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Race, Rights, and Justice

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Contents

Introduction

> *Philosophers often say that the point of their efforts is to make the unclear clearer. But they may make the clear unclear: they may cause plain truths to disappear into difficult cases, sensible concepts to dissolve into complex definitions, and so on. To some extent, philosophers do do this. Still more, they may seem to do it, and even to seem to do it can be a political disservice.—Bernard Williams*[1]

This book is on the moral foundations of law ranging from Ronald Dworkin's theory of law as integrity, to Immanuel Kant's and John Rawls' respective theories of global justice, to the concept of rights (both individual and collective), to the dire circumstances of civil war, illicit drugs, and humanitarian intervention in Colombia and some of the problems that these circumstances imply for international law. It provides integrated philosophical discussions of the legal concepts of the nature of justice and rights in both domestic and global contexts.

By "global justice," I not only mean notions of global human need and how that important and complex cluster of challenges ought to be met, but also how societies ought to behave toward one another and how they ought not to in order to not violate certain rights to sovereignty and related rights that states and individuals have. Global justice, then, is that area of philosophy of law (and of political philosophy, more generally) that examines questions concerning the rights and responsibilities states and individuals have toward each other and to themselves, including the protection of individual rights. Moreover, it is clear that each chapter's main topic deserves attention that a book would bring to it. My goal, however, is not to provide a comprehensive philosophical treatment of each such topic. Rather, it is to weave these chapters together into an integrated whole of topics in the mainstream of philosophy of law.

[1] Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), p. 64.

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This book does not, moreover, propose to offer grand and complete new theories of the topics under investigation. As W. E. B. DuBois states, ". . . one can never tell everything about anything. Human communication must always involve some selection and emphasis."[2] In relying on important works on constitutional interpretation, rights, justice, and humanitarian intervention, my arguments and analyses are meant to advance significantly and multifariously these crucial philosophical discussions. In so doing, I challenge some of the prevailing wisdom pertaining to these areas of investigation. Thus the task herein is to assist in the refinement of what I take to be largely plausible existing theories of these problems. Insofar as my general approach makes the moral prior to the political, my views follow those of Rawls and can be subsumed under a structuralist version of political moralism. Insofar as they make the moral prior to the legal, my views can generally be placed under the category of legal moralism. Throughout, however, I infuse into mainstream analytical philosophy of law points of argument recognizing fully the rights of indigenous peoples and other racial underclasses (such as blacks). This influences my assessment of certain theories of legal interpretation, as well as my assessments of Rawlsian and cosmopolitan liberal accounts of global justice and how I assess the cluster of problems that is the quandary of humanitarian intervention into Colombia.

As noted in the Preface, this book has three parts: Interpreting Constitutional Law, Justice, and Rights. Certain chapters in this book have been largely revised in order to integrate into them plausible aspects of some of the perspectives of nonmainstream philosophies of law, such as critical race theories. Thus issues of racism play an essential role in my approach to philosophy of law. Moreover, the chapters herein have been written to take account of what a number of legal scholars (some historical, and others contemporary) have argued on constitutional interpretation, justice, and rights. And the result is a book on philosophy of law that is quite inclusive in its approach to address some of the fundamental problems of philosophy of law. In light of DuBois' words cited above, I beg forgiveness from the reader that I do not herein take into account factors of how legal problems are engendered or sexualized. I do, however, demonstrate significant sensitivity, though perhaps insufficient for some, to the problem of socioeconomic class and how it effects some of the problems I address.

What is law? And when it is codified in the form of a constitution, such as in the case of the Constitution of the United States of America, how ought it to be interpreted by judges? These are the key questions that make up the

[2] W. E. B. DuBois, *An ABC of Color* (New York: International Publishers, 1963), pp. 50–51.

