

The Circumstances of Justice

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Political philosophy is shaped by an understanding of the circumstances of justice, which describe the need for justice. John Rawls draws the outline of his understanding of these circumstances from David Hume, who claimed that the instability of material possessions, along with their scarcity, is the chief impediment to social peace and harmony, and that the security of possessions is the chief advantage of society. “[S]uch possessions as we have acquir’d by our industry and good fortune,” writes Hume., “are both expos’d to the violence of others, and may be transferr’d without suffering any loss or alteration; while at the same time there is not a sufficient quantity of them to supply everyone’s desires and necessities.”(Hume 1978, 487-88) According to Hume, the virtue of justice is the remedy it provides to the problems of material scarcity and insecurity.

The Humean circumstances of justice rest on a claim about the origins of political society in relation to human nature. Rawls’s description of the circumstances of justice, as we will see, are broader than Hume’s, and emphasize the insecurity of important liberties and opportunities, as well as material possessions. Yet in his classic work, *A Theory of Justice*, Rawls shares Hume’s aspiration to generalize across time and place in philosophizing about justice through an appeal to the abstraction of a pre-political state of nature.

I will argue for a more historically sensitive understanding of the circumstances of justice than the one Rawls presents. I propose that the circumstances of justice should be understood to include contingent facts about the history of the society to be governed, ideally, by principles of

justice. I argue that the parties to Rawls's original position thought experiment should consider, in their deliberations, their society's history of war and other forms of politically organized violence and domination, at least when that history has resulted in enduring forms of social inequality that call for rectification, on grounds of justice. I will take it for granted that social inequalities that are premised on norms of group-based inferiority call for rectification because they are fundamentally at odds with any reasonable theory of democratic forms of social organization.

Regrettably, history is replete with examples of social orders premised on the inferiority of racial, ethnic, religious, and sexual minorities, as well as women, the mentally ill, the poor, and the disabled. I am especially interested in forms of collectively organized violence and domination that are perpetuated through social and political institutions, or what Rawls refers to as "the basic structure" of a society. I will refer to institutionalized forms of violence and domination, and the social inequality they have produced, as structures of domination. My focus will be the racial caste system in the United States because it has been central to the economic and social order of the United States since the birth of the nation. My argument is that a theory of justice should be designed to address the significance and persistence of structures of wrongful subordination in a society's history.

Reckoning with a history of collectively organized structures of domination and subordination is typically delegated, by Rawlsian and non-Rawlsian political philosophers alike, to the realm of "nonideal" or applied theory. The idea is that we formulate ideals of justice in theory, apart from our knowledge of a particular society's history of individual and collective wrongdoing, and the distortions those structures may inflict on people's motivations and concern for one another, and then use ideal principles of justice as a guide to real-world social

change.(Rawls TJ 1999, 215) I resist this approach and, instead, locate structures of domination within the circumstances of justice that motivate the theoretical task itself. I advocate this theoretical revision to emphasize that the social significance of collective wrongdoing and its legacy shape the problems of justice that the resources of political philosophy, including the rich resources of Rawls’s theory, can and should help us to think about.¹

In short, I am proposing to reorganize the question to which Rawls provides insightful answers. When we revise the description of the circumstances of justice, we revise our understanding of the importance of the chosen principles. This is because our understanding of the circumstances of justice shapes our ideas about why justice matters.

I will not take issue with Rawls’s two principles of justice. Instead, I emphasize that exploring the application of the Rawlsian “original position” thought experiment to the problem of remedying historically-rooted wrongs enables us to add something to what Rawls has to say about the good of justice. One aspect of the good of distributive justice is that it provides a basis for moral repair in the wake of collective wrongdoing.

I arrive at a more expansive understanding of the circumstances of justice by engaging with Rawls’s thoughts about the historical origins of *political liberalism*. According to Rawls, liberal conceptions of justice have three features: first, they are committed to certain basic rights, liberties, and opportunities, namely, he says, those familiar from constitutional democracies; second, they accord a special priority to these basic rights, liberties, and opportunities; and third, they are committed to providing all citizens with the resources people need to make effective use of their basic rights, liberties, and opportunities.(Rawls PL, 6)

¹ On the relevance of the circumstances of justice to the framing of problems of justice, see Murphy 2017, 84. I have benefitted from Murphy’s discussion of the circumstances of justice in transitional societies.

