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Accommodating Republicanism

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ACCOMMODATING REPUBLICANISM

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Presently, there is a debate raging between deontological and teleological theories of justice. No doubt, both Jürgen Habermas and John Rawls would want to see themselves on the deontological side of the current debate. However, each accuses the other of a kind of latent Aristotelianism.[1] The source of that accusation is clearly to be found in both thinkers' attempts to accommodate the critique of liberalism by republicanism. In the following I want to turn to that portion of the 1995 debate between Rawls and Habermas[2] which focuses on the Ancients and the Moderns in order to clarify what is at stake in what I have called "accommodating republicanism." Then I want to pose the question of the relationship of deontological to teleological theories of justice to see what kind of response Habermas might make to Rawls's characterization of him as a "classical humanist" or what we have referred to as a latent Aristotelian. Finally, in a curious way, law is at the center of this issue whether one wants to see it in the form of Rawls's constitutionalism or Habermas's co-originality thesis. Does Rawls's constitutionalism provide an alternative to the co-originality thesis?

I. ANCIENTS VS. MODERNS

The battle between Rawls's interpretative constructivism and Habermas's argumentative constructivism comes to the fore over Benjamin Constant's idea that the liberties of the moderns and the liberties of the ancients should be nourished by the same root.[3] Habermas argues simply that private and public autonomy are co-original.[4] In his (Habermas's) view, Rawls finds himself defending the quintessentially liberal position of prejudicing the liberties of the moderns, private rights, over those of the ancients, political rights.[5] This is the heart of the debate. How

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1. The term Aristotelianism may be questionable. I presume that is what Habermas means when he associates Rawls with a classical theory that legitimates its theory of justice by assuming the actuality of just institutions as he does in chapter two of *Between Facts and Norms*. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 58 (William Rehg trans., 1996). Further, I assume that is what Rawls means when he associates Habermas with classical humanism, which he does at the end of the debate. *See infra* note 2.

2. The debate consists of an article written by Habermas, with a reply by Rawls. *See* Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109 (1995); John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995).

3. *See* Rawls, *supra* note 2, at 156–57 & n.39.

4. *See* HABERMAS, *supra* note 1, at 104.

5. *See* Habermas, *supra* note 2, at 127.

does one retain the basic framework of liberalism while at the same time accommodating the republican critique? The republican critique says about liberalism the very thing that Habermas is here saying about Rawls: namely, that liberalism functions to justify private rights. But there is more at stake. The question is, how does one realize justice as fairness while assuring impartiality in a process that is eminently democratic? The notion of reciprocity derived from the procedure of argumentation provides the basis for Habermas's solution. At issue is the notion of intersubjectivity and with it the claim that, echoing Hegel's critique of Kant, Rawls adopts a position that is monological, a kind of liberal solipsism. Of course, the Habermasian thesis, anticipated from the beginning, is that justice as fairness can only be achieved through an adequate notion of reciprocity. In turn, in accord with Habermas's argument, an adequate notion of reciprocity can only be gained from the procedure of argumentation in which the actors in the political process mutually recognize the claims and counterclaims of one another. Here, we encounter the centrality of public will-formation, read democratic procedure, which can be reconstructed as a public and intersubjective process derived from the procedure of argumentation. The emerging thesis, which is a reconstruction of the intersubjective demands of discourse, postulates the assumption that private right can only be derived from the process of public will-formation. It follows from this that private and public autonomy are co-original. Or to put it another way, rights follow from the process of recognition. The consequence would be that rights are democratically grounded from the outset.

The point of all this is the claim that for Rawls rights are not democratically grounded. According to Habermas, this claim follows from the critique of the original position. The critique goes something like this: if Rawls had accepted Habermas's second critique, the epistemic association of the reasonable and the true with the consequence that consensus and validity would be linked from the outset, then he would not have to use the original position as a device of representation because he would have found that "the moral point of view is already implicit in the socio-ontological constitution of the public practice of argumentation."[6] Further, Rawls would not have had to make the second step in the theory, that is the step to overlapping consensus, because the public practice of argumentation requires the "complex relations of mutual recognition that participants in rational discourse 'must' accept (in the weak sense of transcendental necessity)."[7] In other words, if Rawls had built consensus into the first stage of the theory, rather than adding it on in the second stage, he would have escaped both the arbitrariness of the second stage as well as the implicit monological perspective of the first stage. Instead, given this speech-act view based on the nature of performatives from

6. *Id.*
7. *Id.*

which one derives a certain intersubjective necessity, intersubjectivity, with its notion of reciprocity, which guarantees impartiality, is written into the theory from the outset. In this sense, practical reason is actualized through mutual recognition. The result: "we could say that precisely those principles are valid which meet with uncoerced intersubjective recognition under conditions of rational discourse."[8] In other words, consensus need not be an afterthought.

