RACE, RIGHTS, AND JUSTICE

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RACE, RIGHTS, AND JUSTICE

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For Lorraine

Preface

This volume is intended to serve as a companion to my previous book on two central and related areas of analytical philosophy of law.[1] Together these two books cover a wide range of issues in mainstream philosophy of law. Generally, they cover many central topics on legal interpretation, justice, rights, responsibility, and punishment. More specifically, *Responsibility and Punishment* covers the problems of individual responsibility and punishment, Immanuel Kant's view of the nature and justification of crime and punishment, the development of a Kantian theory of punishment that evades traditional concerns with retributivist theories of the justification of punishment, an articulation and defense of a new offender-centered analysis of forgiveness and apology, the problems of collective responsibility, punishment and compensation, including reparations to indigenous Americans.

Race, Rights, and Justice is comprised of three parts: Interpreting Constitutional Law, Justice, and Rights. The chapters on constitutional interpretation include treatments of both Antonin Scalia's theory of textual originalism and Robert Bork's theory of original intent (Chapter 1), along with Benjamin Cardozo's theory of constitutional interpretation (published in 1921), one that philosophers of law seem not to have noticed serves as a precursor to that of Ronald Dworkin's (Chapter 2). Infused in this discussion is a moderate version of the perspective of critical race theory, a standpoint that is largely ignored by philosophers of law in the analytical tradition. Furthermore, I find that the basics of critical race theory are not inconsistent with what I take to be a plausible theory of constitutional interpretation (Cardozo's). More specifically, that the framers and ratifiers of the United States Constitution were racists (especially in regard to American Indians and blacks) makes problematic an appeal to their original intent in order to interpret it. Another significant feature of my treatment of this topic is that the major elements

[1] J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9.

of Dworkin's theory are found in Cardozo's. Indeed, it is a challenge to find out what major part of Dworkin's theory cannot be traced back to Cardozo's theory.

The problems facing legal interpretation pertain to the foundations of international law and global justice insofar as any system of legal rules requires interpretation. Although my treatment of legal interpretation focuses, as does the bulk of the analytical philosophy of law tradition, on U.S. law, what is true of problems in interpreting the U.S. Constitution is also true of difficulties posed to the interpretation of international law, though currently issues of how to construe original intent are not as pressing in international law as they are in U.S. law for obvious reasons. But some of the basic issues in the interpretation of the U.S. Constitution still pose themselves for the interpretation of international law: ought law to have a foundationalist, coherentist, or some other structure? Should established law serve as absolute or *prima facie* precedent for legal decision-making by judges? Is it justifiable, on moral grounds, for judges to make legal decisions based on majority viewpoint? And should judges, in attempting to make best sense of the body of law, inject their decisions with their own religious or political moralities, especially in hard cases? Although this last question poses difficulties in domestic cases of judicial decision-making, it poses particular problems in the sphere of international law wherein justices from different cultural backgrounds are faced with the task of interpreting and applying international law to hard cases.

Until recently, analytical philosophy of law itself has paid precious little attention to problems of international law, much in the same way that political philosophers have until recently paid little attention to matters of global justice. In investigating these matters in Chapter 3, I list several desiderata of a plausible theory of international law, embarking on a description of Kant's view of international law, and then H. L. A. Hart's.

In Chapter 4, I articulate and assess John Rawls' Law of Peoples in terms of what it omits regarding compensatory justice. I then consider and reject certain aspects of cosmopolitan liberalism in its critique of Rawls. I conclude that Rawls' theory of international justice is more plausible than cosmopolitan liberalism, and better serves as a moral foundation of an international legal system.

Since the chapters on constitutional interpretation, international law, and global justice make heavy explicit and implicit use of the concept of rights, it is vital that I devote a couple of chapters to rights with the Feinbergian assumption that, though rights are not the be all and end all of a just society, a state or federation of states cannot be just without them. The nature and value of rights is explored with some depth in Chapters 5 and 6—the

