12

THE JURISPRUDENTIAL USES OF JOHN RAWLS*

RICHARD B. PARKER

I

In December 1973, the Association of American Law Schools met in New Orleans. At the convention's major luncheon, with the Chief Justice of the United States in attendance, the announcement was made that a book by a Harvard philosophy professor [1] had won the Coif Award as the best book written in law in the three preceding years. The strangeness of the occasion can be more easily appreciated against a list of earlier winners of the Coif Award. They were:

1964: *Selected Essays on the Conflict of Laws* by Brainerd Currie
1967: *Security Interests in Personal Property* by Grant Gilmore
1970: *The Oracles of the Law* by John P. Dawson and *The Limits of the Criminal Sanction* by Herbert O. Packer [2]

One explanation for the award which I heard expressed at the convention was that the selection committee was unduly influenced

* A draft of this essay was read to the Tuesday Evening Club at New York University Law School on December 6, 1977. I am indebted to the members of the club for several helpful suggestions and criticisms. I am

by several members with abnormally strong philosophical interests.[3] Why otherwise should a book of social philosophy, however meritorious, be given an award ordinarily going to a book about law? Were important books in sociology or economics given consideration?

Events since 1973, however, seem to support the selection committee's view of the unusual interest for lawyers of this particular work of social philosophy. Citations to the book in law reviews have become increasingly numerous. The book is required reading for a larger and larger percentage of law students. Law professors with no special interests in philosophy increasingly feel some professional obligation to become acquainted with the main ideas of the book. My own impression is that *A Theory of Justice* has been more enthusiastically received by lawyers than by philosophers and political theorists. Part of the explanation for the enthusiasm may be the unprecedented publicity which the book has received.[4] But the main purpose of this essay is to show that lawyers have uses of their own for *A Theory of Justice* and have discovered virtues in it that many philosophers have failed to appreciate fully.

A law professor friend, educated in Europe, once remarked to me that Rawls's book reads as though the nineteenth century had not happened. He then noted that the United States is still governed by an eighteenth-century constitution. One reason for the inclusion of Rawls in a legal education is that *A Theory of Justice* articulates some fundamental values protected by the United States Constitution. To put it more strongly, it is arguable that *A Theory of Justice* formulates as well as any book to date the principles of justice expressed by the Constitution. This thesis, if true, would be sufficient to establish the importance of the book for lawyers regardless of the truth of Rawls's theory or the cogency of his reasoning.

The initial plausibility of the idea that any constitution expresses a single conception of justice rests on the picture presented by Rawls's own four-stage sequence.[5] Recall that Rawls sets out his four-stage sequence as a framework to simplify the application of the two principles of justice.[6,7] The first stage is the original position

---

indebted also to David A. J. Richards, Kenneth I. Winston, and the editors of *Nomos* for their very useful correspondence on that earlier draft.

behind the veil of ignorance in which Rawls's two principles of justice are chosen. The final statement of Rawls's two principles with some accompanying priority rules which Rawls offers to aid interpretation of those principles is as follows.

First Principle:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle:

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged consistent with the just savings principle,[8] and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

First Priority Rule (The Priority of Liberty):

The principles of justice are to be ranked in lexical order [9] and therefore liberty can be restricted only for the sake of liberty. There are two cases:

(a) a less extensive liberty must strengthen the total system of liberty shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second Priority Rule (The Priority of Justice over Efficiency and Welfare):

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity [clause (b) of the Second Principle] is prior to the difference principle [clause (a) of the Second Principle]. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.[10]

After the choice of this conception in the original position, the contractors move to the second stage, a constitutional convention, where, subject to the constraints of the principles of justice already

chosen, they are to design a system for the constitutional powers of government and the basic rights of citizens.[11] At this second stage, the veil of ignorance is thinned a bit so that the contractors now know "the relevant general facts about their society, i.e., its natural circumstances and resources, its level of economic advance and political culture, and so on." [12] The third stage is the legislative stage where the veil of ignorance is totally lifted except that contractor-legislators do not know particular facts about themselves.[13] The fourth stage is the following of rules of law by judges, administrators, and citizens.[14] Everyone has access to all the facts. At each of the first three stages, the veil of ignorance keeps out that information that is not relevant from the point of view of justice to the decisions to be made at that stage.[15] At each stage, the conclusions of the prior stages are binding upon the participants: the constitution is chosen to implement the principles of justice, the legislators are bound by the constitution, and the citizens are bound by the law.[16]

The veil of ignorance and the four-stage sequence are only expository devices.[17] The story of contractors in the original position behind the full veil of ignorance is a graphic way of summarizing a whole set of normative and empirical premises, few of which are argued for in the book.[18] I discuss this point in more detail in the next section of this essay.

The thesis the truth of which would justify and explain lawyers' interest in *A Theory of Justice* is that the United States Constitution as it presently exists with all of its amendments might have been chosen by contractors who had already chosen Rawls's two principles and were now charged with drawing up a constitution, given knowledge of the relevant general facts of present-day American society, including the fact that we now have the Constitution we do have. Another way of stating the thesis is that Rawlsian contractors already committed to Rawls's two principles of justice would not significantly alter the United States Constitution. In this sense, the Constitution is an expression—an expression relative to American economic, political, and social history—of Rawls's two principles of justice.

The thesis that the contractors would choose not to change the present-day United States Constitution does not entail that Rawls's

conception of justice has been realized in present-day America. Having a constitution does not guarantee that everyone's constitutional rights are respected. The United States Constitution sets standards that are often not met. The thesis holds only that those constitutional standards are an attempt to apply Rawls's two principles to the particular circumstances of American economic, political, and social history.

