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Other Theories of Justice

Anthony Amatrudo, Middlesex University

John Rawls has been enormously influential in political theory and his ideas will forever be associated with the social policy reforms that followed the Kennedy and Johnson administrations. However, he also made a contribution to punishment theory which is generally neglected and this essay seeks to address. His work on punishment is underscored by the fundamental notion that at a deep level all citizens share a common morality (Rawls, 1971: 19). Moreover, as a neo-Kantian, he holds that this common morality embodies the basic equality of all persons (Rawls, 1971: 511). The significance of this fundamental equality is that it is the basis of *natural* duties of mutual respect and the fact that it demands all human beings are treated as moral persons. Rawls' Kantianism is in his contention that all individuals are essentially free to act justly (Rawls, 1971: 256). Any social contract must recognise this and to assist that process he famously suggests a "veil of ignorance" (Rawls, 1971: 24). The Original Position is best understood as a hypothetical situation in which individuals, conceived of as rational calculators, or agents, choose the principles of social relations under which their principles would do best. Their choices are subject to certain constraints, however, and it is these constraints, *which* embody the specifically moral elements of Original Position argumentation. Importantly, in the Original Position rational calculators do not know prior-facts about their principles, which should be morally irrelevant to their choice of principles of justice. This restriction on their reasoning is embodied in Rawls' *veil of ignorance*, which obscures information about an individual's age, ethnicity, sex etc. (Rawls: 1971: 136- 148). Rawls maintains that only in the Original Position, it being the case that information about a person's age, ethnicity, sex etc. is unavailable to them, the plurality of interested parties disappears, and the problem of choice, and interests, is made redundant; and individuals choose ideally neutral principles. All persons in the Original Position, which is best understood as the contracting position, can choose principles of justice without regard to the abilities, or otherwise, they and others possess and without regard to their position in society. It would be irrational for anyone to choose principle of unfairness unaware of the position they may occupy (Rawls, 1971: 17- 22). Rawls writes of ethics of "mutual respect" and "self-esteem" (Rawls, 1971: 139,178, 256). However, whilst Rawls holds that persons deserve equal respect and consideration he is clear that is all they deserve (Rawls, 1971: 104). The Rawlsian settlement is essentially about ensuring an impartial basis for our theoretical considerations.

Retributive and Distributive Considerations

In *A Theory of Justice* Rawls is primarily interested in distributive justice but he also has some interesting things to say about the institution of punishment which have received far less attention (Scheffler, 1982: 306). His writing on punishment sits, somewhat uncomfortably, with his work on distributive justice and, in places, seems at odds with the thrust of *A Theory of Justice*. It is also, undoubtedly, less systematic. Here I have in mind the contention our social institutions should not themselves be constructed so as to penalise, or reward, persons on the basis of their abilities and natural talents. One of the issues is that Rawls advances two types of social-psychological model: one being largely deterministic and the other with a more libertarian flavour. My suggestion is that we be more radical and hold to a Kantian approach in acknowledging the existence of the morally arbitrary (Rawls, 1971: 40). Rawls substitutes desert in his explanation of distributive justice with the notion of legitimate expectation and holds that persons are *individually* responsible for their own beliefs and actions. Moreover, he refutes the notion that there is natural symmetry between economic and retributive justice. He notes: "... some (argue) that distributive shares should match moral worth ...this option may arise from thinking distributive justice as somehow the opposite of retributive justice ... the purpose of the criminal law is to uphold basic natural duties ... not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men's conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults. It is clear that the distribution of economic and social advantages is entirely different ... The function of unequal distributive shares is ... to attract individuals to places and associations where they are most needed from a social point of view" (Rawls, 1971: 314- 15). What we note from this extract is that Rawls studiously avoids the language of desert. Moreover, the view of criminal law he advances is restricted to natural duties alone. What he is more certain of is that criminal law should to be understood in terms of legitimate expectations. The implications of this passage are retributive, as is its tone, and moral worth is directly connected to bad character. Famously this led Sandel and Scheffler to make the claim that Rawls' writing on punishment is incompatible with the thrust of *A Theory of Justice* (Sandel, 1982:89- 92; Scheffler, 1992). It can be argued that the idea of character is itself morally arbitrary as it relates to the Difference Principle (Rawls, 1971: 103). In this essay I want to establish why Rawls is so sure of this notion of criminality.