former addressing individual rights and the latter analyzing group or collective moral rights. The focus of these chapters, like the rest of the book, is on moral rights that ought to ground legal ones. That is to say, when we say that so and so has a moral right, what we often mean is that the law ought also to respect that right inasmuch as the law can do so, all things considered. These chapters provide substance to the contents of their predecessors, a depth that is not reflected in other accounts of international law or justice. Yet without such substance, critical thinkers are left to wonder just what these rights are that are "human" and ought to be respected by everyone. Knowing the nature and value of rights, human or otherwise, enables us to avoid making hasty and ungenerous claims about what others believe about them. An example of such disingenuous misunderstanding is exposed in Chapter 5 where I demonstrate how Allen Buchanan misconstrues Karl Marx on rights and in turn misconstrues what differentiates liberal political theories from Marxist ones. Indeed, this error could have been avoided if Buchanan thought more carefully about the nature and value of rights, and if he took the time to read Marx, the target of his critique, with due care and generosity. Chapter 6 addresses confusions about whether or not some collectives of certain kinds (such as ethnic groups) can and do have rights. Most philosophers, even today, have gravely mistaken what the real issues are here, and thereby have taken problematic positions on the matter unnecessarily.

Finally, I include a chapter on international law and the Colombian crisis. I use Michael Walzer's conception of humanitarian intervention and Rawls' notion of the duty of assistance and apply them to the Colombian case, and with new results for both the U.S.-declared drug problem, and for the civil war in Colombia, and for U.S. involvement in Colombia. While morally dirty hands abound, it is clear that the U.S. has some of the most soiled hands in this scenario, violating Walzer's and Rawls' respective principles of intervention and assistance. This chapter takes theory into practice of our world of injustice, and locates perpetrators of severe injustice who are in no way justified in assisting or intervening.

Cumulatively, my writing of this book has been over a period of a decade. It contains chapters that reflect a mainstream training in philosophy of law, but with the added feature of taking race and racism quite seriously throughout my analyses. This is particularly true when it comes to indigenous rights. While there are a few analytical philosophers of law who address problems of racism, I do so from an indigenous perspective, and, more broadly, from the perspective of the racial underclasses. I do so with the goal and intention of not capitulating to what many political liberals endorse, namely, a kind of not really taking seriously the rights of racial underclasses. My approach is not typical in mainstream analytical philosophy of law, as such racial

perspectives are left to legal scholars in the critical race theory camp who themselves are not mainstream analytic philosophers and who characteristically eschew mainstream thought about justice and rights as these concepts are construed within mainstream analytical philosophy of law.

Those whose philosophical and legal theoretic work on the issues addressed herein that have most influenced me include Feinberg and Rawls, though at bottom my indigenism frequently bids me to go beyond some of their points of argument and analysis as even these astute minds failed to address and take seriously enough the rights of indigenous and otherwise racial underclasses. I am forever grateful to Feinberg and Rawls for what they have given to both philosophy and legal theory.

There are numerous people and organizations I wish to thank for their assistance in making this book possible. Appreciation extends to Oxford University Press for the use of "Dworkin's *Empire* Strikes Back!" *Statute Law Review* (2000), pp. 43–56, which is reprinted (with revisions) as part of Chapter 2. I would like to thank the Canadian Philosophical Association for the use of "Marx and Rights," *Dialogue* (1994), pp. 377–389, which is reprinted (with revisions) as part of Chapter 5. I am grateful to the *Canadian Journal of Law & Jurisprudence* for the use of "The Problem of Collective Moral Rights," 7 (1994), pp. 237–259, reprinted as the bulk of Chapter 6.

It would be remiss of me to neglect to thank my former mentor Joel Feinberg for his incisive comments on drafts of Chapters 2, 5, and 6. And I am grateful to Marisa Diaz-Waian, Michael Jenkins, Eduardo Salazar, and Fernando Serrano for their proofreading skills and indexing. I am also grateful to two anonymous referees for Springer's Law and Philosophy Series for incisive comments on the penultimate draft of this book, and to Neil Olivier, Publishing Editor, for his encouragement and expertise. I also thank Deivanai Loganathan for her excellent production assistance.

San Diego, California J. Angelo Corlett

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Introduction

Philosophers often say that the point of their efforts is to make the unclear clearer. But they may make the clear unclear: they may cause plain truths to disappear into difficult cases, sensible concepts to dissolve into complex definitions, and so on. To some extent, philosophers do do this. Still more, they may seem to do it, and even to seem to do it can be a political disservice.—Bernard Williams[1]

This book is on the moral foundations of law ranging from Ronald Dworkin's theory of law as integrity, to Immanuel Kant's and John Rawls' respective theories of global justice, to the concept of rights (both individual and collective), to the dire circumstances of civil war, illicit drugs, and humanitarian intervention in Colombia and some of the problems that these circumstances imply for international law. It provides integrated philosophical discussions of the legal concepts of the nature of justice and rights in both domestic and global contexts.