Rawls locates the origins of the philosophy of these features of liberal thought in the history of war and violence, specifically, in early modern Europe. The American context differs in important respects, but common threads emerge, upon reflection. This is because group-based violence presents difficult challenges to the pursuit of justice as well as increasing its urgency. Though Rawls would not disagree, he does not accord structures of domination much attention in the theoretical representation of the problem of justice. Nevertheless, I believe his two principles of justice can address them. The generality we give up in framing the deliberative problem to incorporate concern with historical wrongdoing is recovered in convergence, across different social settings, on the selection of liberal principles of justice.

In his later writings, Rawls emphasized that liberal conceptions of justice should be *political* in that they should not assume or require moral consensus among people of differing religious and secular values. Justice does not require moral consensus among people who disagree about questions of the good. Though members of a pluralistic democracy will disagree about matters of ethics and religion, they might be brought to share political values—in particular, those connected with the three defining features of liberal conceptions of democratic justice. Rawls proposes that a conception of democratic justice representing these values could be the object of an *overlapping consensus*. An overlapping consensus is a point of convergence among people's diverse life plans—a module of shared political values that fits into a variety of reasonable life plans.

Rawls's interesting proposition might seem, however, to push the critical question back. How is an overlapping consensus possible? That is, how might those who endorse different and even conflicting moral and religious views come to identify and commit to a common set of political values? Where could the will to identify this formula for peace and justice come from?

Rawls's answer to this question draws on historical experience: an overlapping consensus might emerge from the exhaustion of war, as it did in Europe after centuries of religious fighting. People who are tired of fighting have reason to identify common values. Out of the ashes of war's destruction, a *modus vivendi* or peace of exhaustion might emerge. A *modus vivendi* might evolve into a collective commitment to a liberal core of political values.

This argument locates the possibility of political liberalism in what is called *transitional justice*. Transitional Justice describes a political setting in which members of a society lack a commitment to mutual rights and obligations. There is no social contract. People are not mutually respecting members of a cooperative scheme. They are survivors. They are recent enemies, injured and traumatized. They approach one another in grief and with mistrust and resentment. They lack a common sense of justice, but they have reason to find common ground. The ending of their war presents an opportunity, indeed, their circumstances make it *necessary* for them to forge a common future out of a destructive past. It is necessary for them to identify common values if they are to live together. The alternative is political splintering and the persistence of conflict and injustice, or disintegration and abandonment through political secession of the possibility of common society.

The necessity of reaching agreement does not, however, show how it is possible to achieve it. How might wounded peoples find their way forward together? Let's return to Rawls's thought. He writes, "the historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries. Something like the modern understanding of liberty of conscience and freedom of thought began then. As Hegel saw, pluralism made religious liberty possible, certainly not Luther's and Calvin's intention."(Rawls PL, xxvi) In

considering Rawls's reference to "the long controversies over religious toleration in the sixteenth and seventeenth centuries," we might think of Locke's letter on toleration and other important intellectual contributions to liberal political thought. But we might also concentrate on the circumstances that gave birth to the liberal values that Locke and others debated.

Here, I submit, we need a wider understanding of the circumstances of justice than Rawls presents. From the vantage point of history, we can see that the circumstances of justice include organized forms of domination and oppression. Rawls did not articulate this fully enough. His description is more individualistic. Following Hume, he describes the "objective" circumstances of justice to consist in resource scarcity, a rough equality of people's physical and mental powers, their mutual vulnerability to attack, and the need to share geographical territory. These circumstances describe the plight of individuals in a state of nature. Rawls describes them as, "the normal conditions under which human cooperation is both possible and necessary." (Rawls, TJ 1999, 109) He remarks that because individuals are similar in physical and mental powers, "no one among them can dominate the rest." While this might be true, strictly speaking, it is also true that groups of people are capable and have organized together, with great commitment, to dominate other groups. This is the case even though the underlying instability of oppressive social structures leads over time to eruptions of violence and war.