Strains and Stability

In an important passage in *A Theory of Justice* Rawls advances the notion that there is an important subsequent stage for persons in the Original Position. In this stage persons must consider their commitment to adhere to the assurances they have given. In other words persons in the Original Position need to reflect upon the stability of the society that they wish to form on the basis of the values they have chosen. Rawls maintains that: "(persons) cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty ... when we enter an agreement we must be able to honour it even should the worst possibilities prove to be the case. Otherwise we have not acted in good faith. Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances" (Rawls, 1971: 176). I believe this passage might be taken as germane to the understanding of Rawls' ideas about punishment since criminal sanctions could obviously be key to the overall stability of society if following their exit from the Original Position persons came to see their own well-being, or benefit, in conflict with the principles of justice that they espoused in the Original Position and accordingly they failed to commit to them. This, however, would be an incorrect reading. In the Original Position persons are explicitly outlawed from considering the use of force in maintaining the principles of justice that they arrive at: indeed Rawls explicitly denies the use of persuasion and the use of external enforcement. Rawls sees the contract made in the Original Position as about the individual's commitment to honouring their own agreement (Rawls, 1989: 246). We should note Rawls' Kantianism is at work here in that commitment is primarily about *one's own commitment to one's own maxims*

(Rawls, 1977; Korsgaard, 1996: xii). Therefore morally one ought to accept the principles of justice agreed to in Original Position, made behind a veil of ignorance (Rawls, 1971: 136- 48). His Kantianism prompts Rawls to surmise that the two principles he advances, together, afford a sort of culture of justice in a manner that utilitarian approaches cannot. Rawls understands that the social system may demand that some should forgo advantages for the sake of the greater good of the whole (Amatrudo, 2009: 94). Thus the scheme will not be stable unless those who must make sacrifices ... accept the greater advantages of others as a sufficient reason for lower expectations over the whole course of lives” (Rawls, 1971: 178- 9). On this reasoning he demonstrates that utilitarianism falls short of his *strains of commitment* yardstick. The basic point Rawls wants to underscore here is that there are strains involved in holding to the principles agreed to in the Original Position but that these are more than balanced by reasons to hold to them nonetheless rather than choose other principles, such as principles of average, or aggregate, utility (Rawls, 1971: 250). What is more, it is, in Rawls’ terms, an “extreme demand” (Rawls, 1971: 179). However, such an interpretation of the *strains of commitment* test as a moral, and political, claim about the acceptance of one’s station seems to make the test itself an unnecessary duplication of the Original Position. The main reason why utilitarian criteria are deemed to be an insufficient basis for punishment is precisely that they are not chosen in the Original Position. If they were it would only show that the Original Position was wrongly formulated and, as Barry argues, it would not meet the criteria of *reflective equilibrium*. If a person cannot accept the basis of their position, i.e. the underlying reasons for it, this is taken as proof that their position is not in accord with principles of justice (Barry, 1995a: 137-53). However, this *strains of commitment* test is neither a good measure, nor a good theory, about stability; although Rawls puts great emphasis upon this issue of stability. His *strains of commitment* test seems not to be about stability at all since it is not really concerned with what principles of justice can be accepted, rather it is another way of determining what the contents of such principles of justice are. In other places he raises the issue of whether, or not, persons can *actually* live in accord with established principles of justice (Rawls, 1971: 11). The problem is that in focusing too narrowly upon stability he confuses two separate issues, on the one hand, the motivation of the person in being just, and on the other, the possibility of necessary coercion (Rawls, 1971: 241).

Punishment and Kantian Motivation

When considering Rawls’ views one must never overlook the fact that his is essentially a *committed* position and not one springing from what we might term moral disinterestedness (Rawls, 1971: 568). Although persons in the Original Position may be termed morally disinterested Rawls is nonetheless committed to the view that persons living in society have a real sense of justice. Moreover, that a persons’ individual sense of justice is honed through reflective equilibrium wherein they: “... apply (it) to act from the position of justice” (Rawls, 1971: 567). The affirmation of one’s sense of justice is rational and it is natural but Rawls argues this is an insignificant issue because members of: “... a well-ordered society desire ... to act justly and fulfilling this desire is part of their good” (Rawls, 1971: 569). A well-ordered society is defined by Rawls as one where: “... everyone accepts and knows that the others accept the same principles of justice, and the basic institutions satisfy and are known to satisfy these principles” (Rawls, 1971: 453-4). However, one may think that this is fairly weak as a response to the issue of why persons ought to act morally. Rawls’ view is that person will typically be motivated to act fairly and his position is rooted in earlier philosophical thinking. He maintains that our natural inclinations to act fairly typically springs from our desire to be just towards our friends and notes that in a: “well-ordered society these bonds extend rather widely” (Rawls, 1971: 569- 70). However, he also explicitly cites Aristotle by noting that our motivations to act fairly springs from: “the Aristotelian Principle ... that participating in the life of a well-ordered society is a great good” (Rawls, 1971: 571). Finally, his Kantianism is invoked, to which we shall return, that maintains that acting fairly (justly) is naturally something all free, and equal, person would want to do. Moreover, that the inclination to act justly springs from: “... the desire to express our nature as free moral persons” (Rawls, 1971: 572). It is a tenet in Kant, and in Rawls, that persons are free to act (Amatrudo, 2009: 95). This Kantian argument also turns out to be Rawls’ favoured