By "global justice," I not only mean notions of global human need and how that important and complex cluster of challenges ought to be met, but also how societies ought to behave toward one another and how they ought not to in order to not violate certain rights to sovereignty and related rights that states and individuals have. Global justice, then, is that area of philosophy of law (and of political philosophy, more generally) that examines questions concerning the rights and responsibilities states and individuals have toward each other and to themselves, including the protection of individual rights. Moreover, it is clear that each chapter's main topic deserves attention that a book would bring to it. My goal, however, is not to provide a comprehensive philosophical treatment of each such topic. Rather, it is to weave these chapters together into an integrated whole of topics in the mainstream of philosophy of law.

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[1] Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005), p. 64.

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_1, © Springer Science+Business Media B.V. 2009

This book does not, moreover, propose to offer grand and complete new theories of the topics under investigation. As W. E. B. DuBois states, ". . . one can never tell everything about anything. Human communication must always involve some selection and emphasis."[2] In relying on important works on constitutional interpretation, rights, justice, and humanitarian intervention, my arguments and analyses are meant to advance significantly and multifariously these crucial philosophical discussions. In so doing, I challenge some of the prevailing wisdom pertaining to these areas of investigation. Thus the task herein is to assist in the refinement of what I take to be largely plausible existing theories of these problems. Insofar as my general approach makes the moral prior to the political, my views follow those of Rawls and can be subsumed under a structuralist version of political moralism. Insofar as they make the moral prior to the legal, my views can generally be placed under the category of legal moralism. Throughout, however, I infuse into mainstream analytical philosophy of law points of argument recognizing fully the rights of indigenous peoples and other racial underclasses (such as blacks). This influences my assessment of certain theories of legal interpretation, as well as my assessments of Rawlsian and cosmopolitan liberal accounts of global justice and how I assess the cluster of problems that is the quandary of humanitarian intervention into Colombia.

As noted in the Preface, this book has three parts: Interpreting Constitutional Law, Justice, and Rights. Certain chapters in this book have been largely revised in order to integrate into them plausible aspects of some of the perspectives of nonmainstream philosophies of law, such as critical race theories. Thus issues of racism play an essential role in my approach to philosophy of law. Moreover, the chapters herein have been written to take account of what a number of legal scholars (some historical, and others contemporary) have argued on constitutional interpretation, justice, and rights. And the result is a book on philosophy of law that is quite inclusive in its approach to address some of the fundamental problems of philosophy of law. In light of DuBois' words cited above, I beg forgiveness from the reader that I do not herein take into account factors of how legal problems are engendered or sexualized. I do, however, demonstrate significant sensitivity, though perhaps insufficient for some, to the problem of socioeconomic class and how it effects some of the problems I address.

What is law? And when it is codified in the form of a constitution, such as in the case of the Constitution of the United States of America, how ought it to be interpreted by judges? These are the key questions that make up the

[2] W. E. B. DuBois, *An ABC of Color* (New York: International Publishers, 1963), pp. 50–51.

first two chapters of this book. Chapters 1 and 2 explore various kinds of theories of legal interpretation, and assess their plausibility. They explicate and critically assess various theories of U.S. constitutional interpretation—including textual originalism and original intent—and argue in favor of one that is most consistent with Dworkin's theory of law as integrity, a theory that seems to be consistent in the main with that of Benjamin Cardozo's views on legal interpretation.[3] Furthermore, I defend Dworkin's version of Cardozo's theory against the respective objections raised by J. L. Mackie and Andrew Altman. I then reason toward a modified version of Dworkin's theory: "constitutional coherentism." On this view, no legal rule is in principle beyond the reach of being revised, overturned, or rejected for the sake of the betterment of the legal system, *ceteris paribus*. One reason for this is that, contrary to an essentially conservative position about the law, I assume that the law is to serve its citizens rather than vice versa, and this implies that citizens have a cluster of rights pertaining to the changing of the law, subject to their being good reasons to do so. A view that would deny this assumption would seem to imply that the citizens of a country are not only bound to the law, but are its servants. The reason why I reject such a view is that, among other things, it would appear to undermine individual autonomy and the sovereignty of a people. Finally, throughout my discussion, I assume a general kind of objectivist realism concerning morality and the law.[4]