It is important to realize that the truth of the thesis does not require that the United States Constitution be a unique solution to the application of Rawls's principles of justice to present-day America. The principles are very general, and many constitutions might fill the bill.[19] The federal system, for example, is not explicitly required by the two principles. Yet given that the facts of present-day American society include a federal system to which everyone is accustomed, it seems reasonable to suppose that the contractors would presently choose a constitution which provides for a federal system.[20]

Analogously, the truth of the thesis does not require that difficult cases of constitutional interpretation be solvable by direct application of Rawls's two principles of justice. That would be to expect too much of theory and to give too little credit to the importance of the lawyers' craft.[21] Both Rawls's principles of justice and many of the most interesting provisions of the United States Constitution are too abstract to be mechanically applied. Their application requires practical wisdom, and skill in the arts of casuistry in which lawyers are trained.

A counter-example to the thesis would be a provision in the Constitution clearly incompatible with Rawls's two principles. Examples are the provisions for the institution of slavery in the United States Constitution of 1789.[22] Fortunately for the thesis, these provisions were removed by the Civil War amendments.[23]

It appears that the major arguments against the thesis are not positive provisions in the Constitution which directly contradict Rawls's two principles, but the absence of provisions that seem to be dictated by the two principles. For example, if the proposed Equal Rights Amendment [24] is necessary to insure equal citizenship to women, that is, if the equal protection clause of the Fourteenth Amendment [25] is in fact not sufficient, then the present absence

from the Constitution of the Equal Rights Amendment would weigh against the thesis that the Constitution expresses Rawls's two principles.

The most telling arguments against the thesis arise with Rawls's Second Principle. The Constitution of the United States seems designed neither to insure that all offices and positions shall be open to all under conditions of fair equality of opportunity nor, especially, that all social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged (the "Difference Principle").[26] Part of the solution to these difficulties may be to view the Constitution as designed to further only the First Principle of justice insuring that each person have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Rawls himself assigns the labor of insuring expression of the Second Principle to the legislative stage.[27] But a defense of the thesis should not rest on a strict distinction between the constitutional convention and the legislative stage. Rawls also says that the best constitution is found by moving back and forth between the stages of the constitutional convention and the legislature.[28] And, in the United States, all serious matters of the justice of the basic structure of society [29] that become political issues become issues of constitutional law as well. The compliance of the basic structure of society with the Second Principle may have to be governed to some degree by constitutional rights to a minimum income and to the material means for equal opportunity.[30] That the United States Constitution does not seem to require equal opportunity, and clearly does not require the Difference Principle, is a problem for the thesis.

Most Americans, including lawyers, would, contrary to Rawls,[31] defend some notion of moral desert based on effort as basic to social justice. While they believe that such desert should not condition one's basic liberties, the majority of Americans do not believe that sheer citizenship is sufficient to support the constitutional right to the benefits of the Difference Principle. On the other hand, Rawls's First Principle, as well as, to some degree, the requirement of equal opportunity in the Second Principle, and the priorities established between the two principles, seem to most American lawyers to give expression to basic constitutional values. To the degree that the Difference Principle can be defended as a necessary consequence of

the theory unifying so much else of what American lawyers believe about the Constitution, it may in time be accepted that the Constitution requires realization of the Difference Principle. Rawls's theory may simply be the spelling out of the implications of taking human equality seriously. If such equality is also basic to our Constitution, then perhaps the Constitution requires the Difference Principle.

It may be said in derogation of the thesis considered here that the views on social justice of the Founding Fathers or of the authors of the Civil War amendments were closer to Robert Nozick's [32] than to John Rawls's. Two responses can be made to this charge. Both are partially true, and each provides part of the answer.

First, the charge can be denied. It can be asserted that differences between what the founding fathers or the authors of the Civil War amendments believed the Constitution requires and what we believe it requires are only differences over means to achieve Rawlsian ends. The Founding Fathers may have thought—and it may have been true in 1789—that certain property rights were necessary to protect a system of basic equal liberties. But times and the social and economic organization of society have changed so drastically that preservation of equal liberty may now require much more governmental control over private property. Similarly, experience has taught us what the authors of the Civil War amendments could not have known: that doctrines of separate but equal are not adequate means, in the American context, to achieve equal protection of the laws for blacks. Insight into what means are necessary to achieve the vision of society inherent in the Constitution has affected our conception of what the Constitution requires in particular contemporary situations, but the basic principles expressed by the Constitution, and the meaning of the provisions of the Constitution, remain the same.

Second, to the extent that the charge is true, the views of the Founding Fathers or of the authors of the Civil War amendments are not dispositive. They must be considered, as we shall expect future generations to consider our views; but the Constitution is the constitution of those living under it. Accordingly, it must be interpreted to give expression to our own best vision, all things considered, of what is just. Rawls's book is useful as the best available formulation of that vision and, accordingly, the best

available description of the principles underlying the best judicial decisions of the last twenty-five years.

Another indication that the Constitution expresses Rawls's two principles of justice, or something very close to them, is what many lawyers and law students experience upon reading *A Theory of Justice*.[33] They find that a reading of the book strengthens their commitment to the Constitution by clarifying for them what they themselves believe about social justice. Read as an expression of belief, lawyers experience the book as an exciting reaffirmation of constitutional and personal values. They are moved by Rawl's vision in Part III of his book of a New Englandish society composed of a hierarchy of town meetings. *A Theory of Justice* seems to function among lawyers as a handbook for the faithful. For those out of sympathy with the Constitution, and few lawyers are out of sympathy, Rawls is unsatisfying because so much that is basic is simply asserted without argument. But as I shall argue below, *A Theory of Justice* is not designed to persuade the heathen.