position and he returned to it in his later writings (Rawls, 1982: 16). This Kantian reasoning is a metaphysical claim rather than a straightforward normative mode of interpretation. This Kantian element is an *essential* claim about the nature of men and women that resolves the matter of their being just. This is a point underscored by Barry, at some length (Barry, 1995b: 874- 915). This metaphysical element in Rawls' work is easily picked out in his text, which is peppered with references to human nature (Rawls, 1971: 574- 5). Indeed such claims about human nature seem to be far more focused on the case for social stability, as a political endeavour, than they do anything else. As Sandel has argued Rawls is far more focused upon metaphysical claims than upon empirically derived suppositions (Sandel, 1982; Sandel, 1984: 81- 96). However, though Kant follows a Kantian rationale here he nonetheless falls short of claiming that it always gives actors sufficient grounds for acting justly. He states that there will be persons who: "... find that being so disposed to act justly is not a good for them" (Rawls, 1971: 576). This is very curious if these persons are Kantian actors since if they were then if they are free and moral then the desire to fulfil their nature; and it would be a decisive motivation, since the Kantian claim is always a *universal* claim about human nature.

Criminals

This issue of whether, or not, Rawls is a rigorous Kantian is important to our discussion of punishment. Is Rawls arguing that criminals do not possess the (natural) capacity to be free and equal actors? If so that would make them natural slaves (Deslauriers, 2006: 48- 69). The answer is surely not to be found in Aristotle but rather in maintaining that they possess a different view of the good and that, by extension, they cannot contain their own self-interest, as is required by the principle of justice. In short, the criminal is someone who does not understand that it is part of his, or her, nature to act in accordance with the principles of justice. Criminals do not act justly because they believe it is not good for them to do so and one might, accordingly, understand them as having a defective nature (Rawls, 1971: 576). Such persons (criminals) must therefore be coerced and that has a cost for society as a whole. Moreover, the coercers act justly when they ensure those persons (criminals) who uphold their own version of justice, over and against, the rightful version and are required to comply and, in any case, this is a basic requirement for the functioning of just institutions (Rawls, 1971: 575). Punishment is never a morally ambiguous function for the punishers and Rawls details how where crime is more extensive that: "... penal devices will play a much larger role in the social system" (Rawls, 1971: 576). We see now how punishment is closely related to Rawls' stability problem (which is given a far more extensive treatment by Rawls in *A Theory of Justice*). In Rawls the penal system is necessary, once justice is instituted, to ensure social stability and the only limitation upon it is that of practicality. It satisfies Rawls' *strains of commitment* test since persons in the Original Position are aware that even in the case where they occupy a less well-off position they nonetheless ought to accept the rationale for their position, since it is an *objectively* fair distributive model. This holds for criminals and it holds too for non-criminals who we might term indolent or moral rebels (Robinson, 2010, 77- 97). For Rawls coercion is rightful and even where the criminal does not accept his or her punishment they surely, and objectively, ought to (Honig, 1993a). There is no way around this, in Rawls, and even in the case of the moral rebel or indolent the Difference Principle is in place in *A Theory of Justice*, to assuage minor misfortunes (Rawls, 1971: 75- 83; 101- 105; 300- 321). The Difference Principle is best understood as coming out of Rawls' egalitarianism and holds that there should be no differences between persons except those that can be established on the grounds of efficiency. Moreover, that all social and economic inequalities should be so arranged to advantage the least advantaged and that all offices should be opened up to all persons irrespective of any advantage i.e. under conditions of equality. Rawls demands that everyone supports his scheme of retribution through the mechanism of the Original Position, for the sake of stability.