Chapters 1 and 2 set the stage for difficulties that arise for any attempt to establish a system of international law in order to create and sustain a reasonably just society of peoples. Regardless of which rules are adopted by whichever participatory states, such laws will require interpretation. Thus the basic points made in Chapters 1 and 2 apply globally as well as domestically. In Chapters 3 and 4, subsequent to a description of Kant's views on international law, and following a statement of H. L. A. Hart's perspective on the same,[5] Rawls' theory of international justice as it is articulated and defended

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[3] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

[4] For important discussions of objectivity in morality and the law, see Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs*, 25 (1996), pp. 87–139; Kent Greenawalt, *Law and Objectivity* (Oxford: Oxford University Press, 1992); Michael Moore, *Objectivity in Ethics and Law* (Burlington: Ashgate, 2004), Part Two; Gerald Postema, "Objectivity Fit For Law," in Brian Leiter, Editor, *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 99–143. For an overview of the subject of truth in legal contexts, see Dennis Patterson, *Law and Truth* (Oxford: Oxford University Press, 1996).

[5] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), Chapter 10.

in *The Law of Peoples*[6] and cosmopolitan liberalism are examined. Assumed throughout my discussion is that considerations of international justice ought to inform international law. Some of the most important objections to each theory are noted, and no attempt is made for a comprehensive assessment of either. But a new challenge to each position is set forth and defended, one which places a high priority on compensatory justice between peoples or states. This challenge holds that no theory of international justice is complete unless and until it can adequately handle cases of compensatory justice, including reparations to peoples who are severely and wrongfully harmed by other peoples—even well-ordered ones. Thus it appears that both theories of domestic and global justice share a common malady: in their focus on matters of distributive justice, they seem to have ignored the importance of compensatory justice and the foundational role it plays in a generally just society (global or otherwise), or one attempting to be just. This criticism is especially poignant in light of Rawls' desire to formulate principles of international justice that can be used to construct a *realistic* utopia.

Of course, rights are fundamental to any viable system of law. So it is important to come to a plausible understanding of them, both legally and morally, insofar as it is believed that the foundation of legal rights and rules ought to be ethical. By this, it is meant that moral rights are not "nonsense upon stilts" as Jeremy Bentham believed them to be,[7] but rather grounded in what the balance of human reason informs us about conflicting claims or interests, all things considered. Legal rights ought to be grounded in "true" morality, though not everything that is morally wrong ought to be legally prohibited for practical reasons. The origin of rights, whether noninstitutional (moral) rights or institutional (legal) ones, is human reason. Not all moral rights can be institutionalized because not every moral ideal can in practical terms be workable within a legal system. But this hardly means that legal rights have no moral grounding.[8] Legal rights worth respecting have some degree of moral justification, at least those that have moral import. In any case, I assume that the grounding of moral and legal rights in human reason is such that rights can and do exist, regardless of whether or not they need to be exercised. This implies that it is problematic to think that rights are contingent on wrongs in the sense that wrongs are the sources of rights.[9] Such

[6] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

[7] Jeremy Bentham, "Anarchical Fallacies," in John Bowring, Editor, *The Works of Jeremy Bentham* (Edinburgh: Edinburgh University Press, 1843), Volume 2, pp. 491f.

[8] Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapters 8–10.

[9] Alan Dershowitz, *Rights From Wrongs* (New York: Basic Books, 2004).

a view begs the question concerning the nature of wrongs, and thus does us little or no good in determining the sources of rights. Wrongs, whatever they are, may serve as an indication that rights are to be discovered by human reason in search of protections from them. But there is no logical correlation between wrongs and rights, or vice versa.