We should conclude from the long history of war and violence that the objective circumstances of justice include the familiar dynamics of group domination and subordination. In the United States, group-based domination includes centuries of slavery followed by civil war, Jim Crow segregation, and mass incarceration. These structures of domination have inflicted group-based harms on Black Americans, including the social stigma imposed on them as members of a formerly enslaved caste. The stigma of group-based harms damages what Rawls

refers to as the social bases of self-respect. As Rawls recognizes, the social bases of self-respect are important components of democratic equality. This implies that democratic inclusion demands a remedy to the harms of group-based stigma. We might come to see group-based stigma as not merely an unfortunate consequence of slavery, but a persisting social injustice.

Democratic inclusion is a form of belonging. At several junctures in his theory, Rawls emphasizes the importance of the search for belonging. This search may, of course, reach beyond democratic membership. A religious quest for belonging connects human existence to a transcendent and eternal reality. By contrast, nontranscendent versions of the possibilities for belonging track the accomplishments of human society and, indeed, the value of humanity itself. Rawls describes the outer reaches of a secular search for human belonging in this way. To take up the conditions that are “reasonable in our conduct with regard to one another” would be, he says, “to view the human situation not only from all social but also from all temporal points of view,” which is, he says, “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.” He continues. Such persons would, “whatever their generation, bring together into one scheme all individual perspectives and arrive together at regulative principles that can be affirmed by everyone as he lives by them, each from his own standpoint.”(Rawls TJ 1999, 587) This mode of normative thinking, as Rawls so beautifully describes it, is a form of impartiality that displays sensitivity to place and time. It is responsive to the variations in human experience across geography and history.

I submit that the passage from *A Theory of Justice* that I have just quoted can be seen as a highly abstract way of describing a search for reconciliation between people who stand in unjustifiably unequal social positions. Furthermore, one way to describe Rawls’s insight, though

he does not put it this way, is to say that justice should be understood to include a remedy for group-based harms that will facilitate moral repair between people whose relative social standing has been marred by a history of collective wrongdoing.

I turn now to what Rawls refers to as the “subjective” circumstances of justice. As Rawls describes them, the subjective circumstances of justice comprise conflicts of interest that arise from people’s limited knowledge, biased reasoning, selfish tendencies, and doctrinal differences, which span a diversity of philosophical, religious, social, and political views. I agree that these conflicts of interest are real and important, but they under-describe the historically familiar subjective circumstances that demand a just remedy. I have in mind not simply ordinary biased judgement, selfish tendencies, and philosophical disagreements, but extraordinary efforts groups of people have made to erect economies and social structures aimed at the exploitation of other human beings. I would also include the deliberate efforts that members of dominated and exploited groups have undertaken to resist their oppression. These efforts appeal to the conscience of all persons who are willing, in good faith, to reckon with the past and its legacy.

So, to sum up so far: we should recognize that the circumstances of justice include not only people’s present needs, limited resources, self-concern, and conflicting beliefs, but also their shared history. The circumstances of justice should be understood to call for a collective search for reconciliation in the aftermath of collective wrongdoing, including war and other forms of organized violence.

Those who have not recently been at war do not share that experience of hardship to motivate their efforts. Seriously disadvantaged people, of course, feel the urgency of the need for change, but privileged people do not typically feel a sense of urgency, because they enjoy substantial benefits from social inequality. Still, persons of conscience among them often search

at the very least for some rationale for what cannot be justified. This may lead to some confusion and miscommunication, of the sort lamented by Martin Luther King, Jr., who remarked, “Negroes have proceeded from a premise that equality means what it says, and they have taken white Americans at their word when they talked of it as an objective. But most whites in America in 1967, including many persons of goodwill, proceed from a premise that equality is a loose expression for improvement. White America is not even psychologically organized to close the gap—essentially it seeks only to make it less painful and less obvious but in most respects to retain it. Most of the abrasions between Negroes and white liberals arise from this fact.”(King 1967, 8) What King describes as a lack of “psychological organization” by whites to rectify unjustifiable inequalities should be counted among the circumstances of justice.