first two chapters of this book. Chapters 1 and 2 explore various kinds of theories of legal interpretation, and assess their plausibility. They explicate and critically assess various theories of U.S. constitutional interpretation—including textual originalism and original intent—and argue in favor of one that is most consistent with Dworkin's theory of law as integrity, a theory that seems to be consistent in the main with that of Benjamin Cardozo's views on legal interpretation.[3] Furthermore, I defend Dworkin's version of Cardozo's theory against the respective objections raised by J. L. Mackie and Andrew Altman. I then reason toward a modified version of Dworkin's theory: "constitutional coherentism." On this view, no legal rule is in principle beyond the reach of being revised, overturned, or rejected for the sake of the betterment of the legal system, *ceteris paribus*. One reason for this is that, contrary to an essentially conservative position about the law, I assume that the law is to serve its citizens rather than vice versa, and this implies that citizens have a cluster of rights pertaining to the changing of the law, subject to their being good reasons to do so. A view that would deny this assumption would seem to imply that the citizens of a country are not only bound to the law, but are its servants. The reason why I reject such a view is that, among other things, it would appear to undermine individual autonomy and the sovereignty of a people. Finally, throughout my discussion, I assume a general kind of objectivist realism concerning morality and the law.[4]

Chapters 1 and 2 set the stage for difficulties that arise for any attempt to establish a system of international law in order to create and sustain a reasonably just society of peoples. Regardless of which rules are adopted by whichever participatory states, such laws will require interpretation. Thus the basic points made in Chapters 1 and 2 apply globally as well as domestically. In Chapters 3 and 4, subsequent to a description of Kant's views on international law, and following a statement of H. L. A. Hart's perspective on the same,[5] Rawls' theory of international justice as it is articulated and defended

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[3] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

[4] For important discussions of objectivity in morality and the law, see Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs*, 25 (1996), pp. 87–139; Kent Greenawalt, *Law and Objectivity* (Oxford: Oxford University Press, 1992); Michael Moore, *Objectivity in Ethics and Law* (Burlington: Ashgate, 2004), Part Two; Gerald Postema, "Objectivity Fit For Law," in Brian Leiter, Editor, *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 99–143. For an overview of the subject of truth in legal contexts, see Dennis Patterson, *Law and Truth* (Oxford: Oxford University Press, 1996).

[5] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), Chapter 10.

in *The Law of Peoples*[6] and cosmopolitan liberalism are examined. Assumed throughout my discussion is that considerations of international justice ought to inform international law. Some of the most important objections to each theory are noted, and no attempt is made for a comprehensive assessment of either. But a new challenge to each position is set forth and defended, one which places a high priority on compensatory justice between peoples or states. This challenge holds that no theory of international justice is complete unless and until it can adequately handle cases of compensatory justice, including reparations to peoples who are severely and wrongfully harmed by other peoples—even well-ordered ones. Thus it appears that both theories of domestic and global justice share a common malady: in their focus on matters of distributive justice, they seem to have ignored the importance of compensatory justice and the foundational role it plays in a generally just society (global or otherwise), or one attempting to be just. This criticism is especially poignant in light of Rawls' desire to formulate principles of international justice that can be used to construct a *realistic* utopia.

Of course, rights are fundamental to any viable system of law. So it is important to come to a plausible understanding of them, both legally and morally, insofar as it is believed that the foundation of legal rights and rules ought to be ethical. By this, it is meant that moral rights are not "nonsense upon stilts" as Jeremy Bentham believed them to be,[7] but rather grounded in what the balance of human reason informs us about conflicting claims or interests, all things considered. Legal rights ought to be grounded in "true" morality, though not everything that is morally wrong ought to be legally prohibited for practical reasons. The origin of rights, whether noninstitutional (moral) rights or institutional (legal) ones, is human reason. Not all moral rights can be institutionalized because not every moral ideal can in practical terms be workable within a legal system. But this hardly means that legal rights have no moral grounding.[8] Legal rights worth respecting have some degree of moral justification, at least those that have moral import. In any case, I assume that the grounding of moral and legal rights in human reason is such that rights can and do exist, regardless of whether or not they need to be exercised. This implies that it is problematic to think that rights are contingent on wrongs in the sense that wrongs are the sources of rights.[9] Such

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[6] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

[7] Jeremy Bentham, "Anarchical Fallacies," in John Bowring, Editor, *The Works of Jeremy Bentham* (Edinburgh: Edinburgh University Press, 1843), Volume 2, pp. 491f.

