

# LIBERALISM WITHIN THE LIMITS OF THE REASONABLE ALONE: DEVELOPMENTS OF JOHN RAWLS' POLITICAL PHILOSOPHY, ITS POLITICAL POSITIVISM, AND THE LIMITS ON ITS APPLICABILITY

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The Enlightenment and the Age of Liberalism that it spawned are among the great spiritual and intellectual movements in the history of Western civilization.<sup>1</sup> When John Rawls published *A Theory of Justice* in 1971, he set in motion a powerful and inspirational force in that tradition as well as in the consciousness of his legions of admirers, interpreters, students, and critics. His abstract theory of justice offered the promise of a coherent and schematic account of a great number of our very concrete moral/political judgments:<sup>2</sup> he combined the immense

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1. See Theodore M. Greene, *The Historical Context and Religious Significance of Kant's Religion*, in RELIGION WITHIN THE LIMITS OF REASON ALONE (Immanuel Kant, ed. 1960).

2. Many courts have been impressed by this promise and have factored Rawls into their decision-making. Rawls has factored prominently in decisions from the federal bench although citation in the U.S. Supreme Court has eluded him. See *Goetz v. Crosson*, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring) (citing Rawls with respect to procedural justice and veil of ignorance in context of due process discussion); *West v. Bowen*, 879 F.2d 1122, 1145 n.15 (3d Cir. 1989) (Mansmann, J., concurring in part and dissenting in part) (citing Rawls and Michelman in context of discussion of welfare rights); *United States v. Bodiford*, 753 F.2d 380, 382 n.10 (5th Cir. 1985) (citing Rawls to support ancient maxim *nulla poena sine lege*); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 285 (2d Cir. 1981) (Mansfield, J., dissenting); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980) (citing Rawls regarding right of publicity), *cert. denied*, 449 U.S. 953 (1980); *Flynt v. Leis*, 574 F.2d 874, 877 n.5 (6th Cir. 1978) (referring to Rawls for discussion of reasons underlying basic procedural due process rights), *rev'd*, 439 U.S. 438 (1979); *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 938-39 (D.C. Cir. 1973) (Wyzanski, J., dissenting) (citing Rawls for rights of racial minority to bargain directly with employer), *rev'd sub nom.*, 420 U.S. 50 (1975); *Levin v. Harleston*, 770 F. Supp. 895, 900-01 (S.D.N.Y. 1991) (referencing Rawls with regard to N.Y. TIMES editorial and response letter regarding Howard Beach incident in context of civil rights action), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992); *Martin v. Dugger*, 686 F. Supp. 1523, 1569 n.18 (S.D. Fla. 1988) (dismissing economic and Rawlsian approaches in death case), *later proceeding*, 708 F. Supp. 1265 (S.D. Fla. 1989), *aff'd*, 891 F.2d 807 (11th Cir. 1989), *cert. denied*, 498 U.S. 881 (1990); *Runway 27 Coalition, Inc. v. Engen*, 679 F. Supp. 95, 105 (D. Mass. 1987) (discussing Rawls in context of preferring welfare of society as a whole over individual entitlement); *In re Alyucan Interstate Corp.*, 12 B.R. 803, 805 n.2 (Bankr. D. Utah 1981) (invoking concept of reflective equilibrium); *Melville v. American Home Assurance Co.*, 443 F. Supp. 1064, 1101 n.61 (E.D. Pa. 1977) (citing Rawls with respect to complex conflict of laws issue), *rev'd*, 584 F.2d 1306 (3d Cir. 1978); *United States v. McDaniels*, 379 F. Supp. 1243, 1249 (E.D. La. 1974) (citing Rawls in discussion of "interest of justice" test contained

in Federal Rule of Criminal Procedure); *Winningham v. HUD*, 371 F. Supp. 1140, 1153 n.15 (S.D. Ga. 1974) (citing Michelman on Rawls), *aff'd*, 512 F.2d 617 (5th Cir. 1975); *Ortiz v. Hernandez Colon*, 385 F. Supp. 111, 117 (D. P.R. 1974) (Rawls factors in discussion of voting rights), *remanded*, 511 F.2d 1080 (1st Cir. 1975) *vacated and remanded on appeal*, 429 U.S. 1031 (1977); *United States v. Lucas*, 2 M.J. 834, 838-39 (A.C.M.R. 1976) (Costello, J., concurring) (citing Rawls in context of "argument for greater control of individual conduct" for proposition that "even in a near-ideal society some human tendencies can only be influenced by the prospect of certain and unfavorable outcomes upon deviant behavior").

Rawls has perhaps been even more prominent in the state courts, particularly Missouri, New York, and Massachusetts. See *In re Bryant*, 542 A.2d 1216, 1220 (D.C. 1988) (discussing issue of substituted judgment invokes Robertson, *infra*, *In re Boyd*, 403 A.2d 744, 751 n.12 (D.C. 1979)) discussing substituted judgment citing Robertson, *infra*; *Gorham v. United States*, 339 A.2d 401, 429 n.1 (D.C. 1975) (citing Rawls in discussion of mens rea in the common law); *Commonwealth v. Davis*, 401 N.E.2d 811, 820 n.22 (Mass. 1980) (Rawls cited in context of discussion of ex post facto doctrine); Opinion of the Justices to the Senate, 484 N.E.2d 95, 98 n.4 (Mass. 1985); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 430 n.15 (Mass. 1977) (discussion of philosophical basis of substituted judgment rule invokes Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 63 (1976) (quoting J. Rawls); *People v. Juillet*, 475 N.W.2d 786, 810 n.3 (Mich. 1991) (citing Rawls with respect to reflective equilibrium and the similarity to judicial decision-making); *Williams Int'l Corp. v. Smith*, 375 N.W.2d 408, 415 n.8 (Mich. Ct. App. 1985) (nuclear weapons protestors cite Rawls on civil disobedience and court cites Rawls to undermine their privacy argument); *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 859 (Minn. 1976) (Rogosheke, J., concurring specially in case involving involuntary intoxication cites Rawls and H.L.A. Hart for importance of mens rea to criminal responsibility); *Hall v. Wood*, 443 So. 2d 834, 838 (Miss. 1983) (variation of first principle of justice used to describe rights of use and enjoyment); *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd.*, 457 So. 2d 1298, 1321 (Miss. 1984) (in context of issues involving "the distribution of material and highly valuable resources," the court acknowledges that fairness is "among the more noble purposes of the state. It is a fundamental component of the idea of justice" and cites Rawls for this point); *Lowe v. Norfolk and Western Ry. Co.*, 753 S.W.2d 891, 896 (Mo. 1988) (Donnelly, J. dissenting) (quoting *Missouri Pac. R.R. Co.*, *infra* as a "brave attempt to implant Rawls' principle of fairness in the law of Missouri. But it was not to be."); *Fahy v. Dresser Indus. Inc.*, 740 S.W.2d 635, 645 (Mo. 1987) (quoting Rawls in product liability action) *cert. denied* 485 U.S. 1022 (1988); *Jensen v. ARA Servs. Inc.*, 736 S.W.2d 374, 381-82 (Mo. 1987) (en banc) (quoting Rawls regarding principle of fairness); *Barnes v. Tools and Mach. Builders, Inc.*, 715 S.W.2d 518, 523 (Mo. 1986) (Donnelly, J., dissenting) (referring to *A Theory of Justice* as an "awesome contribution to the subject of distributive justice" and basing virtually entire dissent on Rawls); *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 600 (Mo. 1986) (en banc) (Donnelly, J., dissenting) (Rawls' principle of fairness invoked in concurrence in strict products liability comparative negligence case) (superseded by statute as stated in *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993)); *Penner v. King*, 695 S.W.2d 887, 893 (Mo. 1985) (Donnelly, J., concurring) (citing Rawls prominently with respect to priority of liberty in case addressing rights of conscience); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 444 (Mo. 1984) (Donnelly, J., dissenting) (citing Rawls on asbestos liability); *Parks v. Union Carbide Corp.*, 602 S.W.2d 188, 193 n.1 (Mo. 1980) (Welliver, J. dissenting) (referring to principle of fairness); *Steinman v. Strobel*, 589 S.W.2d 293, 296 (Mo. 1979) (referring to principle of fairness); *Missouri Pac. RR. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 469 (Mo. 1978) (acknowledging a principle of fairness in the history of the law of joint and concurrent tortfeasor liability linked to Rawls' account that "is the basis of our fault-based system of tort liability"); *Hampton v. Safeway Sanitation Servs. Inc.*, 725 S.W.2d 605, 607 (Mo. Ct. App. 1987) (following *Whitehead & Kales* and principle of fairness); *K-Mart Corp. v. Ponssock*, 732 P.2d 1364, 1368 n.4 (Nev. 1987) (invoking Rawls in support of justice of affording tort remedy); *State v. Komisarek*, 362 A.2d 190, 191 (N.H.

intuitive pull of contractarianism and its pragmatic applicability with a direct appeal to our noumenal selves.<sup>3</sup> *A Theory of Justice* promised comprehensiveness and concreteness, and a deontological alternative to various forms of utilitarianism, including the utilitarian variants which may fall under the heading of law and economics.

Now, a tendency towards abstractness<sup>4</sup> and limitation (both

1976) (citing Rawls on *ex post facto* doctrine in context of criminal action); *People v. Shepard*, 409 N.E.2d 840, 848 (N.Y. 1980) (Fuchsberg, J., dissenting) (citing Rawls as to power of state to overwhelm a primary interest of the individual); *In re Nathan N.*, 389 N.Y.S.2d 963, 967 n.6 (N.Y. Fam. Ct. 1976) (citing Juvenile Justice Standards Project (Amer. Bar Assn. Inst. of Jud. Admin. 1976) at p.29, quoting Rawls), *aff'd*, 391 N.Y.S.2d 599 (N.Y. App. Div. 1977); *Auld v. Estridge*, 382 N.Y.S.2d 897, 904 (N.Y. App. Div. 1976) (citing Rawls in case involving dissolution of partnership); *Repetti v. Gil*, 372 N.Y.S.2d 840, 848 (N.Y. App. Div. 1975) (using Rawls' priority of liberty arguments to question constitutionality of statute condoning arrest for civil misdeeds).

3. No doubt, even if Rawls has redirected his view away from many of the Kantian transcendentalisms, there were distinct and inspiring moments, almost Zen-like in quality, in *A Theory of Justice*. Thus at the end of *A Theory of Justice*, Rawls discusses why we should have any interest in the centerpiece of his view, the hypothetical contract point of view of the original position:

Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*: it is to regard the human situation not only from all social but also from all temporal points of view. The perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world. And having done so, they can, whatever their generation, bring together into one scheme all individual perspectives and arrive together at regulative principles that can be affirmed by everyone as lives by them, each from his own standpoint. Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view.