The issue of distinguishing moral rebels and the indolent from criminals was tackled by Honig in her *Political Theory and the Displacement of Politics*. The criminal is in a different

category because though it is true that our abilities and natural talents are contingent aspects of our being it is the act of affirming a sense of justice that reveals our true natures and binds us to a general notion of desert. The Original Position allows actors, to choose those principles of social relations under which their principles would do best. However, those choices are nonetheless subject to constraints; and it is these constraints, that embody the specifically *moral* elements of Original Position. Actors are unaware of the underlying facts about their principles, since these are morally irrelevant to the choice of principles of justice. This restriction on their reasoning is embodied in Rawls' veil of ignorance, which covers information about a person's age, sex, religious beliefs, etc. (Rawls, 1971: 136- 148). As this information is unavailable the problem of choice is rendered determinate. Desert in Rawls is derived in terms of general principles of justice; not principles that favour individuals or groups of individuals through the mechanism of the Original Position. Honig argues that: "... desert is not finally overcome by Rawls.... it returns to haunt justice as fairness when Rawls reaches for antecedent moral worth (or unworthiness) to account for the presence of criminality in a just regime and to justify its punishment ... (Rawls) relies on desert to serve its traditional function ... it makes sense of evil and justifies our dealing harshly with it ... Rawls, because he does not acknowledge deserts return, makes no provisions for its engagement" (Honig, 1993b: 131). The important point Honig makes here is that although the actor may come to their own principles (and even alter them, after self-reflection) their sense of justice is not subject to self-reflection because it establishes their self. It is a constitutive aspect of the Rawlsian self, as Zink has also described (Zink, 2011: 331- 344). Honig maintains that individuals, after they leave the Original Position, are subject to retributive justice; though a similar logic is not paralleled in distributive justice terms. I think this is an unsatisfactory position since the basic capacity to affirm a sense of justice is a *universal* one it cannot therefore differentiate persons (Rawls, 1971: 147). However, Rawls, in other passages, notes some persons are unable to affirm a sense of justice and unless he is to slip into a form of the *natural slaves* argument, that we noted earlier, he is forced to admit that the inability to affirm a sense of justice is a misfortune, of a kind: in which case the misfortune cannot be someone's fault. This is a real problem since in Kantian terms the ability to affirm a sense of justice is primitive for it reveals exactly who the person is and not doing so collapses the model into what Rawls terms the: "... contingencies and accidents of the world" (Rawls, 1971: 575).

Punishment

Rawls' work mixes retributivist and utilitarian elements in his treatment of punishment. He is retributivist in that he holds to *proportionality* which disallows punishing the innocent and, importantly, his conception of punishment is backward-looking and therefore interested in what a person did rather than forward-looking (that is interested in the consequences of the consequences of punishment). He is utilitarian in that he, in some places, looks at the effects of punishment and he ends up arguing that utilitarian principles are useful when justifying the practice of punishment and retributivist ones when evaluating a particular choice within that practice. In other words he supports a utilitarian argument for adopting a practice of punishment but only in the case where the rules (for punishment) are retributivist in nature.

This is all very interesting for any theory of punishment since it seems to preclude a straightforward desert-based version of retributivism (Honig, 1993a: 100- 115). The reason being that like other forms of Kantianism the time-honoured issues seem to reappear as obstacles. It therefore follows that the contingency of our talent and ability seems to mirror the role of the phenomenal world, in Kant, and our transcendental natures, which are free and equal, seem to mirror the noumenal in Kant (Collard-Bovy, 2006; Fleischaker, 1988). On this reading the criminal's nature seemingly makes him or her unable to realise what their true nature, as a free and equal person, actually is. We can only say that such a state of affairs is either unfortunate, wherein it is not the criminal's fault, or it is unavoidable, and again nobody's fault (including the criminal's). Honig ostensibly tries to make Rawls' account of the inability of the actor to affirm a sense of justice compatible with her contention that the inability of the actor to affirm a sense of justice is actually a *deserving* criterion in, and of, itself (Honig, 1993b: 131). This is surely not a correct reading of Rawls, or of Kant. Rawls recognised that whilst the inability of the actor to

affirm a sense of justice was their own that it was not simply possible to read off fault since the inability was, in turn, related to “contingency and happenstance” (Rawls, 1971: 574). In Rawls there is a difficulty in simply holding an actor straightforwardly responsible for their inability to affirm a sense of justice and therefore deserving of punishment given the: “accidents of the world” which he details (Rawls, 1971: 575).