II

It is important to keep in mind in reading Rawls that both the original position with its veil of ignorance and the four-stage sequence are only expository devices used to set out in summary form the many normative and empirical premises which Rawls accepts without argument and from which he argues to his two principles of justice. In his interesting reconstruction and critique of Rawls, Robert Paul Wolff argues that when Rawls began to develop his theory in the 1950s, he hoped to show that his two principles were binding on any rationally self-interested agent willing to commit himself to a moral point of view.[34] Wolff argues that Rawls came over time to see that he had set himself an impossible task and that he came to regard his theory more and more as a rational reconstruction of his and his reader's views on social justice.[35] On this view of what Rawls is doing, the normative and empirical premises which are built into the notion of the original position and the veil of ignorance are acceptable if they are in fact our premises. No further argument is necessary if Rawls is simply reconstructing and ordering our own views for us. It seems clear that this is what

Rawls is doing,[36] which makes him less interesting to philosophers but much more interesting to lawyers.

Philosophers often criticize Rawls either (1) for not providing argument for debatable premises, or (2) for not being specific enough regarding the practical application of his conception of justice.[37] Rawls would and must plead guilty to both charges.

Rawls does knowingly assert virtually without argument that: (1) justice is the first virtue of social institutions; (2) a "well-ordered society," that is, a society composed of free and equal moral persons adhering to a single conception of justice, is both possible and desirable; and (3) the conception of justice most suitable for a "well-ordered society" is the one which would be unanimously agreed to in a hypothetical situation that is fair. None of these three propositions is argued for in *A Theory of Justice* except that Rawls hopes that the coherence and scope of the entire picture painted by the book may convince the uncertain reader.[38] What is argued for in the book is that given these three assumptions plus several others, the particular conception that will be chosen in the fair hypothetical situation will be Rawls's two principles. Societies based on aesthetic values, or on warrior virtues, are not seriously considered. The moral equality of persons is taken for granted. Caste systems are beyond the pale. Rawls also knowingly assumes the same mildly pessimistic view of human nature that is presupposed by the United States Constitution. He does offer in Part III some arguments from developmental psychology to counter a deeper pessimism that would regard the vision of a human society organized around Rawls's two principles as a dangerous pipe dream.[39] He does not consider more optimistic views of mankind that would allow the possibility of human societies not organized by the jealous virtue of justice. Given that Rawls takes all this as given, it is no wonder that some social philosophers and political theorists complain that he has begged all the interesting questions. But lawyers, self-selected into American law schools, and educated in the American constitutional tradition, already believe what Rawls assumes about equality and human nature. They are willing to grant Rawls all of his basic premises, for they are interested in his actual enterprise of showing how a single determinate conception of justice follows from his, and their, premises. To the degree that Rawls's conception of justice is

an articulation of what they already believe, his principles of justice provide lawyers with a common starting point and an enriched vocabulary for discussion of how to apply the only slightly less abstract provisions of the United States Constitution to contemporary problems.

At one point Robert Paul Wolff says of Rawls's theory:

> So long as we remain in the realm of rational reconstruction [of the readers' beliefs about social justice] the logical status of the project is clear, and not terribly satisfactory. The ground for asserting the principles arrived at by the analysis is merely the general agreement of the audience with the original moral convictions of the author. In short, the entire procedure can be no more than aimed for a sophisticated rendering of the *consensus gentium.*[40]

I think that rational reconstruction is all that Rawls is doing, or claims to be doing. Wolff is expressing a philosopher's disappointment that Rawls did not do more. But what is disappointing to philosophers is exciting to those who agree with the *consensus gentium,* which includes most American lawyers. Even statements as abstract as Rawls's two principles of justice eliminate many possible justifications for decisions made by American legislatures and courts.[41]

As for the second charge that Rawls is not specific enough, if Part II of *A Theory of Justice* is viewed as a serious attempt to address the problems of designing a particular constitution, or of weighing liberties against one another in concrete cases, or of designing particular economic systems, then it is obviously inadequate. But the fact that Rawls does not spell out in much detail how his principles are to be applied does not usually bother lawyers. They do not expect it from a philosopher. They view Part II of *A Theory of Justice* as Rawls intended it, as a clarification of the conception set out in Part I, not as an attempt to apply that conception to the hard problems of designing in a particular social context, particular social and political institutions.[42] They understand that actual application of Rawls's two principles requires the intervention of at least two more levels of specialists: first, philosophically trained lawyers to translate Rawls's conception of justice into principles of

constitutional law; and second, sophisticated practicing lawyers and judges willing to apply those principles of constitutional law in complex factual settings.

A growing literature by philosophically trained lawyers takes Rawls's two principles as starting points and attempts to apply them to particular public policy issues.[43] This literature, and Rawls' book, can be seen as the two middle stages of a developing five-stage unification of theory and practice.

At the first stage there is traditional social philosophy and political theory, the classical authors such as Locke, Rousseau, and Kant, and the secondary literature and commentary comprising "the familiar theory of the social contract" [44] which underlies not only Rawls's theory but also the United States Constitution.[45]

The second stage is Rawls's theory which picks up where much traditional political theory leaves off and argues to a formulation attractive to, and applicable in, our own society (attractiveness being one of the conditions for applicability).[46]

The third stage is the work of philosophically inclined lawyers who begin where Rawls leaves off and discuss the application of his conception of social justice to particular problems of constitutional law.[47]

The fourth stage is the work of the practicing lawyer, bureaucrat, or judge who applies the analysis of the third stage to particular cases.