JOHN RAWLS, *A THEORY OF JUSTICE* 587 (1971) [hereinafter *THEORY OF JUSTICE*]. The powers of such an appeal have been lost in Rawls' more recent writings. In *Political Liberalism*, Rawls aims to distinguish comprehensive moral views from the core of the domain of the political, which is now his focus.

4. Thomas Pogge commented:

[T]he trend of Rawls's later work [post-*A Theory of Justice*] [is] toward abstraction, vagueness, and conservatism. I see this trend as due, in large part, to the widespread criticism of his work, which, in this decade at least, has been predominantly conservative. Rawls has been exceptionally unwilling to disagree sharply with his critics. Reluctant to claim privileged access to his work, he has shied away from saying (and showing) clearly and straightforwardly that a particular reading of it is just plain wrong. Instead, aiming for an overlapping consensus among political philosophers as well, he has made every conceivable effort to accommodate the moral positions of others, even where such accommodation had diluted the central moral statement of his own conception of justice.

With hindsight it seems fair to say that this has not been a winning strategy . . . . [T]his strategy has moved the debate in exactly the wrong

practical and aspirational) that had been pregnant in his post-*A Theory of Justice* writings,<sup>5</sup> has become manifest in *Political Liberalism* as Rawls states:

Sometimes one hears reference made to the so-called Enlightenment project of finding a philosophical secular doctrine, one founded on reason and yet comprehensive.

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Whether there is or ever was such an Enlightenment project we need not consider; for in any case political liberalism, as I think of it, and justice as fairness as a form thereof, has no such ambitions.<sup>6</sup>

The Rawls of *Political Liberalism*<sup>7</sup> has taken a problematic and ironic turn towards simultaneously limiting the aspirations of his theory of justice and generally increasing its abstractness. Nonetheless, he generates, along the way, some startling particular conclusions but in a narrow range of questions which

direction. As the political content of Rawls's conception has become more and more vague and indeterminate, attention has shifted to the philosophical underpinnings of the theory. We are back to issues in moral psychology, metaethics, and moral epistemology—to debates that are metaphysical in style, if not in substance.

THOMAS W. POGGE, *REALIZING RAWLS* 4 (1989). In more recent writings Rawls has tended to emphasize the "importance of his works for enhancing the legitimacy of our social institutions." *Id.* at 214. Pogge has stated:

On the view stressed in the later writings, the importance of Rawls's work consists then in finding a way of arranging prevalent considered judgments on all levels of generality into a unified and perspicuous whole, giving due weight to the values alive in this culture—to the liberty of the ancients and that of the moderns; to freedom, equality and fraternity; to the ideas of Hobbes, Locke, Rousseau, Kant, and Sidgwick; to rational choice theory and the perspective *sub specie aeternitatis*.

*Id.* at 213 (citations omitted).

5. The tendency can even be identified in *A Theory of Justice* itself.

6. JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1993) [hereinafter *POLITICAL LIBERALISM*].

7. Rawls acknowledges that there has been a shift in justice as fairness—now it is inevitable that many interpreters will see at least an early Rawls and a later Rawls—and he is candid about the process of transformation in his own views:

I have tried to set out how I now understand justice as fairness as a form of political liberalism and why changes in it were necessary. These remarks emphasize the serious internal problem that forced those changes. I do not mean, however, to give an account of how and why those changes were actually made. I don't think I really know why I took the course I did. Any story I would tell is likely to be fiction, merely what I want to believe.

*Id.* at xxix-xxx. See also *id.* at 31-32 n.34.

are themselves circumscribed in the depth in which they are considered.<sup>8</sup> The turn in Rawls' recent work away from the promise of *A Theory of Justice* is not slight and will render many positions that were once Rawlsian virtually incompatible with the now avowed deepest themes of *Political Liberalism*.<sup>9</sup> It will, inter alia, and perhaps should, (a) tend to deter judges and jurists from relying explicitly on Rawls, and (b) cease to make justice as fairness a serious contender with more pragmatic forms of non-deontological normative positions, such as law and economics.

Particularly in light of *Political Liberalism*, I now believe that a vision of a reasonably comprehensive pragmatic concrete application of *A Theory of Justice*, even if augmented heavily (as we shall see) by intuition (as he defined it therein), is and was circumscribed and too complex a project. Rawls' exposition of justice as fairness is not a helpful guide to judges and jurists who wish to use Rawls' inspirations.<sup>10</sup> As a result, I take up, in considerable detail, how *A Theory of Justice* might have been brought to bear on practical legal controversies (and the limitations inherent thereto) and the role of intuition in that endeavor envisioned by Rawls in that book.<sup>11</sup> In a concluding

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8. Although carefully crafted to allow ample room for retreat and modification if necessary, Rawls seems to believe that what the Supreme Court determined in *Roe v. Wade* accords with justice as fairness (although Rawls does not cite or refer to the case or subsequent abortion cases in the Supreme Court by name). *Id.* at 243 n.32. That Rawls would draw such a concrete and contestable conclusion within the framework of justice as fairness is surprising, and not. On the one hand, Rawls had come under increasing attack from some of his constructive critics. See Pogge, *supra* note 4 and Lake *supra* note 4. Assertions such as those regarding *Roe* would tend to blunt such attacks (until it becomes manifest that the most specific and concrete implications of justice as fairness are severely limited in their scope and breadth.). On the other hand, his *Roe* conclusions serve his political liberalism by, inter alia, demonstrating that it is not a view driven by consensus, but reasonable consensus, and that it will be impossible to characterize Rawls' view as one that holds that simple agreement is necessary for all its implications.

9. Notwithstanding Rawls' recent essay "*The Law of Peoples*," John Rawls, Oxford Amnesty lecture (Mar. 22, 1993), much "Rawlsian" work in the area of international relations and human rights is dangerously close to being marginally Rawlsian or flatly contradictory to certain now basic assumptions made by Rawls. A clear example of this is the slight attention given to the work of Thomas Pogge, and Pogge's comments etc., in *Political Liberalism*.

10. Rawls' biggest contributions to jurists, as far as I am concerned, will be through the various notions and constructs he has proposed, but not in comprehensive theory construction or the concrete application of justice as fairness.

11. My sense—and it is just that—is that courts may continue to use *A Theory of Justice*, but will less frequently cite subsequent works, and will use *Political Liberalism* cautiously (and mostly in areas of Bill of Rights concerns, particularly freedom of speech and voting rights).

series of arguments, I illustrate how Rawls has effectively jettisoned in *Political Liberalism* the bulk of that mission of *A Theory of Justice* by severely limiting the scope of his theory of justice and by relying heavily on the ideas of public reason and the domain of the political in ways that invite judges and jurists to disregard Rawls' own view, even as it was expressed in *A Theory of Justice*.<sup>12</sup>

Rawls' exposition of his version of liberalism suggests that the notion of "political liberalism" is oxymoronic. Rawls' *Political Liberalism*, more than any other recent work in political philosophy, has brought me to question whether its liberalism is compatible with the severe limitations Rawls has put upon it. Have we come to a point where liberalism provides us what is in essence at its best moments political positivism<sup>13</sup>—the "domain of the political"? Is political liberalism a gain over cost/benefit, means/end rationality, and/or utilitarianism when it cannot compete with the doctrinal applicability of, say, law and economics reasoning?

A theme runs through this essay that I address only in passing, in spite of its significance. I believe that much of Rawls' tendency to limitation and abstraction comes from his fear of the unreasonable and a skepticism about the possibility of the discovery of truth and the attainment of excellence in human form.<sup>14</sup> Political liberalism, at least as Rawls conceives of it, fights the belief that we exist in a comprehensive, ordered universe and has adopted as its *raison d'être* the defense of the illusion of a place of safety (the domain of the political) as its

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12. A key point is that Rawls virtually treats some of his own view in *A Theory of Justice* as a "comprehensive moral conception" which he now disdains for use in the public reason of courts' decisions.

13. John Austin, the father of legal positivism, took the seminal posture that "positive law" is law existing by position—a command backed by a threat by an unbound sovereign in a political society. John Austin, *Lectures on Jurisprudence*, (1832), reprinted in THE GREAT LEGAL PHILOSOPHIES—SELECTED READINGS IN JURISPRUDENCE 336-63 (1985). That effort to isolate a core of "law" from other types of things called law (such as natural laws) and morality is the essence of Austin's legal positivism (and much if not all legal positivism since). Rawls has mirrored this type of initiative, but with a different set of purposes and objectives. Rawls sets out to identify the domain of the political—complete with its own methods—which overlaps with reasonable comprehensive doctrines, but is distinctly its own domain. Political justice exists in reference to this domain in *Political Liberalism*.

14. No doubt, unreasonable people are often scary and the attainment of excellence can seem impossibly difficult, see (or should I say *hear*) INDIGO GIRLS, *Galileo*, on RIGHTS OF PASSAGE (Epic Records 1992), but that is no reason to try to deny these features of our existence.

alternative to the acceptance of truth. Political liberalism has evolved away from being practically applicable *and* away from being inspirational. That is a deep turn away from where the Enlightenment began and I am afraid that it has infected Rawls' work in a way that undermines the potential of a theory of justice. The waning inspirational value of justice as fairness will only serve to limit its appeal to those who seek its practical concrete implications.

#### I. THE LIMITATIONS ON PRACTICAL CONCRETE APPLICATION INHERENT IN A *THEORY OF JUSTICE*

In retrospect, although *A Theory of Justice* sets practical application as one of its primary goals, it clearly contains three critical limitations on practical application in concrete normative contexts. First, the role of "intuition," as Rawls defines it, has been so prominent as to severely limit the schematic application of the construct of the original position and the two principles of justice. Second, Rawls persists in circumscribing the scope of inquiry to certain defined topics, taken up in a certain sequence. Many topics involving crucial matters of justice are deliberately put off to some other time. Third, *A Theory of Justice*, and now *Political Liberalism*, concern themselves with so-called ideal theory, even when Rawls admits that the most pressing practical and concrete matters of justice occur in so-called non-ideal theory.

In developing a theory of justice, Rawls had the opportunity, and seems at one time to have had the aspiration: (1) to de-emphasize the role of intuition by more schematically treating concrete issues of justice; (2) to push a theory of justice into more topics of justice; and (3) to begin the process of attacking the dilemmas of non-ideal theory systematically. Rawls has chosen instead to avoid these options in his post-*A Theory of Justice* writings. In Section II, I explore how *Political Liberalism* features additional limitations upon the potential for a theory of justice to inspire and to be brought to bear in concrete practical normative matters. The three critical limitations contained in *Political Liberalism* are: (1) the use and defense of abstraction; (2) the concept of the domain of the political; and (3) the idea and ideal of public reason. These limitations work respectively to make much of *Political Liberalism* highly abstract and not concrete, to limit the comprehensiveness of a theory of justice in its role as a political conception of justice, and to limit the forms

and methods of analysis of the theory of justice in that domain to non-rigorous consensus building types of analysis.