[8] Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

[9] Alan Dershowitz, *Rights From Wrongs* (New York: Basic Books, 2004).

a view begs the question concerning the nature of wrongs, and thus does us little or no good in determining the sources of rights. Wrongs, whatever they are, may serve as an indication that rights are to be discovered by human reason in search of protections from them. But there is no logical correlation between wrongs and rights, or vice versa.

In Chapter 5, I argue that it is incorrect to think, as most philosophers do, that what separates political liberalism from Marxism is that the former believes in rights while the latter does not. Indeed, the well-known but poorly understood words of Karl Marx on rights do *not*, as most believe, condemn rights *per se*. Rather, they condemn the ways in which rights talk can confuse issues rather than infuse working-class folk with empowerment toward freedom to sell their labor power. Indeed, a generous interpretation of Marx implies rather strongly that he did not condemn all rights, but rather condemned rights of bourgeois culture. This implies that there are some rights that Marx does not condemn, such as the right to sell one's own labor power freely, without coercion, and the right to self-determination, of which it is an instance. Indeed, the right to freedom of expression, thought by most in the Western world to gain its initial expression in the writings of John Stuart Mill,[10] was in fact articulated in rather clear terms by none other than Marx himself.[11] With this duly revisionistic understanding of the history of philosophy where Marx is concerned, we then have a duty to revise our misconceptions about what genuinely divides political liberalism from Marxism. It is not my contention that such a conceptual division is much like the emperor's new clothes. I argue that it is not the case that political liberals such as Rawls respect rights while Marx does not; rather, I contend that political liberalism respects a certain cluster of rights (and not others), while Marxism respects another cluster of rights (and not others), whereas there are some rights that both liberals and Marxists respect, perhaps even with equal strength of commitment. Along the way, the nature and value of rights is clarified along the lines analyzed by Joel Feinberg.[12] The relevance of this portion of the book is that it is helpful to understand what truly distinguishes liberal societies from nonliberal ones (in part in terms of the kinds of rights each respects). For in attempting to construct a viable system of international law, such rights must be considered to be important candidates for inclusion in a legal system

[10] John Stuart Mill, *On Liberty* (London: Longman's, Green, and Co., 1865).

[11] J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech," *Wayne Law Review*, 48 (2002), p. 1097.

[12] Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980).

that would morally obligate peoples to it. Moreover, unless there is a proper understanding of what indeed distinguishes liberal societies from nonliberal ones, it will be difficult to accurately interpret whatever legal rules are meant to protect the rights of states and individuals under international law, and global justice will be impossible.

But what is a *collective* moral right? Under what conditions might it accrue? To what sorts of collectives might it accrue, and why? Chapter 6 explores the nature of collective moral rights. It then provides a philosophical analysis of the conditions under which collective rights accrue. A version of Moral Rights Collectivism is defended against Moral Rights Individualism; the latter denies the very possibility of collective moral rights. This analysis has implications for a legal system seeking to become reasonably just and well ordered. Collective rights must not be written off as harmful or nonsense, as many would have us believe. Both individual and collective rights are important to the functioning of a well-ordered legal system. The question then becomes one of which individuals and collectives ought to have rights and under what conditions, not whether or not any collectives ought to have rights.

Having discussed justice and rights in a global context, it is important to explore some of the deeper ramifications of some such rights in a contemporary nonideal setting. Chapter 7 takes up what seems to be an intractable problem in U.S. and some other societies, namely, the matter of illicit drugs. Taking a uniquely indigenous perspective, this chapter uses critically Michael Walzer's and Rawls' notions of humanitarian intervention[13] and the duty of assistance,[14] respectively, in order to argue that recent and current U.S. policies in support of the Colombian government are unwarranted. A wholly new analysis of the conditions of humanitarian intervention is articulated and applied to the drug problem between the U.S. and Colombia, one having implications for international law.

Why another book on justice and rights? One reason is that this book is written within the mainstream analytical tradition of philosophy of law. Yet it explores the above mentioned problems with an eye toward the indomitable difficulties of racism and class, which are rarely, if ever, taken into account in Anglo-American analytical philosophy of law. Although critical race theorists, most of them legal scholars rather than philosophers, analyze legal problems from the perspective of race and class, they do not do so within the analytical philosophical methodological paradigm. I analyze legal

[13] Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, Inc., 2000).

