J. Angelo Corlett

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By

J. ANGELO CORLETT

San Diego State University
San Diego, CA, USA

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Prof. J. Angelo Corlett
San Diego State University
Department of Philosophy
5500 Campanile Drive, MC 8142
San Diego, CA 92182-0001
USA
acorlett@mail.sdsu.edu

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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.

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San Diego, California J. Angelo Corlett