never come at the expense of basic liberties. These liberties include a 'social minimum' of our basic needs (Rawls, 2001, p. 48). The second principle is more complicated. The idea is that parties to the original position would prioritize equality of opportunity over the difference principle. Fair equality of opportunity is understood to require not only that social positions and public offices are open to all, but also that all have a fair chance to attain them.

These principles apply to the basic structure and provide 'background justice' (Rawls, 2001, p. 53). However, these principles are only meant to help provide a framework, and they do not settle all political questions in advance. Rawls argues that all persons may hold a reasonable comprehensive doctrine. The doctrine is a view about value and meaning. Examples include mainstream religious views, such as Catholicism, Judaism or Islam, and philosophical views, such as deontology or utilitarianism.

Rawls recognizes the fact of reasonable pluralism. This is the fact that different persons may possess different, but not unreasonable, comprehensive doctrines. Thus, you and I may agree about a doctrine, and our difference is not a case of only one us holding a reasonable view. Some may hold unreasonable views and these would include fascist or racist doctrines. Such doctrines may provide an understanding of values, but they are unreasonable in that they are based on rigid ideologies of hate or fear, and are irrational. Most hold reasonable comprehensive doctrines. The problem is that many of us will hold different doctrines.

The fact of reasonable pluralism gives rise to the problem of political stability. If many in society hold different and reasonable comprehensive doctrines, then citizens are divided on substantive moral questions. How can political stability be possible in the face of such difference?

The answer lies in the idea of political liberalism. Political liberalism does not prioritize one reasonable comprehensive doctrine over any other. It forges agreement in a new way. Citizens engage with each other through the use of public reason. A public reason is a reason that is grounded in my reasonable comprehensive doctrine that may be acceptable to any other such doctrine. We weigh the relative merit of competing public reasons by reflective equilibrium and forge an overlapping consensus. This consensus is the possibility of future political stability.

There is a great deal more that can – and perhaps should – be said about Rawls's idea of justice.[2] My discussion here is merely indicative of the main arguments and general character of his complex and genuinely fascinating view. Nevertheless, I will now offer a few words about the contents of this volume and develop further certain aspects of Rawls's theory and how it may be applied to questions concerning law and legal theory.

Constitutional Law

Part I of this volume appropriately comprises several important essays concerning Rawls's theory of justice and constitutional law.

Frank Michelman (Chapter 1) offers a true *tour de force* of constitutional legal thinking and insight into Rawls's work. There are certainly differences between how American constitutional law has developed and, say, the lexical priority of basic liberties as the first principle of political justice. Michelman says that by Rawlsian standards 'the U.S. Supreme Court's performance over the years has been so-so' (p. 28). Yet this fact does not foreclose the possibility of greater future agreement.

In Chapter 2 Ronald Dworkin addresses this issue. For Dworkin, Rawls's political philosophy offers new and useful insights to lawyers concerning the character and value of legality. Rawls's view is descriptive in that it begins from a shared understanding of 'what is taken for granted', but 'it is in other ways substantive and normative because the equilibrium it seeks is with principles judged for independent appeal' (p. 40). Dworkin takes Rawls's view to be consistent with Dworkinian constructive interpretativism and for several reasons, not least their similar views on objectivity (p. 53). Perhaps, then, it is a matter of time before the courts recognize the value of Rawls's ideas?

Some believe that Rawls's theory of justice has had a profound influence on legal discourse despite the fact the US Supreme Court has yet to cite his work. For example, Charles Kelbley (Chapter 3) argues that Rawls's ideas have had a deep impact on how we conceive institutional legal reform today. Special mention is made of Rawls's two contributions – namely, the relationship between political liberalism and comprehensive doctrines. This offers us a new perspective on political neutrality that has a real use for constitutional law today.

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[2] For an excellent overview, see Freeman (2007).