There are other familiar obstacles to repair and reconciliation between persons of goodwill, beyond obvious differences in their socioeconomic interests. One obstacle is the sense of social dishonor and alienation experienced by persons who have been oppressed. King described this as the “bleakness of corroding despair.”(King 1963; King 1964, 92)² The internalization of oppression is an obstacle to the just demand for redress. King found that this obstacle must be overcome and that it could be overcome through collective action. The strategy he advocated was the practice of “nonviolent direct action.” It surpassed his expectations. King was astounded by the power of the Montgomery bus boycott to express its participants’ “new found faith in themselves.”(King 1961) The realization of a sense of self-worth through collective forms of political action unsettled the corrosion of despair with a demand for democratic equality. Collective political action is one strategy among possible others for countering the psychological harms of oppression.

² King later revised this statement from “Letter from a Birmingham Jail,” to refer to an “abyss of despair,” (King, 1964, 92).

A second obstacle is found in the sense of loyalty that beneficiaries of historically rooted inequality often feel to one another and to their ancestors, namely, to the socio-ancestral group that has perpetuated forms of domination from which its beneficiaries have benefitted. This may lead to a distorted sense of history. For example, a Confederate monument in front of the Lafayette County Courthouse in Oxford, Mississippi reads, “In memory of the patriotism of the Confederate soldiers of Lafayette County, Mississippi. They gave their lives in a just and holy cause.” The back panel reads, “the sons of veterans unite in this justification of their fathers’ faith.” While this commemoration reeks of bad faith, there are other examples that may be harder to dismiss.³

Consider these words, penned by Thomas Jefferson and inscribed on the walls of the Jefferson Memorial in Washington DC: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, among these are life, liberty, and the pursuit of happiness, that to secure these rights governments are instituted among men.” Over the course of his life, Jefferson enslaved more than 600 people on his estate. He fathered six children with Sally Hemmings, who was one of his slaves. The Jefferson-Hemmings children were enslaved by Jefferson.

Memorialization produces a dilemma for persons of conscience and, indeed, for the conscience of a nation. It is a dilemma that involves choosing between justice and loyalty. The difficulty, in choosing justice, lies in how to recalibrate loyalties while maintaining a sense of authenticity. How can one acknowledge the flaws and injustices of one’s forebearers—as one’s forebearers—while maintaining a sense of their connection to oneself? How can one memorialize them without embracing their injustice?

³ Some have criticized the world Trade Center memorial and museum for remembering 9/11 with no attention to the history of U.S. imperialism in the Middle East.

It is tempting to abstract from moral flaws in the thought and behavior of one's forebearers and to focus instead on the better angels of their nature—to appeal, for example, to abstract principles of justice, equality, and freedom, that might serve to link the past and present of a society's public political culture with the possibility of a better world. But this exercise in selection threatens to constitute an evasion of the historical specificity of how those principles were ignored, violated, misappropriated, and twisted into a weapons of degradation and war. When Thomas Jefferson wrote about the equality of all men, his philosophical position could not be squared with his political commitments. It simply could not be done. The universal rights and equality of “all men” were not compatible with the American institution of slavery.

Democracy has always been understood, by its practitioners, as compatible in fact with the freedom of some to dominate others. This is the central argument in sociologist Orlando Patterson's celebrated book on the history of the concept of freedom. The “freedom to dominate,” Patterson says, is one dimension of a tripartite, Western concept of freedom that emerged under conditions of slavery. Philosophically celebrated notions of “freedom from interference” and “the freedom of collective self-government” have always been historically conjoined with a third aspect of freedom—the freedom to dominate.