The fifth stage is that of the citizen who, under the Constitution, is often called upon to make an independent evaluation of the work of lawyers, judges, and legislators, and decide whether to dissent or disobey.[48]

A major virtue of this five-stage sequence of theory and practice is that, in addition to being more detailed and complete than anything that has gone before, its further development does not depend on the existence of the extraordinary man who combines in himself both theoretical and practical wisdom. People can be trained to do good work at one of the stages, and also trained to appreciate and work with specialists at adjacent stages. Rawls is accessible to academic lawyers as Kant and Rousseau are not. Practicing lawyers will apply the work of academic lawyers who speak directly to a problem on which the working judge or attorney must write a brief or opinion. The work of the capable judge,

attorney, or administrator becomes philosophically informed, more reflective, and more internally consistent—in short, better and more worthy of the respect of the citizen. The results at the fourth and fifth stages will in turn stimulate theoreticians in the first three stages to cooperate consciously in developing a more detailed articulation of the prospectives and values inherent in the American constitutional tradition.

The prospect of a unified theory of the United States Constitution spanning the distance from the best philosophical arguments for the basic moral premises inherent in the Constitution to justifications for decision in actual cases is an exciting one. The lasting effect of Rawls may be that, by working so effectively on an uncharted part of the distance between theory and practice, he has demonstrated both how great that distance is and also how it might be traveled.

III

There is another reason for the success with lawyers of Rawls's book apart from its contribution to the articulation of an ethical tradition already accepted by most lawyers. When the book is viewed as the second stage of a full working out of the "American constitutional tradition" from first premises to specific cases, it becomes clear that that tradition has only one serious competitor within the American legal and political system. That competitor is utilitarianism.[49] Often the unarticulated basis for public policy decisions hidden in some "neutral" consideration such as "efficiency," utilitarianism is rapidly developing its own five-stage sequence. In the first stage are the classical utilitarians such as Bentham and Mill and the large body of sophisticated philosophical literature which makes up utilitarian theory. The analogue to Rawls are those scholars, primarily economists, who begin from utilitarian premises and argue to general principles attractive to and applicable to American society. The third stage is illustrated by Richard Posner's and Guido Calabresi's analysis and criticism of legal doctrines.[50] The fourth stage is the work of the lawyers, judges, and administrators who see their proper role as the fostering of economic efficiency. The beliefs of citizens who justify obedience or disobedience to law in utilitarian terms constitute the fifth stage.

A case could be made that at the present time the utilitarian five-stage sequence is more theoretically developed and more influential in American law and public policymaking than what I have called the American constitutional tradition.[51] In some areas of law, such as antitrust law, where considerations of economic efficiency provide the express reason for the law's existence, the utilitarian sequence easily holds the central place. In areas of law touching immediately on important personal rights such as the case law on provisions of the Bill of Rights and the Civil War amendments, economic efficiency seems to lawyers a much less important, if not bizarre, consideration.[52] In still other areas of law, lawyers increasingly realize that many of the major issues in their fields can be instructively viewed as presenting a choice between a theory that maximizes some conception of the good, whether it be efficiency of some sort, pleasure, productivity, or happiness, and a theory that takes rights seriously enough to honor them even though the sum total of the common good suffers thereby.[53] A major reason for the interest of lawyers in Rawls is that he provides a common point of reference for those presenting the rights side of these debates.

The conscious unification of theory and practice in the five-stage sequences described above, whether the utilitarian sequence or the rights-oriented sequence, represents a new sort of jurisprudence that might be termed "ethical jurisprudence." The double meaning is appropriate. "Ethical jurisprudence" is an apt description of the activity in that ethical premises are appealed to as grounds for justifying, explaining, and criticizing legal doctrine. And the people who engage in the activity regard justifying and criticizing from ethical premises as the ethically required way to handle legal doctrine.

(Some writers at the third stage of the utilitarian sequence attempt an ethically neutral stance.[54] In part, this rhetorical neutrality is a remnant of the view that economics can be, in some important way, value neutral. The original attraction of economic analysis to many lawyers was that it seemed to give value neutral yet nonarbitrary anwers to questions of what the law should be.[55] As economic analysis of law is increasingly seen to be an application of a kind of utilitarian ethics, the rhetorical neutrality will be dropped in favor of substantive argument that the law should above all be economically efficient because, in a world where resources are

limited and people are in need, it is wrong above all to be wasteful.)

The primary problem that many readers who are not philosophers will have with ethical jurisprudence is: whose ethics are to determine decisions when different ethical premises dictate different results in a difficult case or policy decision? Part of the answer is that most of those decisions should involve explicit argument for and against various ethical premises. Ethical jurisprudence builds on the work of philosphers over the last twenty-five years, which shows the possibility of rational discussion of ethical questions.[56] Ethical positions are not simply subjective matters of taste insusceptible to justification or refutation.

Another part of the answer is that many questions open to the moral philosopher are closed to a lawyer arguing from points of authority—statutes, cases, legal principles, and constitutions. His decisions are controlled by the ethical premises contained in those points of authority. The Constitution of the United States, for example, is not some ethically neutral set of procedures for regulating conflict between subjective differences of opinion. Accepting the Constitution as authoritative commits us to a definite and controversial set of ethical premises which forecloses many possible ways of deciding cases or deciding what legislation to pass. Lawyers, all of whom have sworn an oath to uphold and defend the Constitution of the United States or one of the state constitutions, have committed themselves to uphold and defend a definite set of ethical premises. The hard part is to discover just what those premises are and what they require of us. If *A Theory of Justice* comes even close to being an articulation of the ethical premises contained in the United States Constitution, it is no wonder that the book won the Coif Award.

