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RAWLS, RACE, AND REASON

*Sheila Foster**

One of the provocative questions posed by this conference is the relationship between John Rawls's extensive philosophical work on justice and matters of race.¹ As one of the panels queried, *what does Rawls have to say about race—and in particular racial justice—and what do scholars of race² have to say about Rawls?*

The cursory answer to both questions is “not much.” However, this cursory response does not end the inquiry. Rawls's theory is a theory of justice, and race scholars are very much engaged in a “justice” project—inquiring what racial justice might look like and how political and legal principles might support (or undermine) it. So it is, in the end, insufficient to say that neither has anything to say about one another, even if in a formal sense this is true.

Peculiarly, as others have written about here, Rawls said very little about matters involving race, although he might have easily said more.³ Similarly, as a quick search in law review databases for references to “Rawls” and “race” quickly reveals, race scholars have said very little about Rawls. It is this latter phenomenon that I want to comment on briefly. Embedded in this latter inquiry is the suspicion that Rawls and race scholars are speaking past one another. And, in a very real sense, they are.

The central underpinning of Rawls's theory of justice consists of the notion that equal and rational people (in the original position/behind a veil of ignorance) would agree to live by a set of principles decided upon together. Furthermore that such free and rational people would agree upon both a liberty principle (that every person has extensive basic liberty rights), and a difference principle (that social and economic inequalities are to be arranged so that they benefit the least advantaged, while upholding equality of opportunity).

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1. See, e.g., John Rawls, *A Theory Of Justice* (rev. ed. 1999); John Rawls, *Political Liberalism* (1996).

2. Throughout this essay, I equate “scholars of race” with critical race scholars. I do so out of acknowledgement that most contemporary scholarship on race in legal literature falls within this genre, broadly speaking.

3. See Anita L. Allen, *Race, Face and Rawls*, 72 *Fordham L. Rev.* 1677 (2004); Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 *Fordham L. Rev.* 1697 (2004); Seana Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *Fordham L. Rev.* 1643 (2004).

Although feminists and others have thoughtfully critiqued the shortcomings of this theory as applied to various groups in society,⁴ the basic notion behind Rawls's theory stands secure as a very appealing one: Justice—and in particular just distributions—can be achieved through a fair process that is open to all—regardless of race, gender, ethnicity and other characteristics—and which attends to benefiting those least well off.

Taking this theory at face value, why haven't race scholars embraced this appealing notion to construct arguments for housing and educational equality, environmental justice, and the like? Ultimately, the answer lies in a set of central presumptions embedded in Rawls's original position, from which contemporary race scholars diverge.

One of the central questions posed by contemporary race scholars is: Why, after certain fundamental liberties, rights and social goods historically denied to certain racial groups have been distributed to those groups, is there still so much racial injustice that pervades contemporary society?⁵ What might a Rawlsian concept of justice have to say about this basic inquiry? To be sure, Rawls was aware, and even concerned, on a very foundational level about the problems of race and racial discrimination in society. As Tommie Shelby persuasively writes, "[t]he conviction that racial discrimination is unjust helps to shape Rawls's sense of what is morally relevant and what is morally arbitrary from the standpoint of social justice."⁶ This conviction, as Shelby writes, is enshrined in the original position where parties do not know their racial identity or the relative social position of the various races in society so that "[the parties] have no rational basis for choosing principles that would favor one race over another" or otherwise entrench existing racial bias.⁷

Consider also that our antidiscrimination norms (contained both in civil rights statutes and constitutional jurisprudence) arguably enforce the neutrality of the original position—i.e., the neutrality of the process of distribution. The basic principle embraced by antidiscrimination norms is that basic social goods—housing, education, and employment—should not be distributed according to the largely irrelevant characteristics of race, gender, ethnicity and religion.⁸ Embedded in this antidiscrimination norm is that once

4. See, e.g., Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *Fordham L. Rev.* 1537 (2004).

5. See generally Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331 (1988).

6. Shelby, *supra* note 3, at 1699.

7. *Id.* at 1700.

8. See Robert Post, *Prejudicial Appearances: The Logic of American*

stripped of the influence of these characteristics, decisions about what fair social institutions and distributions might look like can be made in a reasoned, rational and impartial fashion.⁹

This is classical liberalism at its best, in its assumption of a *subject* free to choose (autonomous individual), the existence of an *objective* reality (like principles of justice) that can be discerned, and *reason*—“the bridge between the subject and the object that enables subjects to move from their own blindness to ‘enlightenment.’”¹⁰ Contemporary race scholars, however, consciously diverge from the assumptions of classical liberalism (that characterize much of traditional civil rights discourse and law), and hence from Rawlsian notions of justice. That is, the very heuristic—that of reason, rationality, and impartiality—underlying Rawls’s *A Theory of Justice* is itself a problem for “racial justice.”