Historical reckoning opens the possibility of an authentic conversion from loyalty to justice. Reckoning with historical injustice includes an examination of democracy's contradictions and the various rationalizations, including ideas of racial hierarchy and other lies about inequality, that have been used to obscure them. Here I think Rawls can help us. The need to reckon with historical injustice presents an opening for us to learn from what Rawls taught us about how to think about justice.

Rawls proposed the original position as a hypothetical choice situation that is constrained in ways that make the choice of principles under those constraints fair. The constraints on the original position, represented by the veil of ignorance, force each party to consider the interests and perspective of all others as they consider possible solutions to the problems evident in the circumstances of justice. As Rawls presents those circumstances, the relevant problem is a problem about how fairly to distribute the benefits of social cooperation between free and equal persons. Since all cooperating members are understood to contribute to the collective scheme, the parties conclude that the gains should be enjoyed reciprocally.

If we broaden the original position thought experiment to include information about group-based oppression in a society's history and the harms that oppression has caused, this shifts the nature of the problem the parties seek to remedy with principles of justice. The parties would consider the impact of past wrongs on the disadvantaged over time. They would consider how the beneficiaries of those wrongs have evaded responsibility. They would take up the viewpoint of people who resisted wrongs committed against them and concede that they did so understandably and justly. They would understand that democratic justice not only produces a fair system of social cooperation in which people mutually benefit from the production and distribution of goods, but also that distributive justice between them is needed to achieve moral repair in the aftermath of historical wrongdoing. They would seek justice to underwrite the possibility of reconciliation between groups whose relationship has not been a relationship of reciprocity and mutual trust. They would understand that acknowledgment of past wrongs is a way to remediate the social stigma associated with groups who have been wronged.

These ethical thoughts would be stimulated by requiring the rational and self-interested parties in the original position to consider their society's history of group-based forms of

oppression from behind a veil of ignorance that obscures their current social position. Entering the original position thought experiment would encourage a privileged person to find common ground with those who struggled against the oppressive forces that have benefitted a select, undemocratic few, without requiring the privileged person to agree that he would have, had he been in his ancestors' place, relinquished his unjustly achieved privilege.

Reckoning with the past by considering the perspective of people who were wronged—how they felt and what they did in response to their unjust treatment—permits people to stand together without denying differences of social position. It enables all to see clearly something that we know: that the universal truth of certain ethical principles—of justice and equality—is compatible with the abuse of those principles. We also see that the history of resistance to collective wrongdoing is a resource for all members of society.

I have been describing, through the Rawlsian thought experiment, the possibility of conversion from a familiar defense of some version of the status-quo by the privileged to an imagined identification with people who have resisted oppression. This involves, I am suggesting, a projection of oneself into a (possibly ongoing) historical conflict in an effort to view the conflict from the perspective of persons who we know have been wronged. This imaginative exercise opens the possibility of granting their claim to reparative justice.

Rawls argued that the original position thought experiment brings us to the two principles of justice. The two principles include, importantly, the requirement of fair equality of opportunity. Fair equality of opportunity is the demand that those who are similarly motivated and talented should have equal chances of success in attaining their desired social positions.(Rawls JF, 44) As Tommie Shelby has persuasively argued, fair equality of opportunity must be understood as sensitive to a variety of obstacles, including group-based favoritism and

status inequalities, that interfere with open positions.(Shelby 2004, 1697-1714) An unfortunate litany of historical wrongs shows us that fair equality of opportunity can be threatened in multiple ways. It is threatened not only by how the better off may leverage their wealth for further advantages, as Rawls discusses, but also by how they maintain their social standing by withholding important forms of recognition from other social groups. In other words, they may behave in ways that undermine equality in the social bases of self-respect. Interference with the social bases of self-respect unsettles fair equality of opportunity, not only by directly undermining the openness of positions, but also by compromising the social support people normally rely on to develop their talents and motivation. A historically sensitive description of the circumstances of justice brings these dynamics into view.