The combination of the limitations inherent in *A Theory of Justice* (which were not cured but have become enhanced) with the new limitations introduced in *Political Liberalism* creates a political conception of justice with little concrete normative content, little hope of significant further concrete normative development without becoming non-Rawlsian, and little inspirational force.

#### A. *The Critical, Limiting Role of Intuition in A Theory of Justice*

Importantly, for Rawls, the call to arms for interdisciplinary and practical endeavors is a crucial aspiration of his theory of justice.<sup>15</sup> Rawls' *A Theory of Justice* is cumbersome and dense enough that for those busied with day-to-day legal chores application of this aspiration and the theory itself has been a difficult task. Although Rawls' work is exquisitely laid out by philosophical standards and chock full of economics style reasoning<sup>16</sup> the basic approach apparently intended by Rawls for "applying" *A Theory of Justice* in concrete cases, was an approach largely left to intuition, albeit sometimes guided intuition.

That somewhat casual approach to interpreting and using Rawls' texts is, in many ways, the way Rawls appears to have intended his work to be relied upon as a form of comprehensive liberalism through the lens of *A Theory of Justice*. Yet what Rawls meant by "intuitionism" is something somewhat different from the way it has been used in other moral philosophical contexts.<sup>17</sup> Rawls defines intuitionism of his sort in *A Theory of Justice*<sup>18</sup> as having two, and perhaps three, critical features:

15. See POGGE, *supra* note 4, at 7. Mirrored in Kant's sense of politics, this view unites Kantians and Rawlsians. See *id.*

16. See e.g., THEORY OF JUSTICE, *supra* note 3, at 37-39, 81-82.

17. Compare, for instance, H.A. Prichard's use of intuitionism to connote "an inevitable immediacy of knowledge" with Rawls' divergent use of the term. A. I. MELDEN, ETHICAL THEORIES 537 (1967). One is always well-advised to keep in mind the special sense in which Rawls uses the term intuitionism.

18. Rawls has taken a somewhat tricky turn in *Political Liberalism* by refining his account of "rational intuitionism" and contrasting that form of "intuitionism" with "political constructivism." See especially, POLITICAL LIBERALISM *supra* note 6, at 90-99, 112-113. The maturation of justice as fairness from *A Theory of Justice* on this point—namely the role of intuition—is clearly worthy of a separate study. Suffice it to say at this point that

I shall think of intuitionism in a more general way than is customary: namely, as the doctrine that there is an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgment, is the most just. Once we reach a certain level of generality, the intuitionist maintains that there exist no higher-order constructive criteria for determining the proper emphasis for the competing principles of justice. While the complexity of the moral facts requires a number of distinct principles, there is no single standard that accounts for them or assigns them their weights. Intuitionist theories, then, have two features: *first*, they consist of a plurality of first principles which may conflict to give contrary directives in particular types of cases; and *second*, they include no explicit method, no priority rules, for weighing these principles against one another: [*third*], we are simply to strike a balance by intuition, by what seems to us most nearly right. Or if there are priority rules, these are thought to be more or less trivial and of no substantial assistance in reaching a judgment.<sup>19</sup>

Rawls' view of intuitionism in *A Theory of Justice* is not thoroughly non-cognitivist or skeptical: an intuitionist sometimes uses more than "instinct," can give *reasons* for many moral claims and judgments, and can balance, weigh, and map them against each other:

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Rawls has moved to new ground; *A Theory of Justice* turns upon the concept of reasonableness and does not, "as rational intuitionism does, use (or deny) the concept of truth; nor does it question that concept, nor could it say that the concept of truth and its idea of the reasonable are the same." *Id.* at 94. However, any reader of *Political Liberalism* will be struck by how little overt effort is made in *Political Liberalism* to connect the account of "rational intuitionism" to the account in *A Theory of Justice* of "intuitionism." Yet as an interpretative issue this is a major point in considering how one ought to bring a theory of justice to bear in concrete moral dilemmas. In *Political Liberalism* Rawls gives somewhat broad ratification to Michelman's interpretation of how the process of concrete application should go. *See id.* at 166 n.29, 237 n.23, 339 n.47. Michelman acknowledges the important role of intuition. Yet Rawls—as the use of public reason would seem to compel—must reconcile this ratification of Michelman with the more developed account of rational intuitionism, etc. *See* POLITICAL LIBERALISM, *supra* note 6. Although I am inclined to believe that such a reconciliation can be made, I do not produce such an argument here; although I do suggest a perspective.

19. THEORY OF JUSTICE, *supra* note 3, at 34 (emphasis added).

It is essential to observe that the intuitionist does not deny that we can describe how we balance competing principles, or how any one man does so, supposing that we weigh them differently. The intuitionist grants the possibility that these weights can be depicted by indifference curves. Knowing the description of these weights, the judgments which will be made can be foreseen. In this sense these judgments have a consistent and definite structure. Of course, it may be claimed that in the assignment of weights we are guided, without being aware of it, by certain further standards or by how best to realize a certain end. Perhaps the weights we assign are those which would result if we were to apply these standards or to pursue this end. Admittedly any given balancing of principles is subject to interpretation in this way. But the intuitionist claims that, in fact, there is no such interpretation. He contends that there exists no expressible ethical conception which underlies these weights. A geometrical figure or a mathematical function may describe them, but there are no constructive moral criteria that establish their reasonableness. Intuitionism holds that in our judgments of social justice we must eventually reach a plurality of first principles in regard to which we can only say that it seems to us more correct to balance them this way rather than that.<sup>20</sup>

Rawls' notion of intuitionism in *A Theory of Justice* can acknowledge that many moral decisions rest on rational and reasonable arguments and that even a description of moral views is often possible, but that at *some* point(s), reference must be made back to a plurality of principles with no basis in justification other than that "they seem most nearly right." And there may be no way to balance these first principles other than by what seems most nearly correct.<sup>21</sup> A Rawlsian intuitionist can engage in

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20. *Id.* at 38-39.

21. At this point, Rawls' theory takes on affinities for more traditional senses of "intuitionism": one difference is that some normative theory construction (descriptive and prescriptive) is possible and the other may be that such judgments remain analyzable into concomitant experiences that accompany them and/or confirm them. The latter point raises tricky metaethical questions that need not be addressed herein.

some normative theory construction, but at some point(s), she must fall back upon this third critical feature of intuitionism.

In *A Theory of Justice*, Rawls sought to pose an alternative to utilitarianism and intuitionism and to describe "intuitionism" in his sense in a way that removed many of the more problematic implications<sup>22</sup> associated with more radical forms of intuitionism, principally the belief that moral theory construction is a vain exercise.<sup>23</sup> By abandoning some of intuitionism's strongest claims, Rawls described a sense of intuitionism (we could call it the weaker sense) that could have (and has had) direct appeal to many judges and lawyers: sometimes a decision must be made by "instinct," or by balancing competing claims in a way that seems fair or appropriate; and on other occasions, precedent or other judgments constrain or even compel a decision on well-accepted and reasonable grounds of principle and/or policy (or at least do so within a legal doctrinal area). Although there is nothing startling about such a conclusion, what is intriguing is that many of Rawls' critics and interpreters have overlooked or downplayed

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22. Another important way in which Rawls may be ameliorating the more strident aspects of stronger intuitionist views is by offering an account of "considered judgments" and reflective equilibrium as part of constructivist contractarianism. As Rawls noted in *A Theory of Justice*, "Intuitionism is not constructive . . ." THEORY OF JUSTICE, *supra* note 3, at 52. In large part, *A Theory of Justice* is constructive in that it involves moral sentiments upon which constructive development can occur. Thus, considered judgments occur under certain types of circumstances, see THEORY OF JUSTICE *supra* note 3, and the notion of reflective equilibrium (narrow to wide) involves the possibility of construction (and rejection) of such judgments as a *constructed* moral viewpoint emerges. *Political Liberalism* expounds upon the areas in which political constructivism operates, and makes the claims of political constructivism more discrete. See POLITICAL LIBERALISM, *supra* note 6, at 90-99.

23. In *Political Liberalism*, the distinction (if we would call it that) between rational intuitionism and political constructivism takes on a newer concern. Namely, the problem of rational intuitionism presented in *Political Liberalism*, as it relates to comprehensive viewpoints, is that it turns upon the search for truth and correspondence (or whatever) to some objective reality—political constructivism instead looks to the concept of the reasonable and a different ontology with which to make a reference. I recognize that there are other differences, but I believe this to be a crucial matter. Rawls has shifted attention away from the problem of practical schematization to *Political Liberalism's* focus upon the concern that a theory of justice will be viewed as a form of rational intuitionist moral realism with concomitant claims of truth and comprehensiveness. In the domain of the political, the use of intuition is largely supplanted by the idea and ideal of public reason, and hence the need for a separate notion of intuition wanes.

the cautious and limited ways that Rawls walked away from the weak sense of intuitionism in *A Theory of Justice*:<sup>24</sup>

*Now there is nothing intrinsically irrational about this intuitionist doctrine. Indeed, it may be true. We cannot take for granted that there must be a complete derivation of our judgments of social justice from recognizably ethical principles. The intuitionist believes to the contrary that the complexity of the moral facts defies our efforts to give a full account of our judgments and necessitates a plurality of competing principles. He contends that attempts to go beyond these principles either reduce to triviality, as when it is said that social justice is to give every man his due, or else lead to falsehood and oversimplification, as when one settles everything by the principle of utility.*<sup>25</sup>

Rawls did not reject the weak sense of intuitionism as an irrational position and indeed admitted that it may be true. Rawls' caution translated in *A Theory of Justice* into some very important practical conclusions with respect to how one would apply his theory of justice of that vintage.

Notably, Rawls took the position in *A Theory of Justice* that there is no way in the *abstract* to offer a suitable alternative to the weak sense of intuitionism, but that the contractarian must offer up the criteria that would put forth a way to account for a balancing, etc., of first principles. In short, for a Rawlsian contractarian circa *A Theory of Justice*, the way to suggest an alternative to the weak sense of intuitionism is to provide a theoretical account—perhaps not complete nor even completable in every or even most concrete senses—of constructive criteria that form a theory of justice:

The only way therefore to dispute intuitionism is to set forth the recognizably ethical criteria that account for the

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24. I would expect that as the body of commentary on *Political Liberalism* grows, more interpreters will see the link between Rawls' cautious rejection of weak intuitionism and his more recent attempts to circumscribe the domain of the political (defining the parameters of an overlapping consensus) and set out the project of political liberalism. In *Political Liberalism*, much lies outside the political conception of justice and is hence left, if at all, to intuitive determination in a comprehensive theory.