The jurisprudence of one generation of lawyers is often the accepted practice of the next generation. When Oliver Wendell Holmes, Jr, refers to jurisprudence in his 1897 essay, "The Path of the Law," [57] he means the activity of abstracting basic principles of law from the cases. Examples are his own groundbreaking treatise, *The Common Law,*[58] published in 1881, and the later *Restatements of the Law* published by the American Law Institute beginning in the 1920s. In the 1930s and 1940s, the use of sociology and psychology to explain legal decisions was urged and illustrated in jurisprudence courses. Now such explanations are incorporated routinely into

many courses in the law school curriculum. In twenty years, the techniques of ethical criticism of legal decisions will, I think, be part and parcel of legal education. Now those techniques are the stuff of jurisprudence courses around the country (I include courses in economic analysis of the law where the ethical basis of the analysis is explicitly recognized), but are scarcely used in other courses. The hope of a value-neutral "science of law" dies hard. Rather than reject principled justification of legal results in favor of causal explanation and prediction as the legal realists did, ethical jurisprudence rejects only the hope of ethically neutral principles as a sufficient basis for legal decision and affirms the possibility of a principled ethical justification of legal doctrines.[59] Just as the legal realists made clear that law could be improved by using the social sciences, ethical jurisprudence attempts to show that the law will improve when legal doctrines are explicitly justified in ethical terms.

Although Rawls's book is the expression of an eighteenth-century moral and political tradition which happens to be our own, *A Theory of Justice* is in one respect a twentieth-century book. Rawls does not view himself as putting forward *the* theory of justice. He concedes that some might not find compelling the ethical and empirical premises that he builds into his description of the original position. Nor does he appeal to any authority beyond the reader's own well-considered beliefs. The question can always be raised: why should the reader not change his beliefs, or the country change its traditions? Rawls is important to lawyers as a description of what we believe and as an aid to making decisions consistent with the Constitution which we have sworn to uphold and defend. Whether we might hold other, better beliefs, and have different, better traditions is an important question, but one which does not seem to lawyers as urgent as the question of what is required of us by our present traditions and beliefs.

NOTES

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) [hereafter cited as *TJ*].
2. Information supplied by Ms. Jessie Petcoff, Administrative Assistant to Professor Frank Strong, National Secretary-Treasurer of the Order of the Coif.

The winner of the 1976 Coif Award was Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973).

3. The Selection Committee for the 1973 award was: Dean Francis A. Allen, Chairman, University of Michigan Law School; William T. Coleman, Jr., Esq., Dilworth, Paxon, Kalish, Levy & Coleman; Professor Ronald M. Dworkin, Yale Law School; Professor Marian G. Gallagher, University of Washington School of Law; Hon. Frank R. Kenison, Chief Justice, Supreme Court of New Hampshire; Dean James A. Rahl, Northwestern University School of Law; Professor Yosal Rogat, Stanford University Law School; Professor Franklin E. Zimring, University of Chicago Law School.
4. See the Introduction to *Reading Rawls: Critical Studies of A Theory of Justice,* ed. Norman Daniels (New York: Basic Books, 1974), p. xi, for an account of the publicity received by *A Theory of Justice.*
5. *TJ,* 195-201.
6. *TJ,* 195.
7. It is essential to keep in mind that the four-stage sequence is a device for applying the principles of justice. This scheme is part of the theory of justice as fairness and not an account of how constitutional conventions and legislatures actually proceed. It sets out a series of points of view from which the different problems of justice are to be settled, each point of view inheriting the constraints adopted at the preceding stages. Thus a just constitution is one that rational delegates subject to the restrictions of the second stage would adopt for their society. And similarly just laws and policies are those that would be enacted at the legislative stage. Of course, this test is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate. Institutions within the permitted range are equally just, meaning that they could be chosen; they are compatible with all the constraints of the theory. Thus on many questions of social and economic policy we must fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lie within the allowed range, and the legislature, in ways authorized by a just constitution, has in fact enacted them. This indeterminacy in the theory of justice is not in itself a defect. It is what we should expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and if it singles out with greater sharpness the graver wrongs a society should avoid. (*TJ,* 200-201)

8. The just savings principle is a limitation on consumption in any one generation, in order to provide for future generations. See *TJ,* 284-293.
9. Lexical order requires complete satisfaction of the First Principle before moving to the Second Principle. Thus, the First Principle cannot be weighed against the Second because the First Principle has an absolute weight with respect to the Second Principle. First Principle considerations cannot be sacrificed to Second Principle considerations. See *TJ,* 40-45.
10. *TJ,* 302-303.
11. *TJ,* 196-197.
12. *TJ,* 197.
13. *TJ,* 198-200.
14. *TJ,* 199-200.
15. It may be that some remnant of the veil of ignorance is also necessary at the fourth stage, that is, that some ignorance of some facts is necessary to an impartial application of any law. Those facts not necessary to the application of a law, yet liable to influence or distract the person applying the law, should ideally be kept from the person applying the law. This is, in fact, the major purpose of the legal rules which govern the admissibility of evidence at trials.
16. *TJ,* 200.
17. *TJ,* 21, 200-201. See the quotation *supra* note 7.
18. Robert Paul Wolff, in *Understanding Rawls: A Reconstruction and Critique of "A Theory of Justice"* (Princeton, N.J.: Princeton University Press, 1977) [hereafter cited as Wolff], pp. 119-132, questions the possibility of knowledge of "general facts about human society" or knowledge of general facts about present American society. Wolff draws a sharp distinction between our knowledge of natural reality and our knowledge of social reality. The former can be atemporal, but social knowledge is always "historical, self-reflective, and constitutive as well as descriptive" (Wolff, p. 126). Therefore, according to Wolff, the knowledge conditions of the ahistorical original position, and, presumably, of the constitutional convention and of the legislative stage as well, are defective.