My revision of the Rawlsian circumstances of justice overlaps with a line of thought suggested by Charles Mills, who has been highly critical of the project of Rawlsian ideal theory. The idealizing abstraction of liberal theory is, as Mills sees it, an exercise in avoidance. Despite 350 years of slavery and 100 years of Jim Crow racial segregation in the United States, liberal political philosophies contain almost no discussion of racial injustice. Furthermore, liberal political philosophers have failed to interrogate the fact that the heroes of liberal political thought—Locke, who invested in African slavery, and Kant, the father of scientific racialism—articulated ideals of justice that were, to their minds, compatible with white supremacy. Mills thinks liberal theory's failure to reckon with this apparent contradiction is the result of its misdescription of social reality. Despite the allegedly firm distinction between ideal and nonideal theory, Mills argues that liberal political philosophers elide the distinction between the ideal and the actual by conceptualizing political society as, fundamentally, a cooperative system. This

erases the social position of members of society who are excluded from the benefits of social cooperation and exploited for white benefit.(Mills 2017, 29-39)

Still, Mills does not abandon the framework of liberal political philosophy altogether. Instead, he proposes a version of the Rawlsian thought experiment described by a thinner veil of ignorance. The thinner veil—allowing the parties to the original position to know that they will emerge into a society “whose basic structure has historically been shaped by white supremacy”—would permit the original position to serve as a device of representation for arriving at principles of corrective justice.(Mills 2017, 213; see also Mills and Flickschuh 2018, 85)

I follow Mills in favoring a thinner veil, but I differ with him on the need for additional principles of corrective justice. I am urging that we view Rawls’s two principles themselves as principles of corrective justice, properly interpreted as sensitive to the harm structures of domination have inflicted on the social bases of self-respect, as well as the material interests, of oppressed people. The thinner veil, which permits an expanded understanding of the circumstances of justice, brings into view the urgency of substantiating fair equality of opportunity by closing the wealth gap and repairing the social bases of self-respect.⁴

A historically sensitive original position helps us to understand that moral accountability is needed to address persisting inequalities that are the result of historical wrongdoing. It is especially important when the social bases of trust and mutual respect have been damaged. Accountability is achieved through public efforts by the state to address past wrongs and to deliver the promise of democratic equality. Rawls saw philosophy itself as a form of reconciliation and here is an example of its possible resources. Though this is not what Rawls

⁴ In 2016, the median family wealth in the U.S. for whites was \$171,000 and \$17,600 for blacks. See, e.g., Lee 2019.

meant by reconciliation, I submit that philosophical reflection, with hindsight, might lead us to the view that those who have suffered wrongs have a claim to reparative justice. Closing the wealth gap and ensuring the rights and opportunities to which all members of society are entitled achieves reparative justice when and because it represents an effort to correct wrongful forms of domination that have shaped the social distribution of wealth and the dynamics of social status. My point is that public reasoning about justice matters. In particular, public efforts to acknowledge past wrongs are critical to achieving a just social order because they are needed in order to recalibrate loyalties among the privileged, to correct the harms of stigma wrongfully imposed on historically marginalized groups, and to repair the social bases of self-respect.

My extension of the Rawlsian thought experiment permits us to view Rawls's principles of justice in a new way: as principles of acknowledgment and redress. In turn, this understanding of fair equality of opportunity sheds light on the underlying good of justice. An important aspect of the value of distributive justice is that it offers the possibility of recognition, reparation, and reconciliation in the aftermath of historical injustice.

I conclude with a thought about the Rawlsian notion of a "people." The idea of a people threatens to stand for a troublesome romantic notion that is highly subject to ideological distortion. But it is less troublesome when it is rooted in history, which incorporates multiple perspectives. The notion of a people that is rooted in history is not a romantic ideal. Rather, it is a historical fact that must be confronted as a condition of hope for the future.⁵

⁵ For comments on an earlier draft, I am grateful to Vincent Chiao, Chad Flanders, Joshua Kleinfeld, Christopher Lewis, Cynthia Stark, Paul Weithman, and participants at a conference at the University of Notre Dame, "John Rawls's A Theory of Justice at Fifty: An Anniversary Conference," September 24-25, 2021.

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