Not everyone agrees. Neomi Rao (Chapter 4) counters that, yes, philosophers such as Rawls have influenced the American courts. Moreover, this is a very bad thing. It is bad because the courts should rely on legal precedents and not moral philosophy. The use of philosophy is an illegitimate substitute for precedent. Thus, where the law runs out, the use of philosophy is ushered in. Judges have used philosophy to argue for controversial positions often unsupported by law. Therefore, philosophy has no place in the courthouse and it should remain outside the front door.

Thom Brooks (Chapter 5) is critical of this view on many levels. The US Supreme Court mentions philosophers only rarely, if at all. Where they are mentioned, there is no evidence that reference to philosophers and their ideas have held priority over legal precedents. Brooks considers the famous Philosophers' Brief which draws particular criticism from Rao. He argues that she is mistaken on many counts regarding the Brief and its claims. Indeed, the Brief does not argue its case on the basis of moral philosophy, but of legal record. Moreover, there is some evidence that the US Supreme Court indirectly responds to its main arguments even if this response is not explicit. Philosophy deserves a place at the US Supreme Court after all, and this is no bad thing.

Immigration

Part II deals with immigration, a topic not only of increasing importance for our globalized world, but also the target of greater attention. In Chapter 6 Matthew Lister attempts to offer important insights into what should be included in any comprehensive normative account concerning the limits of discretion states should have in setting their immigration policies. The freedom of association all citizens possess is a freedom that may cross borders. Lister argues that there are reasons to claim that the right to family-based immigration can outweigh the associative desires of a majority under certain circumstances. The understanding of rights and general framework of justice that help us with these claims largely derive from Rawls's work. Thus, Rawlsian justice may help shed new light on immigration law and associated duties.

Political Liberalism and Public Reason

One key part of Rawls's theory of justice concerns the relation between political liberalism and public reason. Part III incorporates insightful essays that relate Rawls's thinking on these ideas to law.

Michael J. Sandel (Chapter 7) reviews Rawls's arguments for political liberalism and offers a helpful summary of the many debates that have been inspired by Rawls's work. These debates concern Rawls's defence of the priority of the right over the good, as well as his political conception of the individual and what political justice is about (and what it is not

about). Sandel presents important criticisms of these views. For example, Rawls argues that we should bracket differences in our comprehensive doctrines and find consensus through the use of public reason and an overlapping consensus. Sandel replies that we should 'engage rather than avoid the comprehensive moral and religious doctrines at stake' (p. 202).

Frank I. Michelman (Chapter 8) believes that there may be greater promise in Rawls's political liberalism. However, ultimately, much of its argument depends on a particular idea of the self, and the problem is that this idea is contestable and is, perhaps, more of a fantasy and also utopian. This concern about Rawls and his idea of the self is also pursued by Ronald Den Otter in Chapter 10. By contrast, Kent Greenawalt (Chapter 9) finds a problem elsewhere in Rawls's idea of public reason. If we rely purely on public reasons to forge agreement on public policy, then this raises the problem that parties may be forced to forego what they believe are the best (*private*) reasons for a position in favour of the best *public* reasons. Greenawalt offers this challenge:

> ... a Roman Catholic who addresses abortion legislation would have to refrain from relying on a confidently held religious belief that from the moment of conception an embryo is entitled to the moral status of a full human being. Does asking people to refrain from relying on what they believe most deeply itself create a kind of unfairness? (p. 249)

This challenge raises new questions about the role of public reason in political liberalism as fair and politically neutral. Is this neutrality genuinely neutral? Does political neutrality come at too high a price?

Private Law

How helpful is Rawls's theory of justice for developing a clearer idea of private law? Part IV addresses this question. Arthur Ripstein (Chapter 12) argues that private rights protect an important variety of freedom, but that their enforcement is the responsibility of the wider society and an exercise of political power. This presents a kind of antinomy. Ripstein looks to Kant and Rawls for a helpful solution. Kevin Kordana and David Tabachnick (Chapter 11) disagree with much of Ripstein's analysis, arguing that Rawls at best offers a 'consequentialist (outcome-oriented) theory of tort law' (p. 316). Rawls's work is perhaps less Kantian than we have thought and problematic in new ways.