For contemporary race scholars, the answer to why so much racial injustice persists today is answered by a deep skepticism and interrogation *about* reason, rationality and impartiality themselves. As critical race scholars have powerfully argued, race/racism is not something that can easily be rendered “irrelevant” or neutralized. As Angela Harris writes, race scholars believe that “racism is not only a matter of individual prejudice and everyday practice; rather, race is deeply embedded in language, perceptions, and . . . even ‘reason’ itself.”¹¹ So in the turn away from classical liberalism, race scholars embrace the notion that “racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts.”¹² Moreover, as history has constantly shown, “racism can coexist happily with formal commitments to objectivity, neutrality, and colorblindness.”¹³

As such, the antidiscrimination guarantee, and the Rawlsian

Antidiscrimination Law, 88 Cal. L. Rev. 1, 10 (2000) (“In passing Title VII, the Court has said, ‘Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.’” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion))).

9. *Id.* at 11. As a result, American antidiscrimination law typically requires employers, except in exceptional and discrete circumstances such as affirmative action, to make decisions as if their employees did not exhibit forbidden characteristics, as if, for example, employees had no race or sex. This is what underwrites the important trope of “‘blindness’ that ‘has played a dominant role in the interpretation of antidiscrimination prohibitions.’” *Id.* “Blindness renders forbidden characteristics invisible; it requires employers to base their judgments instead upon the deeper and more fundamental ground of ‘individual merit’ or ‘intrinsic worth.’” *Id.*

10. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 Cal. L. Rev. 741, 751 (1994).

11. *Id.* at 743.

12. *Id.*

13. *Id.* at 759.

neutrality that it mirrors, can both “discredit and rationalize practices that perpetuate racial stratification.”¹⁴ Whether this tension between liberal justice and racial justice is expressed in the debate around individual versus group rights, race-consciousness versus colorblindness, the central dilemma is the same. The abstract individual in the original position is very difficult for race scholars to reconcile with the historical and continuing reality of racial subordination. As Glen C. Loury has recently remarked in rejecting liberal justice in favor of “racial justice,” “I cannot abide the imposition of abstract strictures of neutrality upon a game in which systematically nonneutral practices have left so many raced and stigmatized outsiders with so few good cards to play.”¹⁵

Thus, where Rawlsian justice ultimately places faith in the existence of reason, rationality and impartiality, race scholars would put each of these concepts at the center of the justice inquiry and interrogate them. For instance, contemporary race scholars seek to expose the racism within seemingly neutral concepts—like “reasonableness” and “merit”—that are employed by decision makers when distributing social goods, and that shroud decision-making processes in a cloak of rationality and impartiality.¹⁶ They have critically probed the operation of social structures—like the market—that are hidden beneath the veil of reason and naturalized.¹⁷ And, most of all, they would place race (and racial subordination) at the center of analysis in asking whether certain distributional outcomes are fair or just.

In the final analysis, however, contemporary race scholars are deeply ambivalent about a complete turn away from classical liberal tenets. As the literature suggests, they want to neither completely jettison nor uncritically privilege the Rawlsian faith in reason and impartiality. That is, on the one hand, race scholars recognize that an uncritical reliance on such tenets underlies some of the most intractable problems of racial stratification and injustice in our society today. On the other hand, “faith in reason and truth and belief in the essential freedom of rational subjects have enabled people of color to

14. Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 Cal. L. Rev. 77, 106 (2000).

15. Glen C. Loury, *The Anatomy of Racial Inequality* 122 (2002).

16. See, e.g., Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* (1997); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 Wis. L. Rev. 105, 130-47; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 968-97 (1996); David B. Wilkins, *On Being Good and Black*, 112 Harv. L. Rev. 1924 (1999) (reviewing Paul M. Barrett, *The Good Black: A True Story of Race in America* (1999)).

17. Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 58-70 (2001).

survive and resist subordination.”¹⁸

Ultimately, the tenets of classical liberal theory, and hence Rawlsian justice, represent a sort of “moral utopianism”¹⁹ that is essential for all of us who care about “justice” to hold on to, even if their promises have yet to be fully realized. Rawls’s belief in the ability of reason to lead to just results, and that attending to the needs of those less well off is the obligation of every rational person, is undeniably alluring in its power to beckon the best qualities in each of us. Contemporary race scholars certainly do not aim to undermine these principles, or to ignore their moral force. Indeed, what both contemporary race scholars and Rawls ultimately share, I believe, is a desire to make these aspirational principles and goals real for those who have held onto them for so long without reaping their promises. In this sense, Rawls and race scholars aren’t so much speaking past one another as they are having a difficult time finding a common fertile ground in which to plant the seeds of justice.

18. Harris, *supra* note 10, at 753; see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 357 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401, 433 (1987).

19. I borrow this term from Patricia J. Williams, *The Pain of Word Bondage, in The Alchemy of Race and Rights: Diary of a Law Professor* 146, 154 (1991).

Notes & Observations