25. THEORY OF JUSTICE, *supra* note 3, at 39 (emphasis added).

weights which, in our considered judgments, we think appropriate to give to the plurality of principles. A refutation of intuitionism consists in presenting the sort of constructive criteria that are said not to exist. To be sure, the notion of a recognizably ethical principle is vague, although it is easy to give many examples drawn from tradition and common sense. *But it is pointless to discuss this matter in the abstract.* The intuitionist and his critic will have to settle this question once the latter has put forward his more systematic account.<sup>26</sup>

In some ways *A Theory of Justice* was more of an invitation than a proof or even an argument in a strict sense (as from premise to conclusion).<sup>27</sup> That “proof” turned, for its success, on proposing practical concrete implications.

In *A Theory of Justice*, Rawls showed such deference to the possibility of weak intuitionism being a more viable candidate than even a weak version of constructivism that he divided the theory into various parts, so as to isolate areas of philosophical inquiry and to be able to counter intuitionistic arguments, at least in certain discrete areas of priority concern. These divisions serve to limit the scope of inquiry of justice as fairness and are critical to understanding how Rawls’ theory of justice might be (and might have been) applicable in practical concrete contexts. The scope limitations serve to map indeterminacies in the practical implication(s) of justice as fairness that remained even at the time of *A Theory of Justice*.

### *B. Schematization of the Concept of Right: Circumscribing the Topics for Consideration*

In *A Theory of Justice*, Rawls drew several distinctions which served, *inter alia*, to distinguish a constructed vision of moral sentiments from an “intuitionistic” system. But Rawls was quite clear that the task in *A Theory of Justice* was not complete—that much remained to be done and much was (in the interim) left to

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26. *Id.* (emphasis added).

27. At times, Rawls adopts exactly that Charles Kuralt attitude of one inviting another along for the ride to see if it is an appealing journey. See THEORY OF JUSTICE *supra* note 3. That attitude becomes more discrete in *Political Liberalism* as Rawls aligns political constructivism with the concept of the reasonable.

intuition.<sup>28</sup> So the construction *also* served to outline what remains left to intuition or, literally, makes good sense in light of (partially) constructed theory. A *Theory of Justice* was at best a first approximation and reflected what demands primary attention from the point of view of theory construction. Along these lines Rawls did, and does, continue to divide inquiry with respect to questions regarding the concept of right into three parts: (1) social systems and institutions; (2) individuals; and (3) the Law of Nations (Peoples).<sup>29</sup> The first, social systems and institutions, dominates *A Theory of Justice*, and now *Political Liberalism*, and is considered by Rawls to have priority concern among questions regarding the concept of right.<sup>30</sup> Rawls has become more famous for his works in this regard; the two principles of justice<sup>31</sup> relate directly to the "basic structure of society,"<sup>32</sup> or "the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."<sup>33</sup> As Rawls notes: "The basic structure is the primary subject of justice because its effects are so profound and present from the start."<sup>34</sup> Thus, Rawls limits his inquiry to the main topic of justice at the outset.

Although Rawls openly contends that the remaining aspects of the concept of right, the principles for individuals, the law of nations (peoples), and priority rules "are an *essential* part of any theory of justice,"<sup>35</sup> Rawls has openly eschewed any thorough and systematic account of these remaining aspects of *A Theory of Justice*.<sup>36</sup> Thus, Rawls treated issues regarding the principles for the law of nations as a tertiary concern<sup>37</sup> and only deals with

28. Although Rawls of *Political Liberalism* emphasizes how much remains to be done, the account of how we are to proceed is not as clearly left to what Rawls of *A Theory of Justice* would refer to as intuition.

29. THEORY OF JUSTICE, *supra* note 3, at 109. These distinctions literally run throughout *A Theory of Justice*.

30. See *e.g.*, *id.* at 110.

31. As developed, see POLITICAL LIBERALISM, *supra* note 6.

32. And not all social institutions and systems. See THEORY OF JUSTICE, *supra* note 3, at 7.

33. *Id.* at 7. In articles appearing after *A Theory of Justice* and in *Political Liberalism*, Rawls re-describes what he means as the basic structure. POLITICAL LIBERALISM, *supra* note 6.

34. See THEORY OF JUSTICE, *supra* note 3, at 7.

35. *Id.* at 109 (emphasis added).

36. Some effort has been made by Rawls with respect to the Law of Peoples.

37. THEORY OF JUSTICE, *supra* note 3, at 108.

them "in passing."<sup>38</sup> And although Rawls has reiterated his belief in the need for principles for individuals to ascertain many concrete implications of *A Theory of Justice*,<sup>39</sup> Rawls explicitly noted: "nor shall I attempt any systematic discussion of the principles for individuals,"<sup>40</sup> even though he has provided substantial information regarding these principles.<sup>41</sup> Finally, in *A Theory of Justice* Rawls gives several important priority arguments,<sup>42</sup> but again, there is no explicit systematic account of all or even most priority rules.<sup>43</sup>

38. *Id.* at 8, 108, 377-79. Rawls has steadfastly refused the notion of globalizing the two principles of justice. *Cf. The Law of Peoples*:

I think the political conception of justice as fairness is in a suitable way universal, and not relativist or historicist, even though it may not appear to all societies at all times and places. Thomas Pogge's work forthcoming from Cornell University Press includes an account of international justice from within a conception much like justice as fairness, but very importantly revised and extended in a different way to the global sphere. His much fuller discussion will sustain, I believe, the same general point about the universality of such a conception, although his approach to international justice is very different.

*Id.* at 252 n.46. With all due respect given to those who endeavored to convince him otherwise, Rawls has adhered to a view which does not globalize the two principles of justice. *See id.*

39. THEORY OF JUSTICE, *supra* note 3, at 333.

40. *Id.* at 108.

41. *See, e.g., id.* §§ 18, 19, 51-59. In *A Theory of Justice* Rawls breaks principles for individuals into two categories: (1) obligations, and (2) natural duties (negative and positive). Rawls employs this distinction in *A Theory of Justice*, but does not give a clear definition for the distinction. *Id.* at 114-17. He suggests that it turns on whether we are required to do something good or not to do something bad. *Id.* at 114. Rawls avows not to "stress" the distinction and admits that "the distinction between positive and negative duties is intuitively clear in many cases, but often gives way." *Id.* (emphasis added). Yet he nonetheless teases us by suggesting that the distinction may have important priority implications when it is clear, for "negative duties have more weight than positive ones." *Id.* Yet again, Rawls declines to pursue this point in *A Theory of Justice*. *Id.* Thomas Pogge has constructively developed Rawls' notions. *See Pogge, supra* note 4, at 32, 38-39, 238, 276-77, 279 n.42. Effectively, Rawls has not so developed his own view. Rawls does not purport in *A Theory of Justice* to bring natural duties, positive and negative, "under one principle." A THEORY OF JUSTICE, *supra* note 3, at 114. No attempt is made to further this effort in *Political Liberalism*. However, Rawls does provide an account for obligations such that all obligations "arise from the principle of fairness." THEORY OF JUSTICE, *supra* note 3, at 342. *See id.* at §§ 18, 52. Of course, Rawls' account of obligation is far from thorough.

42. *See, e.g.,* THEORY OF JUSTICE, *supra* note 3, at §§ 39, 46.

43. Rawls has significantly developed some of his arguments with respect to priority issues in *Political Liberalism*. In particular, Rawls now offers a more developed account of the principles of liberty in relation to certain moral powers. *See POLITICAL LIBERALISM, supra* note 6, at 310-24.

As a result, even in ideal theory, Rawls' concept of right, as set forth in *A Theory of Justice*, was largely undeveloped, or to put this in an alternative way, Rawls chose to limit consideration, in effect, to one specific topic. The all important first step of identifying principles for the basic structure overshadowed remaining essential steps. Thus, Rawls left a great deal to "intuition," or "further work" *even in ideal theory*.

The topic limitations built into *A Theory of Justice* were further complicated by the information constraints that Rawls built into the more developed and systematic aspects of his ideal theory account of the topic he does consider in depth. Crucially, Rawls does not envision the ideal theory application of the two principles of justice in an immediate leap from the original position to a position full of information.<sup>44</sup> Instead, he has contemplated the use of "some sort of framework . . . to simplify the application of the two principles of justice."<sup>45</sup>

The framework he continues to envision is the use of a "four-stage sequence"<sup>46</sup> which he believes "is suggested by the United States Constitution and its history."<sup>47</sup> Rawls sets up "several intermediate stages" of inquiry and decision that occur in "a definite sequence" and offers "a schema for sorting out the complications that must be faced."<sup>48</sup> "Each stage [reflects] an appropriate point of view from which certain kinds of questions are considered."<sup>49</sup> These stages are:

44. THEORY OF JUSTICE, *supra* note 3, at 196.

45. *Id.* at 195. He has continued to pursue this notion in *Political Liberalism*. See POLITICAL LIBERALISM, *supra* note 6.

46. THEORY OF JUSTICE, *supra* note 3, at 196 n.1. Apart from the parochial implications that such a sequence merely or substantially mimics the status quo (at least in the U.S.), see POGGE, *supra* note 4, at 153, at least one commentator has noted that the need for such a "shuffle" may be "unnecessary." See *id.* at 144 n.42, 202 n.49. In recent writings Rawls has made some effort to defeat this type of attack. See POLITICAL LIBERALISM, *supra* note 6. However, Rawls' response to Pogge-type attacks consists largely in following an idealized version of U.S. constitutional history which drives him back to the original problem of crafting a philosophically parochial view.

47. THEORY OF JUSTICE, *supra* note 3, at 196 n.1. In *Political Liberalism*, Rawls has drawn even closer to developing his four stage sequence in light of U.S. constitutional history.

48. *Id.* at 196.

49. *Id.*

(1) Original position:	Choice of principles for the basic structure under veil of ignorance
(2) "Constitutional Convention"	Subject to constraints of principles of justice chosen in stage (1), parties must "decide upon the justice of political forms and choose a constitution," particularly one that "is best calculated to lead to just and effective legislation," <sup>50</sup> and utilizes additional information under a partial lifting of the veil of ignorance.
(3) "Legislative Stage"	Subject to the two principles of justice and the constitution, the parties are to assess the "justice of laws and policies" from this perspective with additional information.
(4) The stage "of the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally"	Subject to stages (1)-(3); full information.

The aim of the four stage sequence for Rawls is "to formulate a schema that will assist us in applying" the two principles of justice.<sup>51</sup> In *A Theory of Justice*, the sketch is very brief and conclusory; at best it exemplifies certain of the less abstract decisions that might be made (e.g. choose a constitution) in bringing highly abstract ideal theory to bear in practical situations. In *Political Liberalism*, Rawls develops the technique of the four-stage sequence and renders certain implications of the

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50. *Id.* at 197.

