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Symposium: Rawls and the Law: Editors' Foreword

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SYMPOSIUM

RAWLS AND THE LAW

Editors' Foreword

On November 7th and 8th, 2003, Fordham University School of Law held the third in a series of conferences in constitutional and legal theory,¹ entitled "Rawls and the Law." Professor John Rawls of Harvard University is widely regarded as the most important political philosopher of the twentieth century. As James E. Fleming, Professor of Law at Fordham, and the organizer of this conference, observed in his introductory remarks:

Many talk about how important Rawls's work is, not only for its substantive contributions to political philosophy but also for its very revival of political philosophy itself. Indeed, his work has inspired people to believe that we can reason and make arguments about justice rather than merely express our subjective opinions and the like. More than that, Rawls's work is inspiring and instructive as a model of how to construct a theory (and a magisterial one at that)!

Many also talk about Rawls's humility, which of course itself was inspiring. But his humility was not merely a personal and professional virtue. It also applied to his wisdom in judging what we can expect from a theory (even a monumental and magisterial theory like his own). He was not daunted if a theory could not do everything that one might hope for it or that a critic might demand of it.

The focus of this conference is on the implications of Rawls's work for law. Now, you might think, surely that has all been thoroughly worked over. But it has not. Let me give you a graphic illustration of that. Five of Rawls's seven books have been published in the last five years,² and a sixth, *Political*

1. See Symposium, *Fidelity in Constitutional Theory*, 65 Fordham L. Rev. 1247, 1247-818 (1997); Symposium, *The Constitution and the Good Society*, 69 Fordham L. Rev. 1569, 1569-2200 (2001).

2. See John Rawls, *The Law of Peoples* (1999); John Rawls, *Collected Papers* (Samuel Freeman ed., 1999); John Rawls, *A Theory of Justice* (rev. ed. 1999); John Rawls, *Lectures on the History of Moral Philosophy* (Barbara Herman ed., 2000); John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed., 2001). Another book, *Lectures on the History of Political Philosophy*, is being edited by Samuel Freeman.

Liberalism, was originally published in 1993. (We must thank several people, Mardy Rawls, Samuel Freeman, Erin Kelly, and Barbara Herman, for all their work in bringing these five recent books to publication.) Only the first edition of *A Theory of Justice*, originally published in 1971, has been thoroughly worked over. Much work remains to be done not only with *A Theory of Justice* but also these other works. We hope to do some of that work in this conference.

While there have been a number of conferences or symposia on Rawls's individual books—such as *A Theory of Justice* (1971) and *Political Liberalism* (1993),³ there have been none with this conference's focus—to explore the implications of Rawls's work for the law. Over thirty outstanding scholars gathered for the Fordham conference. Professor Ronald Dworkin delivered the keynote address. The conference was organized into seven panels, whose presentations and deliberations were guided by the following themes:

Panel 1: *The Constitutional Essentials of Political Liberalism*. What are the implications of Rawls's conceptions of justice as fairness and political liberalism for constitutional theory? Might his account of constitutional essentials provide a useful guiding framework for conceiving the scheme of basic liberties embodied in the American Constitution? How thin are the commitments of our Constitution as compared with our richer commitments to constitutional justice and political justice? What are the implications of Rawls's work for theory of judicial review and for enforcement of constitutional rights and obligations outside the courts through legislative and executive institutions?

Panel 2: *Equal Citizenship: Gender*. Are Rawls's conceptions of justice as fairness and political liberalism compatible with—indeed, do they require—a liberal feminism that is committed to securing the status of equal citizenship for women? Do they obligate the government to eradicate the vestiges of gender subordination? Does Rawls adequately grapple with feminist critiques of his theory? Can a Rawlsian political liberalism simply incorporate liberal feminist arguments, such as those exemplified by Susan Moller Okin's *Justice, Gender*

3. See, e.g., Symposium, *John Rawls's Political Liberalism*, 69 Chi.-Kent L. Rev. 549 (1994); Symposium, *Political Liberalism*, 94 Colum. L. Rev. 1813 (1994); Symposium, *John Rawls's Political Liberalism*, 75 Pac. Philosophical Q. 165, 165-387 (1994); Symposium on *John Rawls*, 105 Ethics 4 (1994); Symposium, *Rawlsian Theory of Justice: Recent Developments*, 99 Ethics 695 (1989); Symposium, *John Rawls' A Theory of Justice*, 40 U. Chi. L. Rev. 486 (1973). See also, though not officially denominated a symposium, the three articles in one issue: Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973); Thomas M. Scanlon, Jr., *Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 1020 (1973); D.J. Bentley, *John Rawls: A Theory of Justice*, 121 U. Pa. L. Rev. 1070 (1973).

and the Family? What does justice as fairness entail for regulation of the family?