    Wolff explicitly denies that he is making the naive objection that there could never in fact be beings such as Rawls's contractors. He appreciates that the veil of ignorance is a literary device "designed to bring to life a logical claim" (Wolff, p. 121). He appreciates that, for example, it does not matter whether there could be persons without envy (Wolff, p. 121). I think Wolff would agree that Rawls's exclusion of envy from the original position is simply another way of stating the normative premise that envy of a certain sort is not to be taken into

account in determining what is just. Similarly, Rawls's exclusion of facts about individuals is a vivid way of stating what is a controversial moral premise of his argument for his two principles, namely that facts about individuals are irrelevant to the choice of principles of social justice. It is that premise which marks Rawls as Kantian. Indeed, Rawls excludes so much from the original position and describes the contractors in such a way that there can be no real bargaining. All contractors reason exactly the same way because none has any reason to reason differently from the others. There might as well be only one "person" in the original position. This aspect of the story of the original position is simply a vivid way of saying that Rawls's two principles follow logically from the premises he builds into the original position. *(TJ,* 121). The problem is, as Rawls acknowledges, that he cannot produce the deduction, so he gives us the story of the original position instead *(TJ,* 121). It is a story that, like the stories of traveling through time in science fiction, may be incoherent when examined closely. But Rawls's deduction of his two principles from his assumed premises does not turn on the coherence of the story that Rawls uses in place of a full working out of the logical deduction.

I think Wolff would respond that his objection goes to the premises of Rawls's deduction, without regard to the coherence of the story of the original position. But Wolff or the reader make general statements all the time about human societies or about present day American society. Judicial opinions are filled with such statements, as are the preambles to all sorts of legislation. Are these statements, since they are statements about social reality, always defective because social reality cannot be known in the same way that natural reality can? I think Wolff would say that they are (Wolff, p. 210). But his objection is a point against not only Rawls's theory but against "the entire tradition of political philosophy of which *A Theory of Justice* is perhaps the most distinguished product" (Wolff, p. 210). The arguments pro and con are beyond the scope of this essay or, for that matter, beyond the scope of Rawls's book. Rawls limits his enterprise to developing "the familiar theory of the social contract" (*TJ,* 11). See Roberto Mangabeira Unger, *Knowledge and Politics* (New York: Free Press, 1975) and *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976) for an extended argument by a Harvard law professor against the tradition of political philosophy which includes Rawls's book and American constitutional law.

19. See the quotation *supra* note 7.

20. A federal system might also be more conducive to the high degree of decentralization which is implied by much of Rawls's argument in Part III of *A Theory of Justice* that a society well ordered by his conception of justice is psychologically possible and would contribute to the individual good of its members. In his discussion of envy, Rawls relies on a plurality of associations, each with its own secure internal life, to reduce the visibility, or at least the painful visibility, of variations in men's prospects (*TJ,* 536).

    On the other hand, the federal system makes more difficult protection by the federal judiciary of individual rights as required by Rawls's two principles. Yet state courts may in the long run provide better protection for those rights. See Justice William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review,* 90 (January 1977), 489.

21. See the discussion in the text at pages 270-272 on the manner in which Rawls's conception of justice, or any abstract conception of justice, might be applied in the legal process.

22. "The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation not exceeding ten dollars for each Person" (U.S. Const., Art. I, Sec. 9, cl. 1).

    "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the Whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons . . ." (U.S. Const., Art. I, Sec. 2, cl. 3).

    "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due" (U.S. Const., Art. IV, Sec. 2, cl. 3).

23. AMENDMENT XIII [1865]

    Section 1. Neither slavery nor involuntary servitude, as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

    Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of person in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

24. Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

25. See note 23 above for the text of the Fourteenth Amendment.
26. See text, page 271 above for the full statement of the Second Principle.

27. *TJ,* 199.
28. *TJ,* 198.
29. Rawls limits himself in *A Theory of Justice* to the justice of "the basic structure of society," which he defines as the major social institutions that distribute fundamental rights and duties and determine the division of advantages from social cooperation. Examples of such institutions are the legal protection of freedom of thought and freedom of conscience, competitive markets, and the monogamous family (*TJ,* 7-11).
30. Just what combination of constitutional rights, legislative programs, and social institutions would produce realization of the Second Principle in the United States is beyond the present ability of the social sciences to determine. The advantage of viewing the Constitution as requiring realization of a relatively determinant conception of social justice is that if we have some very general sense of the society we wish to achieve, it gives some point to empirical investigations of how to change things. See also *TJ,* 221-234.
31. *TJ,* 312.
32. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).
33. The remarks in this paragraph are based primarily upon reactions of my law students, to whom I have been teaching the book since before it won the Coif Award.
34. Wolff, p. 17 and pp. 180-181.
35. For a summary of the problems which forced this change, see Wolff, pp. 180-186.
36. *TJ,* 46-53. See also Rawls, "Reply to Alexander and Musgrave," *Quarterly Journal of Economics,* 88 (November 1974), 633-655 where he says, "The aim of a theory of justice is to clarify and to organize our considered judgments about the justice and injustice of social forms" (p. 633). See note 38 below.

    Unlike Wolff, I am using the term "rational reconstruction" so that it includes the results of being in "reflective equilibrium" and includes all of our best judgments evaluating the stability and applicability in practice of our conception of justice. See note 46 below. All of these factors affect what our actual conception of justice is; and it is our actual conception of justice that Rawls reconstructs for us.
37. An example of (1) is Milton Fisk, *History and Reason in Rawls' Moral Theory.* An example of (2) is H.L.A. Hart, "Rawls on Liberty and its Priority." Both of these essays are printed in *Reading Rawls: Critical Studies of "A Theory of Justice",* ed. Norman Daniels (New York: Basic Books, 1974). Hart's essay also appeared in *University of Chicago Law*

Review, 40 (Spring 1973), 534. Most of the points made by Wolff fall within either (1) or (2).