51. *Id.* at 197 n.2.

original position remarkably concrete.<sup>52</sup> Rawls himself seems to move comfortably between stages, but the "application" process is cumbersome and most easy to follow only after Rawls has described how he would do so. The process of using the four stage sequence is difficult enough that it is unlikely to appeal to anyone other than Rawls. Some commentators, like Pogge, question the need for "the shuffle" at all.<sup>53</sup> Moreover, much of the specificity that the four stage sequence generates in *Political Liberalism* can be found in basic constitutional guarantees of political and civil liberties,<sup>54</sup> which leads one to question why such a complex procedure is needed to support certain obvious axioms. *Political Liberalism*, however, even in ideal theory, has much less to say about other matters.<sup>55</sup> The use of the four stage sequence for many topics of justice is simply left off.

### C. *Non-Ideal Theory—Partial Compliance and Favorable Conditions*

In his grandest moments, Rawls has made broad claims that he could only fulfill aspirationally:

Viewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception and held to be unjust to the extent that they depart from it without sufficient reason.<sup>56</sup>

Even in *ideal* theory, after *Political Liberalism*, the concept of right remains largely unsystematized and unspecified, and the most systematically developed arguments—those regarding the principles to regulate the basic structure of society—are only sketched with respect to schema which would bring them to bear

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52. POLITICAL LIBERALISM, *supra* note 6.

53. POGGE, *supra* note 4.

54. POLITICAL LIBERALISM, *supra* note 6.

55. *Id.*

56. THEORY OF JUSTICE, *supra* note 3, at 246.

in concrete applications.<sup>57</sup> In and of themselves, these obstacles to substantially non-intuitionistic use of *A Theory of Justice* are formidable, and that situation is only compounded by the fact that Rawls' grandest claims have been made in what Rawls calls *ideal theory*.

Rawls continues to assert that he intends to work out his theory of justice in two parts.<sup>58</sup> The first part, *ideal theory*, concerns itself with "what a perfectly just society would be like"<sup>59</sup> and it "assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances."<sup>60</sup> Rawls openly espouses that his "main concern"<sup>61</sup> is for developing the ideal part of theory under these two conditions—strict compliance and favorable conditions—that will be often counterfactual.

The second assumption, "favorable conditions," rests on the claim that ideal theory comes into play whenever social conditions reach a minimum level of development sufficient to establish the priority of first principle concerns.<sup>62</sup> This assumption is greatly aided by Rawls' decision "to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies."<sup>63</sup> After all, many systems if viewed in such a light (e.g., the United States, the United Kingdom, Germany, Australia, or Brazil) would have ample natural and human resources to merit the "favorable conditions" stipulation. Those systems that do not enjoy (or reasonably cannot be expected to enjoy) favorable conditions are pushed to the margin of concern.

The first assumption, strict compliance, is an assumption in *A Theory of Justice* that applies at all four stages. The principles of justice are selected under the assumption that "[e]veryone is

57. *Political Liberalism* advances the application of the two principles to more concrete contexts, most notably in the context of discussing a fully adequate scheme of basic liberties. See POLITICAL LIBERALISM, *supra* note 6, at 331-62. However, much remains to be done: Rawls does little to advance schematic concrete applications of the second principle of justice. See, e.g., *id.* at 363-68. Moreover, as I explore later, the idea and ideal of public reason limit the application of the implications of justice as fairness with respect to constitutional essentials and basic justice.

58. THEORY OF JUSTICE, *supra* note 3, at 8, 245.

59. *Id.* at 8.

60. *Id.* at 245.

61. *Id.*

62. *Id.* at 247-48.

63. *Id.* at 8. Rawls continues to favor this type of assumption.

presumed to act justly and to do his part in upholding just institutions."<sup>64</sup> But that presumption when translated to concrete application is usually false. In the non-ideal world, we are confronted with questions of, *inter alia*, punishment, just war, opposing unjust regimes, compensatory justice, and dealing with institutional injustices.<sup>65</sup> These are stuff of "everyday life," Rawls tells us, and "[o]bviously the problems of partial compliance theory are the pressing and urgent matters."<sup>66</sup> Thus Rawls justifies the primary attention he gives to ideal theory because

it provides, I believe, the only basis for the systematic grasp of these more pressing problems. . . . At least, I shall assume that a deeper understanding can be gained in no other way, and that the nature and aims of a perfectly just society is the fundamental part of the theory of justice.<sup>67</sup>

Rawls thus requires further division of the theory of justice into partial compliance theory (as an aspect of non-ideal theory). Yet although Rawls admits that much of the significant work in achieving justice will be in non-ideal theory, he declines to provide a systematic account of obligations in non-ideal theory. He continues to so decline in *Political Liberalism*. At times, he seems to suggest that such a systematic account is at least partially possible.<sup>68</sup> Thus, Rawls must and often does fall back on intuitionistic (in his sense) reasoning in arguments about concrete normative issues.<sup>69</sup> Rawls even recognizes "[t]he [two] principles and their lexical order were not acknowledged with these [non-

64. *Id.*

65. *Id.*

66. *Id.* at 8-9.

67. *Id.* at 9 (citations omitted). Rawls continues to adhere to this view in *Political Liberalism*:

In the absence of such an ideal form for background institutions, there is no rational basis for continually adjusting the social process so as to preserve background justice, nor for eliminating existing injustice. Thus ideal theory, which defines a perfectly just basic structure, is a necessary complement to nonideal theory without which the desire for change lacks an aim.

POLITICAL LIBERALISM, *supra* note 6, at 285.

68. THEORY OF JUSTICE, *supra* note 3, at 245-46.

69. *Id.* at 245-46, 302-03.

ideal] situations in mind and so it is possible that they no longer hold."<sup>70</sup>

Indeed in a critical passage in *A Theory of Justice*, Rawls envisions the following:

Viewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception and held to be unjust to the extent that they depart from it without sufficient reason. The lexical ranking of the principles specifies which elements of the ideal are relatively more urgent, and the priority rules this ordering suggests are to be applied to nonideal cases as well. Thus as far as circumstances permit, we have a natural duty to remove any injustices, beginning with the most grievous as identified by the extent of the deviation from perfect justice. *Of course, this idea is extremely rough. The measure of departures from the ideal is left importantly to intuition.* Still our judgment is guided by the priority indicated by the lexical ordering. If we have a reasonably clear picture of what is just, our considered convictions of justice may fall more closely into line even though we cannot formulate precisely how this greater convergence comes about. Thus while the principles of justice belong to the theory of an ideal state of affairs, they are generally relevant.<sup>71</sup>

Thus, it is quite clear that for concrete application in a wide range of urgent matters of justice arising in everyday life, Rawls may have to resort to intuition to bring the ideal part of a theory of justice to bear.<sup>72</sup>

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70. *Id.* at 245.

71. *Id.* at 246 (emphasis added).

72. Rawls believes that the special conception of justice gives some guidance in non-ideal theory:

By way of comment, these principles and priority rules are no doubt incomplete. Other modifications will surely have to be made, but I shall not further complicate the statement of the principles. It suffices to observe that when we come to nonideal theory, we do not fall back straightway upon the general conception of justice. The lexical ordering of the two principles, and the valuations that this ordering implies, suggest priority rules which seem to be reasonable enough in many cases. By various examples I have tried to illustrate how these rules can be used and to indicate their plausibility. Thus

For those who seek to find the concrete implications of *A Theory of Justice*, the fact that an entire half of *A Theory of Justice*—non-ideal theory—was left by Rawls (in large part) to intuition is a source of frustration and error; the belief that *A Theory of Justice* sets as its ambition to systematize all questions under the concept of right is mistaken. Rawls himself, unfortunately, ratifies such false ambitions in the grandest moments of his assertions of the power of theory. Indeed, it seems that he must, for the failure to defeat intuitionism decisively implies the possibility of the failure of the theory, given that this was one of its major goals.

Rawls' staunchest defender and interpreter, Thomas Pogge, has sought to argue a stronger sense of the direct usefulness of Rawls' ideal theory:

Rawls does not merely seek to construct the ideal of a perfectly just well-ordered society and then have us use intuition and instrumental rationality for muddling through toward this ideal. He reiterates again and again that his conception of justice is to guide the course of social change and that a crucial feature enabling it to do this is the serial ordering of the two principles. Of course, Rawls may still choose to limit his ambitions, but this limitation would constitute a devastating loss of practical political relevance for this theory.<sup>73</sup>

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the ranking of the principles of justice in ideal theory reflects back and guides the application of these principles to nonideal situations. It identifies which limitations need to be dealt with first. The drawback of the general conception of justice is that it lacks the definite structure of the two principles in serial order. In more extreme and tangled instances of nonideal theory there may be no alternative to it. At some point the priority of rules for nonideal cases will fail; and indeed, we may be able to find no satisfactory answer at all. But we must try to postpone the day of reckoning as long as possible, and try to arrange society so that it never comes.

*Id.* at 303. The two principles of justice—unlike the general conception of justice—entail certain priority rules that can guide non-ideal theory. In *A Theory of Justice*, Rawls suggests that in some cases the general conception of justice may be the best benchmark for intuition, and he admits that at some point we may be driven back to intuition. *Id.*

73. POGGE, *supra* note 4, at 136 (citations omitted). Pogge develops Rawls' own view, reinterpreting him at certain key points, and in essence affirms a more developed, systematic account of justice that attempts to meet the demand of practical political application. *See id.* at 3-4.

In part, Pogge is correct: There will be occasions (and it will be hard to quantify in the abstract "how many") where Rawls' ideal theory assumptions are either true or so reasonably correct as to merit more or less direct application of the implications of systematically developed ideal theory (where ideal theory is available, which will not always be so).<sup>74</sup> So Rawls' grandest claims are more than just puffing (in at least one sense); perhaps, this has been most true with respect to "first principle" situations where we may reasonably expect individuals to comply in large part with whatever determinations are made and where ideal theory itself contemplates less than the strictest strict compliance. And, in another sense, the development of ideal theory, even if committed to intuition, may be an improvement over otherwise untutored intuition. Yet, without more, the aspiration to provide a schematic practical concrete account of justice flounders.

## II. LIMITATIONS OF A *THEORY OF JUSTICE IN POLITICAL LIBERALISM*

In *Political Liberalism*, Rawls has both made his defense of a theory of justice more abstract (a limitation in itself) and more limited in at least two important ways. *Political Liberalism* is divided into three parts, and it is fair to say that the first two-thirds of the book are devoted to extremely abstract concepts and ideas such as the "idea of a political conception of justice,"<sup>75</sup> the "idea of society as a fair system of cooperation,"<sup>76</sup> the "political conception of the person,"<sup>77</sup> the "idea of a well-ordered society,"<sup>78</sup> the more enhanced conception of the basic structure and the original position (of course),<sup>79</sup> the idea of an (stable) overlapping consensus,<sup>80</sup> the notion of reasonable pluralism (and pluralism simpliciter) and the idea of a reasonable comprehensive doctrine,<sup>81</sup> the idea of the domain of the political,<sup>82</sup> and the idea

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74. This may be true, for example, for some of the contexts in which Rawls develops *Political Liberalism*, such as Bill of Rights/First Amendment issues.