From Habermas's point of view, Rawls's distinction between the private and the public, which underlies his distinction between the political and the comprehensive, is not only unnecessary but leads to undesired consequences particularly when one focuses on liberties and rights. Not only, in Habermas's view, does this contradict his (Habermas's) co-originality thesis, it also goes against the historical insight that the "boundary" defining the relative spheres is always shifting as defined by the basic shifts in political will-formation. In this view, Rawls would be better off if he would subsume this distinction under that of "legal regulation," which would in turn be determined by the democratic life of a political community. In other words, given such a scenario, legal regulation would determine the distinction between the public and private in a democratic way in the sense that those under the law would be its own authors. The reigning question would be: "Which rights must free and equal persons mutually accord one another if they wish to regulate their coexistence by the legitimate means of positive and coercive law?"[9] If one were to put the question that way it would follow that Rawls's characterization of a private domain which contains the realm of the comprehensive as distinguished from a public realm which characterizes the political would be less necessary than it would at first appear. Habermas then would shift Rawls's distinction between the private and the public, the comprehensive and the political, to the domain of the procedure of legal regulation which would accord the right to "*equal* subjective liberties" as well as the public autonomy of its citizens. In brief, legal procedure presupposes the subjective autonomy of its citizens, what Rawls would call the domain of private right. At the same time, legal procedure in a democratic society cannot be legitimate without the public exercise of democratic lawmaking. Private and public autonomy presuppose each other. Hence, one would infer from the argument that Rawls should have concentrated on the procedure of democratic lawmaking.[10]

Rawls denies Habermas's characterization. Here Rawls's more interpretative constructivism comes to the fore. Rawls contends that with careful attention to the design of a constitution in relationship to the process of

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8. *Id.*

9. *Id.* at 130.

10. Habermas believes: "Once the concept of law has been clarified in this way, it becomes clear that the normative substance of basic liberal rights is already contained in the indispensable medium for the legal institutionalization of the public use of reason of sovereign citizens." *Id.*

government, one can see that private autonomy is not pre-political.[11] The constitutional convention selects a constitution with its Bill of Rights which "restricts majority legislation in how it may burden such basic liberties as liberty of conscience and freedom of speech and thought."[12] To be sure then, rights "trump" popular sovereignty, but only as popular sovereignty is expressed in the legislature inasmuch as those very rights are derived from a democratic process. Hence, basic liberties are "incorporated into the constitution and protected as constitutional rights on the basis of citizens' deliberations and judgments over time."[13] In other words, and this is a distinctly American view, popular sovereignty is to be distinguished from "parliamentary supremacy." Following Locke's dualist idea of a constitutional democracy, a distinction is made between ordinary lawmaking by a legislature and the "people's constituent power to form, ratify, and amend a constitution."[14] As a consequence a distinction is made between "higher law of the people" and the "ordinary law of legislative bodies."[15] The example which illuminates Rawls' argument is a historical one. Following Bruce Ackerman,[16] Rawls cites the three significant innovations in American constitutional history, the founding of the Constitution 1787-91, Reconstruction, and the New Deal. Rawls observes that in these periods it was the electorate which "confirmed or motivated the constitutional changes that were proposed and finally accepted."[17]

Of course, Rawls's argument, derived from historical interpretation, and not purely from argumentation, relies on the development of the constitutional history of the United States. As such, Rawls argues this reference proves that justice as fairness is a political notion rather than a notion derived from natural law.[18] As a consequence, "the liberties of the moderns do not impose the prior restrictions on the people's constituent will."[19] But does it prove something beyond reference to the constitutional history of the United States? This is one way of asking the question. Another way might be to ask if the question of the co-relation of the liberty of the ancients and the liberty of the moderns, of private right and popular sovereignty, can be resolved independent of a constitutional history. In Rawls's view it could be that "Habermas may have no objection to justice as fairness but may reject the constitution to which he thinks it leads, and which I think may secure both the ancient and modern liberties."[20] Fair enough. Rawls is willing to concede that, "He and I are not, however, debating the

11. *See* Rawls, *supra* note 2, at 155–56.
12. *Id.* at 157.
13. *Id.* at 157–58.
14. *Id.* at 158.
15. *Id.*
16. *Id.* at 158 (citing BRUCE ACKERMAN, WE THE PEOPLE, VOLUME I: FOUNDATIONS (1991)).
17. *Id.*
18. *See id.* at 159.
19. *Id.*
20. *Id.*

justice of the United States constitution as it is; but whether justice as fairness allows and is consistent with the popular sovereignty he cherishes."[21]