Reparations

Part V consists of a single substantive contribution by Martin D. Carcieri (Chapter 13). Carcieri argues that Rawls can help us find a useful analysis of racial policy and justice. He offers two claims. His first claim is that Rawls's work cannot provide strong forms of affirmative action. Nevertheless, Rawls leads us to a surprising second claim: we can derive from his work strong forms of legislative reparations.[3]

[3] On reparations, see also Brooks (2008b).

Global Justice and International Law

Finally, Part VI considers essays that focus on Rawls's views on global justice and how they might be applied in international law.[4] Rawls's general views are presented in his *The Law of Peoples* (1999). Recall his domestic theory of justice. Rawls asks us to imagine that we are parties to an original position. From this position, the parties agree political principles and their ordering. Likewise, Rawls asks us now to conceive of ourselves as representatives of a people who are party to a global original position. We represent peoples rather than states because the former is a more ethical concept. States are defined in part by their borders, and these borders often lack ethical significance. The only boundary that has such significance is that which can include a people with certain defining characteristics. The parties to this second original position are thought to agree eight principles of justice that will define the Law of Peoples, the global structure within which a Society of Peoples operates. These principles include the idea that peoples are free and independent, and should observe treaties and a duty of non-intervention (Rawls, 1999, p. 37).

Rawls's theory of global justice presented in *The Law of Peoples* has attracted more criticism than praise. This is evident in much work on the subject. John Tasioulas (Chapter 14) begins with Rawls's eight principles of the Law of Peoples and proceeds to offer a helpful critical guide to the central issues in Rawls's view. Unfortunately, Tasioulas finds Rawls's work more 'a counsel of despair', albeit one that 'we need not acquiesce in' (p. 476). Likewise, Thomas W. Pogge (Chapter 15) shares dissatisfaction with what he calls 'the incoherence' between Rawls's different theories of justice.[5] Pogge asks whether it would be more attractive to reform the global institutional order from the perspective of *A Theory of Justice* instead of *The Law of Peoples*. He finds much more of interest – and more compelling arguments – in Rawls's earlier work than in his later work. Rawls's Society of Peoples is not a realistic utopia and the best we can hope for: we can aspire to much more.

Nevertheless, there are more positive results that also may arise through the study of Rawls's work. First, his view of global justice has real coherence. In Chapter 16 Leif Wenar argues that there are several good reasons why Rawls is not a cosmopolitan egalitarian. Nor is it a defect of his views that this is the case. This is not to say that Rawls's *The Law of Peoples* is beyond criticism, but rather to say that such criticism must be found elsewhere.

Regina Kreide (Chapter 17) considers the topic of humanitarian intervention. She finds useful inspiration from the work of Rawls and also from that of Jürgen Habermas. Together, they both help us flesh out a more compelling view. Kreide's essay represents an important contribution to a topic – humanitarian intervention – that has received a particular increase in scholarly attention in recent years. Kreide clearly shows how Rawls's work may contribute to future debates in fruitful ways.

Finally, this book concludes with David Reidy (Chapter 18) on the topic of Rawls and human rights. Rawls's conception of human rights has encountered much criticism for being 'ultraminimalist'. Reidy argues that such criticisms fall short of the mark and that Rawls's idea of rights helps advance our understanding of human rights. Our debates, in his view, would do better to engage more closely with Rawls's conception.

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4 On global justice more generally, see Brooks (2008a).

5 For Pogge's views on global justice, see Brooks (2007).

Conclusion

Rawls is the most important political philosopher of the last 100 years or more. No single volume can do justice to the great influence he has had on how we might think about jurisprudence and the law. I have brought together much of the pre-eminent leading work that shows how rich Rawls's influence has been and how fruitful his ideas are for thinking about so many areas of law. My great hope is that this volume will not only inform the reader of these important ideas, but will also inspire further work. There is so much more to be said. The future may well be Rawlsian.

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