38. That Rawls does not intend to provide argument for these three assumptions is, I think, clear in *A Theory of Justice.* It is made clearer by Rawls in "Reply to Alexander and Musgrave," *Quarterly Journal of Economics,* 88 (November 1974), pp. 633-655, in which Rawls summarizes his theory of justice from a different point of view. Instead of starting with the story of rational self-interested persons in an original position behind a veil of ignorance, he begins with the notion of a well-ordered society. A well-ordered socity is one made up of members who are and who view themselves as free and equal moral persons. A well-ordered society is also effectively regulated by a public conception of justice and is a society in which the basic social institutions generate an effective supporting sense of justice. To this definition, Rawls adds the assumptions of moderate scarcity, a divergence of fundamental interests and ends, and the assumption that social organization is not a zero-sum game. It can benefit all. Given all of these assumptions, the role of the principles of justice is to assign rights and duties in the basic structure of society and to specify the manner in which it is appropriate for institutions to influence the overall distribution of benefits and burdens. Rawls then asks, "[W]hich conception of justice is most appropriate for a well-ordered society, that is, which conception best accords with the above conditions" (p. 637). His answer for which he gives little argument is, "[T]he conception that is most appropriate for a society is the one that persons characteristic of that society would adopt when fairly situated with respect to one another. This hypothetical situation is the original position" (p. 637). Then follows the discussion of which principles would be chosen in the original position. That discussion forms the main argument of the article and of *A Theory of Justice.* Although Rawls makes clear in both the book and the article the value premises contained in the notion of a well-ordered society, argument for these premises is not the main purpose of the book or the article.

> Clearly the value of the notion of a well-ordered society, and the force of the reasoning based upon it, depends on the assumption that those who appear to hold incompatible conceptions of justice will nevertheless find conditions (1) to (7) congenial to their moral convictions, or at least would do so after consideration. [(1)-(7) specify the notion of a well ordered society.] Otherwise, there would be no point in appealing to these conditions in deciding between different principles of justice. But

> we should recognize that they are not morally neutral (whatever that would be) and certainly they are not trivial. Those who feel no affinity for the notion of a well-ordered society, and who wish to specify the underlying conception in a different form, will be unmoved by justice as fairness (even granting the validity of its argument), except of course as it may prove a better way to systematize their judgments of justice. (pp. 636-637)

In the book, where he starts from the notion of the original position rather than from the notion of a well-ordered society, the assumptions characterizing the well-ordered society and the circumstances that make crucial the choice of a conception of justice are assumptions built into the definition of the original position.

See also Rawls, "Fairness to Goodness," *Philosophical Review,* 84 (October 1975),pp. 536, 539-540, and 547-551.

Rawls does provide some argument for his premises in Part III of *A Theory of Justice* by arguing for the possibility and desirability of a society well ordered by his two principles. See, for example, the arguments for the conclusion that "the collective activity of justice is the preeminent form of human flourishing" (*TJ,* 529). These arguments depend on interesting and controversial assumptions of developmental psychology set out in *TJ,* 453-512.

39. See esp. *TJ,* 453-512.
40. Wolff, p. 182.
41. See the literature cited in note 43 below.

42. > In the three chapters of Part Two my aim is to illustrate the content of the principles of justice. I shall do this by describing a basic structure that satisfies these principles and by examining the duties and obligations to which they give rise. The main institutions of this structure are those of a constitutional democracy. I do not argue that these arrangements are the only ones that are just. Rather my intention is to show that the principles of justice, which so far have been discussed in abstraction from institutional forms, define a workable political conception, and are a reasonable approximation to and extension of our considered judgments. (*TJ,* 195)

43. The best example is David A. J. Richards, *The Moral Criticism of Law* (Encino, Calif.: Dickenson, 1977). See also some of the later chapters on particular policy issues in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); ch. 4 of Bruce A.

Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977); Charles Fried, *Medical Experimentation: Personal Integrity and Social Policy* (Amsterdam: North Holland Publishing Co., 1974); and much of Frank Michelman's work, for example, "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," *University of Pennsylvania Law Review,* 121 (May 1973), 962.

44. *TJ,* 11, although the "contract" in Rawls is a metaphor. See note 18 above.
45. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967).
46. Wolff is puzzled as to why Rawls makes one of the considerations for selecting the principles in the original position the ability of the set of principles to produce stability and harmony. If Rawls intends simply to describe what we believe about social justice, why, asks Wolff, should the fact that a society governed by such principles is unstable and disharmonious be a reason for altering our principles. (Wolff, p. 189). The answer is that if society would be unstable and disharmonious under a given set of principles, that is evidence that those principles do not express what we believe about social justice and are not the principles expressed by the Constitution.
47. See the work cited in *supra* note 43.
48. For development of a theory of civil disobedience, see *TJ,* 363-391, and Dworkin, *Taking Rights Seriously,*ch. 8.
49. Philosophers and political theorists have made the point that Rawls's justification for his two principles may be a sort of utilitarianism in which the rule is to maximize the minimum. If so, the conflict between the two five-stage sequences is an intramural struggle within utilitarian theory. But however described, the real conflicts noted in the text at note 53 and the work cited in note 53 between rights and other sorts of efficiencies remain.
50. Richard A. Posner, *Economic Analysis of Law,* 2d ed. (Boston: Little, Brown, 1977); Guido Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970). See also Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard L. Rev.,* 85 (1972), 1089, reprinted in *Economic Foundations of Property Law,* ed. Bruce A. Ackerman (Boston: Little, Brown, 1975); and Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *U. Chi. L. Rev.,* 43 (1975), 69.
51. Bruce A. Ackerman, in his interesting book, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) agrees that Utilitarianism is a powerful force in contemporary American law. We

disagree on the nature of the major competitor to Utilitarianism. Ackerman sets out in his book (p.17) the following table of "forms of legal thought":