Panel 3: *Equal Citizenship: Race and Ethnicity*. One might readily assume that Rawls's conceptions of justice as fairness and political liberalism are committed to a robust principle of equal citizenship for all, whatever one's race or ethnicity. Yet one might ask, as Seana Shiffrin does, "Why does Rawls say so little about race? And why has nobody noticed?" Furthermore, why have scholars of race and ethnicity said so little about Rawls? To put the issues differently, why has no one done for Rawls and race what Okin did for Rawls and gender? What would a Rawlsian conception of racial justice look like? Would it differ in significant respects from leading available anti-caste or anti-subordination conceptions of racial equality?

Panel 4: *The Law of Peoples*. What are we to make of Rawls's *The Law of Peoples* in relation to *A Theory of Justice*? Before Rawls wrote *The Law of Peoples*, one might reasonably have expected that his conception of justice as fairness would yield a strong universalist, cosmopolitan conception of international human rights. Does Rawls in *The Law of Peoples* set his sights too low, e.g., by tolerating merely decent peoples and by accepting regimes that fall too far short of realizing the commitments of justice as fairness and to honoring international human rights? What more generally are the implications of *The Law of Peoples* for international law, international human rights, multiculturalism, and immigration?

Panel 5: *Tort*. Might Rawls's conception of justice as fairness underwrite fairness or reciprocity theories of tort law that are superior—both as normative and descriptive accounts—to utilitarian or efficiency theories? Does Rawls's account of the basic structure of a just society leave open the question of how systems of private law should be structured, or does it entail a certain basic structure of private law? Does his analysis of "reasonableness" (as opposed to "rationality") yield important insights into the "reasonable person" standard of negligence law? Rawls has revitalized and dominated the theory of distributive justice; much of law, including torts, appears concerned with corrective justice; what is the relation between distributive justice and corrective justice?

Panel 6: *Property, Taxation, and Distributive Justice*. Do Rawls's conceptions of distributive justice and defense of the difference principle have implications for tax law and property law? What measures might offer a reasonable likelihood of better realizing such commitments than do current arrangements and proposals on the political table? A

conception of justice in taxation as developed by Thomas Nagel and Liam Murphy? A stakeholder society scheme as proposed by Bruce Ackerman and Anne Alstott? To what extent are efforts to provide tax incentives for socially constructive activities, e.g., rearing children, consistent with Rawlsian conceptions of fairness?

Panel 7: *The Idea of Public Reason Revisited*. What constraints does Rawls's idea of public reason impose upon political and legal justification in a constitutional democracy such as our own? What form should constitutional interpretation by courts take in circumstances of reasonable moral pluralism? Is the Supreme Court, as Rawls suggested, an "exemplar of public reason"? How do or should legislatures and executives, too, exemplify public reason? How inclusive or exclusive should the idea of public reason be with respect to religious arguments grounded solely in comprehensive moral conceptions? What implications does the idea of public reason have for interpretation of the religion clauses of the United States Constitution?

The *Fordham Law Review* is honored to publish the papers presented, augmented and revised in many cases in light of the colloquy that followed each panel, as well as the Keynote Address, *Rawls and the Law*, delivered by Professor Ronald Dworkin. The issue, for the most part, follows the order and organization of the conference.

We would like to thank Dean William Michael Treanor for his ongoing support of the *Law Review*; the Fordham Law School Office of Academic Programs, in particular Helen Herman and Darin Neely, for their help in the planning and administering of this conference; and the Fordham Law School Library Administration and Staff, in particular Paul Miller, Reference Librarian, for his enthusiastic assistance in the publication of this conference. A number of Fordham Professors moderated panels and contributed papers: Michael Baur, Martin S. Flaherty, James E. Fleming, Sheila R. Foster, Abner S. Greene, Tracy E. Higgins, Charles A. Kelbley, Linda F. Sugin, and Benjamin C. Zipursky. We acknowledge and greatly appreciate the presence of Margaret Fox Rawls at the conference, and thank her for providing us with her painting of Professor Rawls included in this issue. Our deepest gratitude is to Professor James E. Fleming, who conceived of the conference and served as its organizer. In addition to working closely with the Editors in the production of this issue of the *Fordham Law Review*, Professor Fleming's service this year as Moderator to the journal is truly invaluable.