In Chapter 5, I argue that it is incorrect to think, as most philosophers do, that what separates political liberalism from Marxism is that the former believes in rights while the latter does not. Indeed, the well-known but poorly understood words of Karl Marx on rights do *not*, as most believe, condemn rights *per se*. Rather, they condemn the ways in which rights talk can confuse issues rather than infuse working-class folk with empowerment toward freedom to sell their labor power. Indeed, a generous interpretation of Marx implies rather strongly that he did not condemn all rights, but rather condemned rights of bourgeois culture. This implies that there are some rights that Marx does not condemn, such as the right to sell one's own labor power freely, without coercion, and the right to self-determination, of which it is an instance. Indeed, the right to freedom of expression, thought by most in the Western world to gain its initial expression in the writings of John Stuart Mill,[10] was in fact articulated in rather clear terms by none other than Marx himself.[11] With this duly revisionistic understanding of the history of philosophy where Marx is concerned, we then have a duty to revise our misconceptions about what genuinely divides political liberalism from Marxism. It is not my contention that such a conceptual division is much like the emperor's new clothes. I argue that it is not the case that political liberals such as Rawls respect rights while Marx does not; rather, I contend that political liberalism respects a certain cluster of rights (and not others), while Marxism respects another cluster of rights (and not others), whereas there are some rights that both liberals and Marxists respect, perhaps even with equal strength of commitment. Along the way, the nature and value of rights is clarified along the lines analyzed by Joel Feinberg.[12] The relevance of this portion of the book is that it is helpful to understand what truly distinguishes liberal societies from nonliberal ones (in part in terms of the kinds of rights each respects). For in attempting to construct a viable system of international law, such rights must be considered to be important candidates for inclusion in a legal system

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[10] John Stuart Mill, *On Liberty* (London: Longman's, Green, and Co., 1865).

[11] J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech," *Wayne Law Review*, 48 (2002), p. 1097.

[12] Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973); Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980).

that would morally obligate peoples to it. Moreover, unless there is a proper understanding of what indeed distinguishes liberal societies from nonliberal ones, it will be difficult to accurately interpret whatever legal rules are meant to protect the rights of states and individuals under international law, and global justice will be impossible.

But what is a *collective* moral right? Under what conditions might it accrue? To what sorts of collectives might it accrue, and why? Chapter 6 explores the nature of collective moral rights. It then provides a philosophical analysis of the conditions under which collective rights accrue. A version of Moral Rights Collectivism is defended against Moral Rights Individualism; the latter denies the very possibility of collective moral rights. This analysis has implications for a legal system seeking to become reasonably just and well ordered. Collective rights must not be written off as harmful or nonsense, as many would have us believe. Both individual and collective rights are important to the functioning of a well-ordered legal system. The question then becomes one of which individuals and collectives ought to have rights and under what conditions, not whether or not any collectives ought to have rights.

Having discussed justice and rights in a global context, it is important to explore some of the deeper ramifications of some such rights in a contemporary nonideal setting. Chapter 7 takes up what seems to be an intractable problem in U.S. and some other societies, namely, the matter of illicit drugs. Taking a uniquely indigenous perspective, this chapter uses critically Michael Walzer's and Rawls' notions of humanitarian intervention[13] and the duty of assistance,[14] respectively, in order to argue that recent and current U.S. policies in support of the Colombian government are unwarranted. A wholly new analysis of the conditions of humanitarian intervention is articulated and applied to the drug problem between the U.S. and Colombia, one having implications for international law.

Why another book on justice and rights? One reason is that this book is written within the mainstream analytical tradition of philosophy of law. Yet it explores the above mentioned problems with an eye toward the indomitable difficulties of racism and class, which are rarely, if ever, taken into account in Anglo-American analytical philosophy of law. Although critical race theorists, most of them legal scholars rather than philosophers, analyze legal problems from the perspective of race and class, they do not do so within the analytical philosophical methodological paradigm. I analyze legal

[13] Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, Inc., 2000).

[14] Rawls, *The Law of Peoples*.

conceptions philosophically and from within the mainstream methodological paradigm of analytical jurisprudence, taking my lead from Joel Feinberg. No call for paradigmatic revolution is made herein. Rather, what is called for is more precise and even deeper (though admittedly not comprehensive) analysis of matters of constitutional interpretation, justice, and rights.

However, it would be a mistake to infer from the fact that this book's propositions are argued and analyzed from within the mainstream analytical tradition of philosophy of law that its conclusions are predictable or always mainstream. On the contrary, the chapter on constitutional interpretation not only places for the first time Dworkin's theory of law as integrity in part of its broader legal theoretical context, demonstrating that it is not in any obvious way significantly novel, but it also (subsequent to defending Dworkin's view from some leading criticisms) sets forth and defends a new version of the theory of legal interpretation known as constitutional constructionism. It is a theory that is neither originalist nor intentionalist, but completely constructionalist. Unlike Dworkin's view that judges must remain faithful to established law, "constitutional coherentism" does not hold such a view. For the adage that "the law must serve the people" is taken most seriously by constitutional coherentism. In demythologizing the U.S. Constitution, constitutional coherentism seeks to place law totally in the hands of reasonable people who take democracy and law seriously.