		Objective of Legal Analysis		
		Policymaker	v.	Observer
Nature of Legal Language	Scientific	Scientific Policymaker		Scientific Observer
	v.			
	Ordinary	Ordinary Policymaker		Ordinary Observer

According to Ackerman, the ordinary view of legal language views legal language as having its roots in ordinary English. "While legal specialists, naturally enough, will sometimes be called upon to make refinements generally ignored in ordinary language, recourse to everyday, nonlegal ways of speaking can be expected to reveal the basic structure and animating concerns of legal analysis" (p. 10). The scientific view of legal language "conceives the distinctive constituents of legal discourse to be a set of technical concepts whose meanings are set in relation to one another by clear definitions without continuing reliance upon the way similar-sounding concepts are deployed in nonlegal talk" (pp. 10-11). Ackerman gives Wesley Hohfelds's system of terms as an example.

With respect to the objective of legal analysis, for the Observer, "[t]he test of a sound legal rule is the extent to which it vindicates the practices and expectations embedded in, and generated by, social institutions" (p. 12). The Policymaker, on the other hand, aspires "to view seemingly disparate legal issues within a common framework provided by a relatively small number of abstract and general principles that are assumed to permit the consistent evaluation of all the disputes the legal system is called upon to resolve" (pp. 11-12). Such a framework is called by Ackerman a "Comprehensive View." Benthams' "Utility" or Posner's "Efficiency" are given as examples of "Comprehensive Views."

Ackerman views the struggle between Utilitarianism and what he calls Kantianism as an intramural struggle between Scientific Policymakers with different Comprehensive Views. He regards the major battle for the possession of the modern American legal mind as being between Scientific Policymakers and Ordinary Observers. He sees

Rawls's book as an important reformulation of Kantian concerns, enabling those concerns to be more easily applied to contemporary social issues by Kantian Scientific Policymakers.

Ackerman's characterization of the Scientific Policymaker may fit the Utilitarian analyst. It does not fit the sort of "Kantianism" which Rawls advances and Richards and Dworkin (see note 43 *supra*) apply to legal issues. This "Kantianism," which I have called the American constitutional tradition, bases its authority primarily on the fact that it is a reconstruction of our personal beliefs and of American constitutional values. It tries to systematize those beliefs and values but does not claim to provide a unique solution to every case. It has a strong and clear sense of the limits of abstract theory and leaves room for the important casuistical work of the application to hard cases which is the special skill of lawyers. And that casuistry is to be carried on in ordinary language. Richards and Dworkin use virtually no technical terms. If the American constitutional tradition had to be placed somewhere on Ackerman's chart, it would seem to me to be a sophisticated form of ordinary observing. The conflict between it and ordinary constitutional lawyering is a struggle between more and less sophisticated ordinary observing. The conflict between the American constitutional tradition and Utilitarianism is indeed the major battle for possession of the modern American legal mind.

Harry H. Wellington says in "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," *Yale Law Journal,* 83 (December 1973), 221, 285, "The Fourteenth Amendment, as Holmes has said, does 'not enact Mr. Herbert Spencer's *Social Statics.*' Nor does it enact Mr. John Rawls's *A Theory of Justice.*" Wellington does not consider whether Rawls might be a reconstruction of "ordinary morality" on which Wellington relies heavily in his theory of constitutional adjudication. Wellington might, on reflection, deny what Rawls asserts, that "everyone has in himself the whole form of a moral conception" (*TJ,* 50). But if not, might not Rawls's conception of justice be "ordinary morality"?

52. See, for example, Richard Posner's discussion of school segregation in which the point is made that one justification for the decision in *Brown v. Board of Education,* 347 U.S. 483 (1954) is that any minority bears a proportionally greater share of the economic burden of discrimination because opportunities for economic exchange between a minority and the majority are economically more valuable to the minority. Posner, *Economic Analysis,* note 50, pp. 528-529. This is no doubt a reason for outlawing discrimination, but a relatively unimportant one. Posner notes in the same discussion that the Court could have exploited the

value which whites attached to school segregation by requiring that communities which desired to segregate contribute X dollars to black education in exchange for being allowed to segregate. If X were a high enough number, blacks would gain from segregation. The discussion serves to illustrate the minor role of economic gain or benefit when fundamental rights are at issue.

53. For example, see George Fletcher, "Fairness and Utility in Tort Theory," *Harv. L. Rev.,* 81 (1972), 537, and Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law," *Harv. L. Rev.,* 80 (1968), 1165.

    All of the material cited in note 43, much of which deals with specific legal issues, takes this distinction to be basic. For a good discussion of the distinction itself without reference to legal issues, see *TJ,* 22-27.

54. For example, Posner, *Economic Analysis,* note 50, pp. 10-12 and 17-23.
55. For a criticism of this hope, see C. Edwin Baker, "The Ideology of the Economic Analysis of Law," *Philosophy and Public Affairs,* 5 (Fall 1975), 3.
56. See, for example, Rawls's early article, "Outline of a Decision Procedure in Ethics," *Philosophical Review,* 60 (1951), 177. See also *TJ,* 46-53, and the work of Kurt Baier, Philippa Foot, David Gauthier, and G. R. Grice, much of which is cited by Rawls in *TJ.*
57. *Harv. L. Rev.,* 10 (1897), 61.
58. Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881).
59. See David A. J. Richards, "Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication," *Georgia Law Review,* 11 (September 1977), 1069.