[14] Rawls, *The Law of Peoples*.

conceptions philosophically and from within the mainstream methodological paradigm of analytical jurisprudence, taking my lead from Joel Feinberg. No call for paradigmatic revolution is made herein. Rather, what is called for is more precise and even deeper (though admittedly not comprehensive) analysis of matters of constitutional interpretation, justice, and rights.

However, it would be a mistake to infer from the fact that this book's propositions are argued and analyzed from within the mainstream analytical tradition of philosophy of law that its conclusions are predictable or always mainstream. On the contrary, the chapter on constitutional interpretation not only places for the first time Dworkin's theory of law as integrity in part of its broader legal theoretical context, demonstrating that it is not in any obvious way significantly novel, but it also (subsequent to defending Dworkin's view from some leading criticisms) sets forth and defends a new version of the theory of legal interpretation known as constitutional constructionism. It is a theory that is neither originalist nor intentionalist, but completely constructionalist. Unlike Dworkin's view that judges must remain faithful to established law, "constitutional coherentism" does not hold such a view. For the adage that "the law must serve the people" is taken most seriously by constitutional coherentism. In demythologizing the U.S. Constitution, constitutional coherentism seeks to place law totally in the hands of reasonable people who take democracy and law seriously.

Moreover, this book's originality is not found in its analysis of the nature and value of rights. The analysis of rights adopted by *Justice and Rights* is adapted from Feinberg's famous and well-received analysis of rights, except that instead of grounding the nature of rights in valid claims, I do so in either valid claims *or* interests, as the case may be. Additionally, I argue that the nature of rights, whether legal or moral, is such that they can be possessed by certain decision-making collectives as well as individual agents. I take this to be a logical extension of Feinberg's position on rights that makes his notion of the nature and possession of rights[15] coherent with his conception of responsibility[16] of both individuals and collectives of certain sorts. Perhaps even more groundbreaking is my refutation of the popular view that what distinguishes political liberalism from Marxism is that the former respects rights, while the latter does not. Despite several detailed arguments, textual and otherwise, to the contrary, I relieve this position from its current and undeserved place in respectable academia. What is now needed is a much more nuanced and deeper analysis of political realities that would properly

[15] Feinberg, *Rights, Justice, and the Bounds of Liberty*; Feinberg, *Freedom and Fulfillment*.

[16] Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970).

classify these eminent political philosophies that have influenced global politics so powerfully and for several generations.

Finally, as a manner by which to apply some of the principles of international law set forth by Rawls in *The Law of Peoples*, a novel approach to the problems that have plagued Colombians for decades is articulated. But the perspective given is not one of a U.S. supporter, or even one of a supporter of either the Colombian government or the rebel forces seeking to replace it. Rather, it is a specifically indigenous perspective, one that sees the intractable quagmires of the region in their deeper complexity, but nonetheless reminds readers that the true possessors of territorial rights in the scenario are the indigenous U'was. Whatever serves as a genuine solution to the problems engulfing Colombia at this time must account for this fact, among other things. Justice in Colombia can find no other route except through this truth. Perhaps it is at this juncture that this book joins well to its companion volume on responsibility and punishment insofar as each argues in favor of justice for indigenous peoples.[17]

In the end, it is hoped that my arguments and analyses will have enabled us philosophers of law to move forward a step or two in our thinking about the problems I address. And I certainly pray that Brand Blanshard's words apply to the writing of this philosophical treatise: "If he is not right, at least he deserves to be; he puts all his cards on the table; he keeps nothing back; he fights, thinks, and writes fairly, even to the point of writing clearly enough to be found out."[18] These insightful words certainly apply to Feinberg. But I offer this book in the hope that they also apply, at least in some meaningful measure, to what I have written herein. In light of Bernard Williams' words that begin this Introduction, I shall "emphasize reality at the expense of philosophical abstraction" in order to avoid making "sensible concepts to dissolve into complex definitions."[19]

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[17] J. Angelo Corlett, *Responsibility and Punishment,* 3rd Edition (Dordrecht: Kluwer Academic Publishers and Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9.

[18] Brand Blanshard, *On Philosophical Style* (Manchester: Manchester University Press, 1954), p. 24.

[19] Williams, *In the Beginning Was the Deed*, p. 64.