75. See *POLITICAL LIBERALISM*, *supra* note 6, at 11, 43.

76. See *id.* at 15.

77. *Id.* at 29.

78. *Id.* at 35.

79. *Id.* at 22.

80. *Id.* at 35. See *THEORY OF JUSTICE*, *supra* note 3, at § 1.

81. *POLITICAL LIBERALISM*, *supra* note 6, at 35.

82. *Id.* at Lecture IV.

of public reason.<sup>83</sup> The abstractness of the vast majority of *Political Liberalism*, which explores "these conceptions and their connections"<sup>84</sup> is itself a kind of important limitation, which Rawls has graced with a defense, albeit an insufficient one.<sup>85</sup> Moreover, I explore two other critical interrelated limitations which flow from (1) Rawls' decision to treat his theory of justice as a creature of the domain of the political, and not as a comprehensive doctrine, and (2) Rawls' defense of the use of public reason.

#### A. Rawls' Use of Abstraction as a Limitation

"Some may protest the use of so many abstract conceptions,"<sup>86</sup> states Rawls, and he devotes an entire section of *Political Liberalism* to the justification of abstraction.<sup>87</sup> Rawls' defense of abstraction is very revealing.<sup>88</sup> His defense of abstraction shows an abiding concern for conflict over political values and non-political values: "We turn to political philosophy when our shared political understandings . . . break down, and equally when we are torn within ourselves."<sup>89</sup> Indeed, he defends the need for abstraction as "not gratuitous,"<sup>90</sup> but,

[r]ather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down. We should be prepared to find that the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots.<sup>91</sup>

83. *Id.* at Lecture VI.

84. *Id.* at 43.

85. *See id.* at 43.

86. *Id.* at 44.

87. *Id.* at § 8.

88. At one level, the argument is intriguing because it is tangential to the question presented. No one seriously debates that some abstraction is useful (one cannot even complete a tax return form without a little abstraction), and Rawls' argument establishes that *some* abstraction is good, *not* that his extensive and excluding use of abstraction is warranted. To the extent that Rawls argues that the amount of abstraction necessary is related to (even roughly proportional to) the intensity and persistence of debate over concrete normative issues his argument for this is oblique at best. *See id.* at 44-46.

89. *Id.* at 44.

90. *Id.* at 45.

91. *Id.* at 46.

Rawls' defense of abstraction turns on two key points. First, abstraction can have a positive practical political effect in enabling conflicts over political values to be transformed into reflection upon "deep" or "root" values which are essential, if not for necessarily resolving such conflicts, than for finding a "reasonable political conception of justice."<sup>92</sup> Rawls is careful not to assert the ridiculous proposition that all conflicts of political values can be resolved immediately by resort to abstraction to uncover deep values (and hence uncover the basis of a reasonable solution). Rawls' example of the imagined interchange of Alexander Stephens and Abraham Lincoln<sup>93</sup> regarding slavery is pregnant with the reality that the Civil War would still have to have been fought despite the fact that a more abstract debate might "lead into political philosophy."<sup>94</sup> Nor does he deny, and I conjecture that he wishes to imply by careful omission, that some political controversies (particularly some of our own internal political controversies) can be resolved by reference to abstraction and by rooting out our deep values. Instead, Rawls appears to defend abstraction as it has utility in "finding a reasonable political conception of justice."<sup>95</sup> That proposition is dangerously close to being self-serving, except that Rawls would no doubt respond that finding a reasonable conception of justice is itself a very immediate practical project: The aim of political liberalism is to find the conditions of "the possibility of a reasonable public basis of justification on fundamental political questions,"<sup>96</sup> and "the possibility of a reasonably harmonious and stable pluralist society."<sup>97</sup> Reaching these goals does not require that all conflicts of value be resolved or even resolvable at any given time among all participants in a political society.

Rawls' defense of abstraction turns on a related and second point as well. Abstraction is part of the process of reasonable justification in political controversies. To meet this practical and

92. *Id.*

93. *Id.* at 44-45.

94. *Id.* at 45. Moreover, Rawls believes that there are those who fail to experience deep conflicts of values. *Id.* at 44. One would naturally assume that one who experiences a conflict of values with such an ideologue (or visionary) would gain little in many cases from making reference to deep values via abstraction—indeed it might make matters worse.

95. *Id.* at 46.

96. *Id.* at xix.

97. *Id.* at xxv.

not epistemological or metaphysical need,<sup>98</sup> Rawls devises the original position as the Archimedean point of a method of reasoning in the tradition of political liberal thought and practice.<sup>99</sup> The original position is part of a reasoning process that helps "to put in order our considered convictions of justice at all levels of generality, from the most general to the most particular."<sup>100</sup> The process does not make a claim (or for that matter, *not* not make a claim) of truth, except *perhaps* by reference to a tradition of political thought and practice.<sup>101</sup>

Rawls' twin defenses of abstraction—result and process—raise troubling problems. One might describe the limitations imposed by the Rawlsian use of abstraction in an abstract way: granting that we can "misdescribe" reason itself<sup>102</sup> and that the process of reflective equilibrium is indefinite (perhaps reason in its highest sense for Rawls), the very notion of the domain of the political and the idea of an overlapping consensus of reasonable comprehensive doctrines are limitations imposed upon reason for fear of truth, perceived truth (or however conceived). This is no paradox, but rather a genuine contradiction in Rawls' political liberalism and a serious limitation on its power to make a plausible claim for our allegiance.

In more concrete terms, Rawls' use of abstraction is founded on a fear of ideologies (and I suppose certain visionaries) and the fear that the full and open quest for truth, without the intermediate device of a domain of the political, is the source of enduring, deep, hideous, and frightful conflict. Deep conflicts demand *reasonable* resolution for Rawls and the domain of the

98. POLITICAL LIBERALISM, *supra* note 6, at 44.

99. *Id.* at 44-49.

100. *Id.* at 45. Rawls retains the picture of the reflective equilibrium as essentially Socratic and indefinite:

It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments. These two sides of our practical thought (not to mention intermediate levels of generality in between) are complementary, and to be adjusted to one another so as to fit into a coherent view.

*Id.* Rawls continues: "The struggle for reflective equilibrium continues indefinitely, in this case as in all others." *Id.* at 97. *See id.* at 8, 28, 72, 95-97. *See also id.* at 53, 87, 92-96, 113, 119, 124, 128, 210.

101. By these assertions, I acknowledge that Rawls initiates the search for the reasonable in lieu of the "whole truth." I can construct an argument that a reasonable political conception of justice has a conception of "truth" and/or an analogy to a conception of truth, but I leave off this discussion here.

102. POLITICAL LIBERALISM, *supra* note 6, at 97.

political is a potentially safe arena for the exchange and development of political ideas and ideals. The very process of justification in the domain reflects reference to practical political reasoning and not separate metaphysical, transcendental, or epistemological realities; the process of deliberation for the domain of the political itself is constrained by the fear of the unreasonable. The abstraction inherent in *Political Liberalism* is the product of the perceived need for denial and limitation.

I suppose that it is hard to relinquish the belief that a structured, ordered, fully coherent (even ideally), understandable, *reasonable* world—the domain of the political—is a safe place. Imagine yourself in World War II as a young person assigned to fly machines of death and destruction on missions of demonstration over the center of civilization. Imagine trying to comprehend the world as a safe and decent place as you participate in the destruction of cities, and the deaths of thousands. Imagine the fear of dying (as so many did), the loss, and the separation. Imagine that you enter the gates of hell armed only with a youthful conception of a war of good versus evil, and perhaps with enough sense to realize that it never had to get this way if people were just reasonable and did not lose themselves in ideology of hate, destruction, and intolerance. Imagine the appeal of a view like political liberalism. The call is strong.

As compelling as the reasonable is, and hence as apparently compelling as the need for abstraction is, the world is not always a reasonable place from a perception within its own limited domain, “political” or otherwise. The attempt to carve out a domain of the reasonable—however well intentioned—cannot succeed if, to do so, we must suppress the truth and put limits of the reasonable on the terms of communication among individuals who share this planet. Such a task would be in derogation of the very light which sparked the Enlightenment and liberalism itself. In this way, reason within limits is inherently unreasonable.

Consider the very real consequences of the use of abstraction as a panacea. Abstraction may assist us—and at times it surely does—but at other times it may be used intentionally or otherwise to confound or defer confrontation with real issues. Abstraction can create phony allegiances, or hide troubling problems that do not go away. Abstractions are sometimes powerful lies; sometimes they are the sheep’s clothing. There is simply no way to be confident that political liberalism will tend to promote “good”

abstraction as opposed to "bad," and the constraints of ideal theory do not solve this dilemma.<sup>103</sup> Indeed, the very process of deliberation via abstraction—particularly when it becomes disconnected from what Rawls thinks of a comprehensive view—has a tendency to become surreal and dangerously misguided. Rawls describes a (limited) sense of "coercion" brought about by the process of reflective equilibrium,<sup>104</sup> although such a process of cognitive decision making is often useful and good, it can also go terribly wrong. I have witnessed good lawyers lose their grounding and their center as they socratically reason themselves into untenable positions.

Rawls' twin defense of abstraction—result and process justifications—misses the fact that most people tend to believe that those who inhabit the domain of the political all too often are liars, and sometimes secretive sorts, and that it is possible (indeed, even likely at times) that a well-reasoned solution (and those who are most confident of their well-reasoned positions) are dead wrong.<sup>105</sup> The domain of the political spawns Lincolns, but it also breeds Eichmanns and Nixons as well. It is only by reference to highly-contested values that lie beyond the domain of the political that we can sort through the layers of abstraction and coherence to find our truth. Abstraction may help us in this regard—and it may not—but the affirmative attempt to use abstraction as a tool to defer confrontation at the level of truth will reap its own rewards. And the tactic is potentially patronizing: as Holmes put it, even a dog knows the difference between being tripped over and being kicked.<sup>106</sup>

Thus, Rawls' use of abstraction, which is linked to his defense of abstraction and which looks to his perceived need to carve out the domain of the political and reasonable (if necessary in lieu of truth), is a limitation upon *Political Liberalism* both concretely in its power to appeal to thoughtful participants in a political arena

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103. For some, Rawls' specification and concretization of a fully adequate system of basic liberties and his reliance on an analysis of "key" concepts like seditious libel will seem dated. The frontiers of genuine First Amendment litigation have moved away from the battles of the last generations, and Rawls' banal account demonstrates his preference for locating his forces in the rear guard.

104. POLITICAL LIBERALISM, *supra* note 6, at 49.

105. Lawyers can become particularly sensitive to these points. By training we encounter exemplary instances of reasoning power that are bereft of judgment, wisdom, compassion, and common sense.

106. Oliver Wendall Holmes, THE COMMON LAW 3 (1881).

and abstractly in its turn from the high ideals of the Enlightenment and liberalism in its grandest moments. These limitations grounded in Rawls' use and defense of abstraction link to the two other crucial limitations put upon a theory of justice in *Political Liberalism*.