Moreover, this book's originality is not found in its analysis of the nature and value of rights. The analysis of rights adopted by *Justice and Rights* is adapted from Feinberg's famous and well-received analysis of rights, except that instead of grounding the nature of rights in valid claims, I do so in either valid claims *or* interests, as the case may be. Additionally, I argue that the nature of rights, whether legal or moral, is such that they can be possessed by certain decision-making collectives as well as individual agents. I take this to be a logical extension of Feinberg's position on rights that makes his notion of the nature and possession of rights[15] coherent with his conception of responsibility[16] of both individuals and collectives of certain sorts. Perhaps even more groundbreaking is my refutation of the popular view that what distinguishes political liberalism from Marxism is that the former respects rights, while the latter does not. Despite several detailed arguments, textual and otherwise, to the contrary, I relieve this position from its current and undeserved place in respectable academia. What is now needed is a much more nuanced and deeper analysis of political realities that would properly

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[15] Feinberg, *Rights, Justice, and the Bounds of Liberty*; Feinberg, *Freedom and Fulfillment*.

[16] Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970).

classify these eminent political philosophies that have influenced global politics so powerfully and for several generations.

Finally, as a manner by which to apply some of the principles of international law set forth by Rawls in *The Law of Peoples*, a novel approach to the problems that have plagued Colombians for decades is articulated. But the perspective given is not one of a U.S. supporter, or even one of a supporter of either the Colombian government or the rebel forces seeking to replace it. Rather, it is a specifically indigenous perspective, one that sees the intractable quagmires of the region in their deeper complexity, but nonetheless reminds readers that the true possessors of territorial rights in the scenario are the indigenous U'was. Whatever serves as a genuine solution to the problems engulfing Colombia at this time must account for this fact, among other things. Justice in Colombia can find no other route except through this truth. Perhaps it is at this juncture that this book joins well to its companion volume on responsibility and punishment insofar as each argues in favor of justice for indigenous peoples.[17]

In the end, it is hoped that my arguments and analyses will have enabled us philosophers of law to move forward a step or two in our thinking about the problems I address. And I certainly pray that Brand Blanshard's words apply to the writing of this philosophical treatise: "If he is not right, at least he deserves to be; he puts all his cards on the table; he keeps nothing back; he fights, thinks, and writes fairly, even to the point of writing clearly enough to be found out."[18] These insightful words certainly apply to Feinberg. But I offer this book in the hope that they also apply, at least in some meaningful measure, to what I have written herein. In light of Bernard Williams' words that begin this Introduction, I shall "emphasize reality at the expense of philosophical abstraction" in order to avoid making "sensible concepts to dissolve into complex definitions."[19]

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[17] J. Angelo Corlett, *Responsibility and Punishment,* 3rd Edition (Dordrecht: Kluwer Academic Publishers and Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9.

[18] Brand Blanshard, *On Philosophical Style* (Manchester: Manchester University Press, 1954), p. 24.

[19] Williams, *In the Beginning Was the Deed*, p. 64.

Part I
Interpreting Constitutional Rights

Chapter 1
Interpreting the U.S. Constitution

What morality requires of a person, in morally difficult circumstances, is not something to be mechanically determined by an examination of the person's office or role-centered duties. An individual must on rare occasions have the courage to rise above all that and obey the dictates of conscience. One's conscience may be wholly convincing, considered only on its own terms. But its conflict with duty will nevertheless make the decision morally complex and difficult—Joel Feinberg.[1]

Constitutional law is part law, part politics, and part history, a history comprising legal precedents and the causes and effects of past political controversies. The pursuit of American constitutional history, for a person who is curious and has the time to pursue it, leads back to the initial debates in the Congress of the United States regarding the meaning of the constitutional text, and beyond, to the proceedings in the Constitutional Convention and to the investigation of the widespread controversies that arose during the campaign to secure ratification. The trail of this history goes back still further: to the Continental Congress under the Articles of Confederation and the attitudes and policies that animated the debates of that body—Joseph M. Lynch.[2]

Over the years, the Supreme Court of the United States of America has gained tremendous power. One need only consider that despite the fact that the right of a pregnant[3] woman to an abortion is nowhere found in the U.S.

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[1] Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), p. 16.

[2] Joseph M. Lynch, *Negotiating the Constitution* (Ithaca: Cornell University Press, 1999), p. ix.