However, Rawls is sensitive to the interpretation, and thus the critique, that Habermas gives to liberalism. Hence, in support of his argument that individual rights are not pre-political, and to some extent in support of his own more interpretative view, he cites an argument which Habermas uses against Charles Larmore.[22] Larmore has argued that one right has to proceed and constrain democratic will-formation, "No one should be forcibly compelled to submit to norms whose validity cannot be made evident to reason."[23] Habermas interprets this to mean the establishment of a pre-political right against the state which is perceived under the category of violence. Against this view, Habermas presents a two-stage model which begins with the "horizontal sociation of citizens who recognizing *one another* as equals, mutually accord rights to one another. Only then does one advance to the constitutional taming of power presupposed with the medium of law."[24] Rawls would view his own construction in a similar way. Hence, he arrives at two conclusions. First, that Habermas's position is not that different from his own. Second, that Habermas misses on his interpretation of liberalism. At this point, Rawls has made no attempt to critique Habermas, but merely defends his position against the presumption of a liberal bias for private rights. But clearly he doubts that Habermas's construction as a theoretical construction, such as the co-originality thesis, will grant the proper exercise of law and justice.[25] Equally, he doubts the emphasis on the political in Habermas's emphasis on "the normative content of the *mode of exercising political autonomy*."[26] He speculates that the origin of that idea is found in classical humanism (he must mean Aristotle) where the greatest good is conceived of as participating in political life. This notion is really derived from a comprehensive doctrine, a notion of the good, which may be admirable and noble, but certainly not applicable, in Rawls's view, to everybody. I take him to mean here that not everybody is interested in the pursuit of the good, defined as politics or political action. Private interests and pursuits are legitimate as well. In any case, from the point of view of political liberalism, it would be inappropriate to assert

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21. *Id.*

22. Charles Larmore, however, generally shares the view of political liberalism with John Rawls.

23. HABERMAS, *supra* note 1, at 456 (quoting Charles Larmore, *Die Wurzeln Radikaler Demokratie* [The Roots of Democratic Reason], DEUTSCHE ZEITSCHRIFT FUR PHILOSOPHIE 41 (1993)).

24. HABERMAS, *supra* note 1, at 457.

25. Rawls is rather adamant on this point arguing that "for there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected." Rawls, *supra* note 2, at 166. Further:

> No special doctrine of the co-originality and equal weight of the two forms of autonomy is needed to explain this fact. It is hard to believe that all major liberal and civic republican writers did not understand this. It bears on the age-old question of how best to unite power with law to achieve justice.

Id.

26. *Id.* at 169.

one comprehensive view over others. Hence, for Rawls, not everybody need pursue the good as in the politics of old.

II. THE TELEOLOGICAL QUESTION

Rawls has made a very interesting point to which, to my knowledge, Habermas has yet to reply. His critique can be formulated in the following way: if one asserts the co-originality thesis in the way that Habermas does, with its implicit assumption about the primacy of the political in the classical, as opposed to the modern sense, then one buys into a teleology which can only be justified through a comprehensive philosophical framework.[27] Of course, Rawls has not responded to Habermas's characterization of him as an Aristotelian in the second chapter of *Between Facts and Norms*.[28] However, it would be interesting to read Habermas's response to this very illuminating critique which suggests Habermas has gone too far in his attempt to accommodate the claims of republicanism. Equally, it would be interesting to know if Habermas believes that Rawls, by relying on American constitutionalism, avoids a similar dilemma—namely, the assertion of the teleological primacy of the public good on comprehensive grounds. Rawls claims to get by his interpretive constructivism what he contends Habermas does not get by his (Habermas's) argumentative constructivism.[29] As I understand it, Rawls claims to be able to assert a merely political and non-comprehensive notion of democratic procedure through his identification with the claims of a certain form of constitutional legal theory. Hence, Rawls could claim a more or less intersubjectivist identification with Habermas's co-originality thesis, but on grounds that require a relatively weak notion of reason. Although Habermas has spoken recently about the distinction between the reasonable and the true in Rawls,[30] to my knowledge he has not addressed the issue of Rawls's constitutionalism.

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27. *See id.* (critiquing Habermas's view of the co-originality thesis).

28. *See* HABERMAS, *supra* note 1, at 56–66 (critiquing Rawls).

29. *See* Rawls, *supra* note 2, at 132.

30. *See* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 75–101 (1998).