### B. The Domain of the Political

A critical feature of *Political Liberalism* (and indeed some of Rawls' earlier writings, (e.g. *Overlapping Consensus*) is the position that a theory of justice is a political conception of justice and not itself a comprehensive doctrine.<sup>107</sup> "Political liberalism is not comprehensive liberalism. . . . The general problems of moral philosophy are not the concern of political liberalism, except insofar as they affect how the background culture and its comprehensive doctrines tend to support a constitutional regime."<sup>108</sup> *Political Liberalism* deals with the domain of the political and limits itself to that domain. In *Political Liberalism*, Rawls normatively refocuses *A Theory of Justice* on "a family of classical problems that had been at the center of the historical debates concerning the moral and political structure of the modern democratic state."<sup>109</sup> That is a fairly narrow range of topics. Epistemologically, *Political Liberalism* does not attempt to answer certain basic questions which relate to the desire "to develop the full range of concepts and principles in terms of which

107. See, e.g., POLITICAL LIBERALISM, *supra* note 6, at 195.

108. POLITICAL LIBERALISM, *supra* note 6, at xxvii-iii. This distinction forms a major breaking point from *A Theory of Justice*:

Note that in my summary of the aims of *Theory*, the social contract tradition is seen as part of moral philosophy and no distinction is drawn between moral and political philosophy. In *Theory* a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice. Nothing is made of the contrast between comprehensive philosophical and moral doctrines and conceptions limited to the domain of the political. In [*Political Liberalism*], however, these distinctions and related ideas are fundamental.

*Id.* at xv (emphasis added).

109. *Id.* at xxviii. Thus, unlike a comprehensive doctrine which in theory would attempt answers to many normative questions, Rawls' theory of justice "treats the grounds of the basic religious and political liberties, . . . the basic rights of citizens in civil society, including here freedom of movement and fair equality of opportunity, the right of personal property, and the protections of the rule of law." *Id.* In addition, but to a much lesser extent *A Theory of Justice* (and again *Political Liberalism*) treats "the justice of economic and social inequalities in a society in which citizens are viewed as free and equal." *Id.* Many major topics remain left aside. See *id.* at xxviii-xxix.

to characterize the requirements of moral life."<sup>110</sup> The normative and epistemological limitations on a theory of justice imposed by the focus on the domain of the political are significant. In essence, Rawls has developed a theory of political positivism.<sup>111</sup>

Normatively, *Political Liberalism* largely focuses on what loosely speaking could be called first principle concerns, basic rights, and liberties, with only minor attention to issues of social and economic equality (largely second principle concerns).<sup>112</sup> In addition, the discussion centers heavily on basic *constitutional* rights and liberties and the problems associated with a just constitution in a democratic regime; the discussion heavily mimics a vision of United States Constitutional history<sup>113</sup> and although it is at times very concrete, the focus is very narrow, even narrower than *A Theory of Justice* in many ways. Rawls' opening directs attention away from a myriad of critical topics: social and economic inequalities; principles for individuals including the account of natural rights and duties and obligations; justice between states and peoples; and questions of justice in the family, workplace, and protection of the environment and wildlife.<sup>114</sup> Thus, the focus on the domain of the political—in lieu of a pursuit of the more comprehensive implications of *A Theory of Justice*—is, or reflects, a severe normative limitation.

Rawls has elected to put his theory of justice to work most concretely in areas regarding First Amendment/due process/voting rights.<sup>115</sup> For most lawyers, the account will be *legally* bland: Rawls seems content at times to provide extensive philosophical argumentation to support some of the most obvious

110. *Id.* at xxvi. See xxvi-xxvii.

111. See *supra* note 13.

112. POLITICAL LIBERALISM, *supra* note 6, at xxviii.

113. For all the protest by Rawls to the contrary, *Political Liberalism* will set Rawls up for critique that *A Theory of Justice* has turned into a stylized defense of an idealized vision of the United States Constitution, its history, and interpretation by the Supreme Court. At times, Rawls seems to use justice as fairness to ratify what would pass for a college-level discussion of the Bill of Rights.

114. It is not that *A Theory of Justice* had *nothing* to say on these topics—the discussion was limited—but *Political Liberalism* directs focus to the domain of the political, and to a certain extent in consequence, away from these topics.

115. See POLITICAL LIBERALISM, *supra* note 6, at 294.

propositions.<sup>116</sup> Moreover, Rawls seizes upon so-called “fixed points”<sup>117</sup> that are fixed only at a level of platitude. For instance, Rawls claims: “Within our tradition there has been a consensus that the discussion of general political, religious, and philosophical doctrines can never be censored. Thus the leading problem of the freedom of political speech has focused on the question of subversive advocacy . . . .”<sup>118</sup> So stated, the proposition is true in the large but uneventful, and the idea that the leading problem of free speech is sedition is highly contestable. The limitations on designing a philosophical theory to verify (or whatever) a bland college civics-level understanding of the basic constitutional political/civil liberties and First Amendment/due process/voting rights are obvious. The domain of the political is an intriguing, crucial arena, but it is only a small part of a bigger landscape and the issues presented in that arena are always deeper and more complex. Underneath a “consensus” on certain platitudes lies a field of highly contested concrete and less abstract matters over which Rawlsian abstractions can serve to cover. For example, what would Rawls say about genuine issues like whether the government can restrict abortion information given to expectant mothers?

Epistemologically, the domain of the political does not take a general position on the three basic questions of moral epistemology and psychology. Instead, it “sees its form of political philosophy *as having its own subject matter*: how is a just and free society possible under conditions of deep doctrinal conflict with no prospect of resolution?”<sup>119</sup> That is just another way of expressing, *inter alia*, that political liberalism is not a comprehensive doctrine or that political liberalism is a kind of political positivism. Without an extensive analysis, it suffices to say that only so much can be gleaned within the domain of the

116. For example, Rawls engages in an extensive discussion of the problem of seditious libel, *see* POLITICAL LIBERALISM, *supra* note 6, III § 10, and draws the particularly uninteresting conclusion that “[t]hus the great importance of *New York Times v. Sullivan* in which the Supreme Court not only rejected the crime of seditious libel but declared the Sedition Act of 1798 unconstitutional . . . .” *Id.* at 343. There is a flavor in the overall discussion that *Political Liberalism* succeeds at the concrete level if it can succeed in justifying a set of standard Supreme Court precedents in their most basic implications.

117. The three fixed points include no seditious libel, no prior restraints “except for special cases,” and the protection of the advocacy of subversive and revolutionary doctrines. *Id.* at 342. These ideas get restated at various points. *See, e.g., id.* at 343.

118. *Id.* at 343.

119. POLITICAL LIBERALISM, *supra* note 6, at xxviii (emphasis added).

political with *its* methods, and so much of what interests and challenges those who operate in the political arena revolves around the untreated basic questions. Rawls has introduced an argument for political positivism featuring a distinctness of political and moral questions (albeit with overlap) not dissimilar to the legal/moral dichotomy espoused by legal positivists (who also acknowledge an overlap).

However far this type of view might take Rawls from the grander claims of *A Theory of Justice*, the epistemological limits of the domain of the political are significant. Rawls no longer makes grand assertions with respect to background comprehensive moral doctrines, even comprehensive liberalism, except at certain points.<sup>120</sup> Many will be dismayed at this turn away from the greater aspirations of a theory of justice.

### C. *The Idea and Ideal of Public Reason*

A dramatic limitation on the practical impact of a theory of justice occurs with respect to the idea and ideal of public reason.<sup>121</sup> The idea and ideal of public reason may seem at first to be an improvement over any intuitionistic reasoning, but on reflection the idea and ideal of public reason reflect a dramatic cutback on the power of philosophical argument. In a closely related passage regarding the role of justice as fairness following Rawls' extended analysis of the institutional framework of political liberalism (and some concrete normative conclusions to be drawn from it), Rawls explicitly directs justice as fairness more

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120. See, e.g., *id.* at 207-10.

121. These limitations occur despite the fact that Rawls acknowledges that individuals do not normally make such distinctions: "To be sure, people do not normally distinguish between comprehensive and public reasons; nor do they normally affirm the ideal of public reason, as we have expressed it." POLITICAL LIBERALISM, *supra* note 6, at 25. And Rawls admits that some liberalisms are not compatible with the idea of public reason. POLITICAL LIBERALISM, *supra* note 6.

to citizens in a democratic society than to jurists<sup>122</sup> and comments:

I should emphasize that the discussion of free speech in the last four sections is not intended to advance any of the problems that actually face constitutional jurists. My aim has been *solely* to illustrate how the basic liberties are specified and adjusted to one another in the application of the two principles of justice. The conception of justice to which these principles belong is *not to be regarded as a method of answering the jurist's questions*, but as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment. *We must not ask too much of a philosophical view.*<sup>123</sup>

This retreat, reminiscent of Rawls' early qualifications of *A Theory of Justice* regarding the role of intuition, is closely tied to the idea and ideal of public reason. The result is that the domain of the political apparently overlaps with the domain of the legal, but the terms of that overlap are often imprecise, relativistic, and intuitionistic. Overt schematic application of "justice as fairness" in the context of actual legal doctrinal concerns asks too much of the philosophical doctrine. Put another way, Rawls now severely limits applicability of justice as fairness in actual juristic problems. Practically speaking, this limitation, particularly when coupled with others, makes any efforts to schematically apply Rawls in the context of actual legal doctrine very difficult and precariously non-Rawlsian.<sup>124</sup> To appreciate the limitations

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122. *Id.* at 369. Although at times Rawls directs the ideal of public reason to jurists, and especially the Supreme Court, he consistently caveats that the ideal of public reason relates to an idealized view of the Supreme Court, *see, e.g., id.* at 233 n.18, 237, 254 n.43, and links the role of jurists to limitations imposed by the idea of public reason that force judicial decision-making to proceed in the most important areas upon reasons that can be accepted and understood by reasonable citizens in a just democratic regime. *See id.* at 236-237. Rawls cannot possibly imagine that complex constitutional jurists like Justice Scalia will take this seriously in any strong sense.

123. *Id.* at 368 (emphasis added).

124. One might persist in defending Rawls by suggesting that justice as fairness has some juristic counterpart in its methods of philosophical exploration. I no longer see the compelling reason to do so, given the spirit of Rawls' later work and the extraordinary complexity associated with trying to do so. Legal doctrine is ill-suited to Rawls' philosophical methods of *Political Liberalism* vintage. Rawls throws one interesting twist

imposed on justice as fairness by the idea and ideal of public reason, a brief sketch of these demands is appropriate.

In *Political Liberalism*, Rawls has placed the guidelines of inquiry and criteria of public reason on a footing with the substantive principles of justice themselves.<sup>125</sup> Rawls links the guidelines of inquiry to the principle of political legitimacy:

[O]n matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens . . . . We add to this that in making these justifications we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial. The liberal principle of legitimacy makes this the most appropriate, if not the only, way to specify the guidelines of public inquiry . . . .