[3] I attribute the right to an abortion to *pregnant* women because it seems a bit odd to say that nonpregnant women have such a right, if indeed anyone has the right at all. If there is a right to an abortion, it would seem to accrue not to women who are not pregnant, or those who can never (for whatever reasons) become pregnant, but only to those who are,

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Constitution, the Court, for better or for worse, "discovered" such a right. While some would seek to curtail the Court's power to create or construct such law to protect a "new" right not found explicitly in the Constitution, others would seek to support the Justices' power in constructing law where the Constitution is silent and where vital issues are at stake. It would appear, then, that the debate is in large part between a descriptive construal of judges as historians of the meaning of the Constitution's text and a normative account of the judge as moralist where the Constitution's text has gaps and does not straightforwardly address a case at hand. But as some have argued, this is a bifurcated argument, as what judges both do and ought to do on the bench is to implement both constitutional textual content and meaning, on the one hand, and extra-legal principles on the other. Judges not only ought to interpret the given text of the Constitution, but sometimes need to go beyond the given text and construct new law wherein situations not addressed by the given text are silent.

In a constitutional democracy such as one that many believe is found in the U.S., the question of the nature of law (usually couched in terms of the famous and ongoing debate between natural law theorists who argue that the law and morality are essentially connected, and legal positivists who argue that they are not) is related to the question of U.S. Supreme Court judges' interpretation of the informational content of the U.S. Constitution. For all but the most trivial of legal statements are interpretive and involve value-laden (and often moral) reasoning.[4] As some legal commentators put it,

> Law is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings through the medium of those ideas. However dispassionately one may seek to analyze the ideas, it is foolish to suppose that one's appraisal of the consequences will be dictated *exclusively* by that analysis. The analysis will help to expose the availability of choices and to elaborate some of the connections between ideas and consequences. But which consequences—and therefore which choices—one regards as tolerable or intoler-

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at some given time, pregnant. It is the latter women, then, who possess the right to an abortion at the time(s) they are pregnant. This is true unless, of course, it makes sense to argue that a woman has a right to an abortion should she become pregnant, and that it is when she becomes pregnant that she is in a position, should she indeed have the right, to claim it.

[4] Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), p. 7. However, "when there is a truth of the matter, . . . the decision is not a matter of choice or discretion" [George Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), p. 55]. But not inconsistent with this claim is one made by Alf Ross: "It is . . . erroneous to believe that a text can be so clear that it cannot give rise to doubt as to its interpretation" [Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), p. 135].

able will necessarily depend in part upon one's values, faiths, and beliefs about the way in which human beings should be treated.[5]

While few believe that such judges neither do nor should interpret the Constitution, there is widespread disagreement as to precisely both what does and what ought to go on vis-à-vis these judges and their interpreting the supreme law[6] of the U.S., or what Bruce Ackerman refers to as its "sacred texts,"[7] but what William Lloyd Garrison[8] not only denounced in many of his speeches, but sometimes burned, calling the U.S. Constitution "a covenant with death and an agreement with hell."[9] For Garrison, "Of all injustice, that is the greatest which goes under the name of law."[10] One helpful way to frame the question of constitutional interpretation is this: precisely what ought interpretation to entail, merely interpreting the given text, or that and constructing rights and duties based on the content of the text when the text is silent or unclear concerning a vital issue at hand?

Which mode of constitutional interpretation is most plausible, both in terms of how the judges do interpret and how they ought to interpret the U.S. Constitution? As Justice Antonin Scalia remarks, "the hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,"[11] leading Scalia to bemoan that "We American judges have no intelligible theory of what we do most,"[12] and "So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is."[13]

Although it is important to understand the history of constitutional interpretation,[14] it is even more crucial to figure out what is the most reasonable

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[5] Amsterdam and Bruner, *Minding the Law*, p. 6.

[6] See Article VI, Section 2 of the U.S. Constitution for the famous supremacy clause.

[7] Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1998), p. 10.

[8] For an account of William Lloyd Garrison, see Russel B. Nye, *William Lloyd Garrison and the Humanitarian Reformers* (Boston: Little, Brown and Company, 1955).

[9] Quoted in William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 242.

[10] Quoted in Douglas, *An Almanac of Liberty*, p. 242.

[11] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 14.

[12] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 14.

[13] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 16.

[14] For an account of the early history of debates concerning how the U.S. Constitution ought to be interpreted, see Lynch, *Negotiating the Constitution*. For histories of legal