[I]n discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth—nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally.<sup>126</sup>

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in the mix, namely, Rawls argues that not all political questions are limited by the idea of public reason. Only questions of “constitutional essentials” and basic justice, see *POLITICAL LIBERALISM*, *supra* note 6, at 227-30, are strictly governed. *Id.* at 214. Many political questions are not so limited or at least not “in the same way, or so strictly[.]” whatever that means. *Id.* at 215. Rawls leaves off the account of this. *Id.* at 214-215. Moreover, many of these questions (many are legal issues) are the kind of questions that Rawls has persistently refused to address. *See id.* Thus, the teaser is that some lesser constraints upon philosophical schematic application may apply (we don’t know much more) and Rawls seems to believe that his comprehensive view is *most* directly applicable without the constraints of public reason in instances where he has offered little or no guidance as how to proceed with schematic application.

125. *POLITICAL LIBERALISM*, *supra* note 6, at 225. As Rawls states: “Without such guidelines substantive principles cannot be applied and this leaves the political conception incomplete and fragmentary.” *Id.* at 223-24.

126. *POLITICAL LIBERALISM*, *supra* note 6, at 224-25.

The guidelines of public reason apply to a specific set, and not all, questions of justice. The limits imposed by public reason apply to questions of "constitutional essentials" and "basic justice,"<sup>127</sup> basically the fundamental principles specifying the general structure of government, the equal basic rights and liberties of citizenship and certain matters involving basic issues of distributive justice, namely, freedom of movement and free choice of occupation and a social minimum covering citizens' basic needs.<sup>128</sup> Rawls distinguishes these essential concerns from a host of others, including issues such as the application of the difference principle apart from these essentials,<sup>129</sup> extensions of the principle of fair equality of opportunity beyond these essentials,<sup>130</sup> and a host of political questions such as taxation, property, national parks, pollution, and arts and museums legislation.<sup>131</sup> The extension of the idea of public reason covers many critical topics, but does leave open the possibility of political discourse based on non-public reasons in many issues of social and economic justice.

Within the areas of concern in which the guidelines of public reason apply, the strictures are tight: the ideal holds for political advocacy in (candidates, officials, citizens) the public forum *and* in non-public political actions like voting.<sup>132</sup> Citizens honor public reason and the principle of legitimacy when they vote their sincere opinion in line with three conditions:

- a) we give very great and normally overriding weight to the ideal it prescribes; b) we believe public reason is suitably complete, that is, for at least the great majority of fundamental questions, possibly for all, some combination and balance of political values alone reasonably shows the answer; and finally c) we believe that the particular view we propose, and the law or policy

127. *Id.* at 214. *See id.* at 227-30. Rawls specifies these constitutional essentials and matters of basic justice in some detail. *See id.* at 227-30.

128. *Id.* at 228-30.

129. *Id.* at 229.

130. *Id.* at 228.

131. *Id.* at 214. In addition Rawls continues to acknowledge that "problems of extension" to other topics, *see id.* at 20-22, remain, which include duties to future generations (just savings *inter alia*), the law of peoples and health care. *See id.* at 244-49. Rawls has sketched some solutions. *See id.* at 245-46.

132. POLITICAL LIBERALISM, *supra* note 6, at 215.

based thereon, expresses a reasonable combination and balance of those values.<sup>133</sup>

Citizens must appeal to political values and accept "that politics in a democratic society can never be guided by what we see as the whole truth . . . ."<sup>134</sup> Rawls is clear that public reason is neither fully specified nor absolute: "Content and idea may vary . . . ."<sup>135</sup> Thus, "[a]ccepting the idea of public reason and its principle of legitimacy emphatically does not mean . . . accepting a particular liberal conception of justice down to the last details of the principles defining its content. We may differ about these principles and still agree in accepting a conception's more general features."<sup>136</sup> And, "[i]t is inevitable and often desirable that citizens have different views as to the most appropriate political conception; for the public political culture is bound to contain different fundamental ideas that can be developed in different ways."<sup>137</sup>

Rawls views the idealized Supreme Court as the exemplar of public reason, and subject to such limitations.<sup>138</sup> In that vein, Rawls paints the Supreme Court as using public reason in reaching decisions—following closely an interpretation of Dworkin<sup>139</sup> not using "their own personal morality" nor "even of political morality"<sup>140</sup> but using the "public political conception of justice or a recognizable variant thereof."<sup>141</sup> Judges will differ in their interpretations at many points and will find that there is not a single agreed upon public political resolution for all controversies. However, "[t]he [C]ourt's role as the highest judicial interpreter of the constitution supposes that the political conceptions that the judges hold and their views of constitutional essentials locate the central range of the basic freedoms in more or less the same place."<sup>142</sup> It appears that Rawls views justice

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133. *Id.* at 241.

134. *Id.* at 243.

135. *Id.* at 226.

136. *Id.*

137. *Id.* at 227.

138. *See id.* at 231-40.

139. *See id.* at 236 n.23.

140. *Id.* at 236, 236-37 n.23.

141. *Id.* at 236-37 n.23.

142. *Id.* at 237.

as fairness as both a nice example of a liberal political conception in such contested areas, and at times exemplary of the core of settled public democratic constitutional thought.<sup>143</sup> In the more controversial areas, given the strictures of the guidelines of public reason, it appears that detailed, careful, schematic, rigorous Pogge-like applications of justice as fairness would be violative of Rawls' own condition of public reason.

The idea and ideal of public reason serve to severely limit Rawls' view in several ways. First, as to all matters of constitutional essentials and basic justice, Rawls' view limits the scope of development of justice as fairness to comply with the guidelines of public reason. Thus, Rawls even suggests that certain social minimum arguments are too broad because of the appeal to the difference principle (which is not in any statute, *arguendo*).<sup>144</sup> Pragmatic schematic and rigorous application of *A Theory of Justice* is cut short in these dimensions. The view is hardly an improvement, if at all, over intuitionism as Rawls once described it. Second, Rawls does acknowledge that the guidelines of public reason do not apply to matters outside the area of constitutional essentials. However, it is almost precisely these areas that Rawls has left undeveloped in justice as fairness in its present form. And, even as to these areas, Rawls waffles a bit and suggests that the range of the guidelines of public reason may apply farther than preliminarily acknowledged.<sup>145</sup> In the whole, the idea and ideal of public reason all but eliminates any genuine *Rawlsian* effort to schematize justice as fairness in adjudication (in particular) and otherwise.

Importantly, at the end of the discussion of public reason, Rawls acknowledges some limits on the demands of the idea and ideal of public reason. Rawls empowers citizens "to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself."<sup>146</sup> The caveat could be important to Rawls' view and might open the door for limited inroads of justice as fairness, as a comprehensive doctrine, into political discourse. However, the boundaries of when these types of inroads become appropriate are, once again, largely left to

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143. *Id.* at 226.

144. *Id.* at 237.

145. *Id.* at 215.

146. *Id.* at 247.

intuition, and at least on one reading, are limited to unexceptional and/or unusual and extraordinary cases.

Rawls appears to consider two such cases; I call them the "sincerity" and "visionary" cases. Neither situation, however, is necessarily of any great overall significance with respect to the limits of the guidelines of public reason. In the former, Rawls acknowledges that we may adopt an "inclusive" view<sup>147</sup> of public reason when a serious dispute in a nearly well-ordered society develops and there is doubt about "the sincerity of one another's allegiance to fundamental political values."<sup>148</sup> To cast aside such doubt, Rawls suggests that it might be appropriate for opposing groups "to present in the public forum how their comprehensive doctrines do indeed affirm those [political] values."<sup>149</sup> The example Rawls uses in this situation, however, is not one involving constitutional essentials, but instead deals with a dispute over how the principle of fair equality of opportunity applies to education rights for all citizens.<sup>150</sup> Thus, in the problem of sincerity, Rawls concedes little to the inclusive view.

The latter, the visionary case, involves a special kind of civil disobedience with respect to guidelines of public reason. Rawls posits a situation where a non well-ordered society experiences a "profound division about constitutional essentials"<sup>151</sup> such as slavery.<sup>152</sup> It is possible in such situations that "the comprehensive reasons [the abolitionists] appealed to were required to give sufficient strength to the political conception to be subsequently realized."<sup>153</sup> The ideal of public reason allows such visionaries to appeal to comprehensive doctrines for the sake of ideal of public reason itself.<sup>154</sup> Indeed, Rawls goes so far as to assert that certain non-public reasons can be supported by "the clear conclusions of public reason."<sup>155</sup>

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147. *Id.*

148. *Id.* at 248.

149. *Id.* at 249.

150. *Id.* at 248.

151. *Id.* at 249.

152. *Id.* at 249-54.

153. *Id.* at 251.

154. *Id.*

155. *Id.* at 250.

Rawls' argument for the visionary—and the inclusive view—is interesting. The matters he uses to illustrate his point are slavery and the denial of basic civil rights; he speaks in terms of “evil” and “curse”<sup>156</sup> and not ordinary matters of political justice.<sup>157</sup> That is true, but it begs the question to describe slavery as clearly against public reason or “clear conclusions based on public reason” circa 1790-1860; and to a lesser extent the same is true of civil rights circa 1870-1950. Rawls' insistence that certain deducible (or whatever) political veracities are of the domain of the political makes his position hard to reconcile. Clearly, it would seem that Rawls does not intend that the special “visionary” cases of justice should set the tone for a general exception to the demands of public reason; the inclusive view is, therefore, of limited overall significance in matters of constitutional essentials. Rawls has no effective way to account for political visionaries like Ghandi, King, and Lincoln apart from this dangerously inconsistent position. Concretely, it is doubtful that a thoughtful judge who accepts a Rawlsian vision of justice as fairness could ever legitimately invoke this special case and use a complex, schematic argument based on Rawlsian premises as a *ratio decidendi*.

#### CONCLUSION

Rawls has now failed to accomplish certain key aspirations for justice as fairness set forth in *A Theory of Justice*. *Political Liberalism* severely limits the practical applicability of justice as fairness—playing out one interpretation of *A Theory of Justice* that did not seem at the time that book was written to be the most coherent and plausible interpretation. As a practical matter, the view fails to offer a serious alternative to forms of utilitarianism, particularly law-and-economics-type variants, which was one of its major objectives. Judges and lawyers will not find justice as fairness as significant a source of philosophical insight for practical concrete implication. Rawls has even hamstrung his academic supporters in a way that would make it difficult for them to do the work for him and remain faithful to his view. Finally, Rawls has abandoned the inspiration of the very movement that spurred his view. Somehow the search for

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156. *Id.* at 295.

157. *Id.*

truth has mutated into a defense of a domain of the political: the defense kills the inspiration that, as a practical matter, brought so many to Rawls' work in the first instance.