In the more metaphysical scheme that Kant outlined the matter of desert is, somewhat, resolved by a recourse to evil. In Kant a free will can elect to choose evil, in other words do wrong (Kant, 1998: 31- 57). The Rawlsian view of punishment does not require the importation of evil to get out of the desert bind here. Moreover, though Rawls does indeed write of “moral worth” he does not favour a retributivist form of punishment: that much is clear (Rawls, 1971: 241; 575-77). What Rawls argues is that punishments are needed to uphold the principles of justice established in the Original Position. After all is said and done Rawls turns out to be in favour of a more nuanced “legitimate expectations” position (Rawls, 1971: 310-15). He argues that after the Original Position, that is when the rules of punishment are established, persons are expected to adapt their choices so as to be consistent with their legitimate expectations. In his essay *The Basic Liberties and Their Priority* he maintains that: “Citizens accept responsibility for revising and adjusting their ends and aspirations” (Rawls, 1982: 170). This is very clear and put simply it asserts that it is never sufficient for a person to regret that they cannot fulfil their desires but have to change their desires in order to affirm their true nature as a free and equal person by conceding that the principles of justice are afforded priority. When an actor cannot change their desires then, I argue, Rawls might well maintain that whilst they (the actor) cannot deny the priority of the principles of justice they should be pitied to the extent that these principles do not accord with their nature. This state of affairs one could term misfortune. Such a situation is best expressed through the language of misfortune which seems to capture Rawls intention better than the language of fault. Moreover, such a view seems to be in line with Rawls’ work on moral rebels and the institution of punishment. Its justification is set in terms of ordering society, the overarching theme of *A Theory of Justice* (Rawls, 1971: 568). This is the nub of it: whatever one’s view of Rawls ideas on punishment in *A Theory of Justice* and their appeal to “moral worth” and “character” it is certain that these elements, containing as they do a retributive flavour, are an exception. Rawls is not typically a retributivist.

Conclusion

When looking at Rawls’ work on punishment we note three separate things going on, which are not entirely compatible with each other. It is also fair to say that Rawls spends less time in *A Theory of Justice* on punishment, per se, than he does on distributive justice; and moreover, that his writings on punishment are themselves to be understood in the context of his overall distributive justice theory. We find three main ideas concerning punishment in Rawls. We noted a straightforward independent desert model (Rawls, 1971: 310- 314). We also find a view that supports a legitimate expectations model that fits well with his overall thesis on distributive justice (Rawls, 1971: 314- 15). The legitimate expectations model seems perfectly suited to his ideas about the well-ordering of society. A legitimate expectations model seems to cover what we might term the assurance problem whereby there is a requirement to augment the rules of justice. These two models, independent desert and legitimate expectations, are compatible and we see similar views at work in the writings of just deserts theorists where desert and expectation are often outlined as aspects of each other (von Hirsch, 1976 & 1990). However, Rawls also sets out a third model in *A Theory of Justice* that relates to liberty. He writes: “I have maintained that the principles justifying these sanctions can be derived from the principle of liberty ... We also see that the principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of *liberty* itself” (Rawls, 1971: 241). He sets out the principle of liberty more technically a little further in the text where he maintains that: “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all ... The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty” (Rawls, 1971: 250). Rawls’ claim, simply put, is that the common

store of liberties that all persons possess must be equal. Moreover, that punishment is that mechanism whose function is both to uphold the strict equality, concerning the distribution of liberty, by making good the disequilibrium brought about by persons claiming a greater share of liberty than they were entitled to and prevent, by means of deterrence, those persons likely to bring about a state of disequilibrium by claiming an unfair portion of liberty for themselves. In section 39 of *A Theory of Justice*, where Rawls sets out his argument for “equal liberty” we see, perhaps, most clearly how his thinking meshes with an idea of fair play to defend the institution of penal sanctions.

What, I think, this essay has achieved is not to relate a meta-theory of punishment in *A Theory of Justice*, nor is it to claim great originality, on the subject of punishment, in Rawls’ writings. It is to demonstrate how Rawls’ writing on punishment in *A Theory of Justice* turns out not only to be at odds with the rest of *A Theory of Justice* but importantly with the bulk of his thinking on punishment too. This is something that Scheffler has argued (Scheffler, 2000: 973-980). It is safer to say that Rawls is much more of a consequentialist, as we have seen, with regards to punishment. What is more Rawls tends to augment his consequentialism with a legitimate expectations notion of personal responsibility. Why he does this is obvious: it is the only solution compatible with his decidedly Kantian account of the motivation problem. By which Rawls’ line is surely to argue that if actors are unable (contingently) to express their true selves as free and equal then it follows that they cannot be deemed to *deserve* on the same grounds as expressed in *A Theory of Justice* concerning distributive justice. What Rawls can safely argue though is, this being the case, this is a matter of regret since, as we have seen, Rawls understands that situation as *their* (and note the possessive pronoun) “nature” and *their* “misfortune.” We have, at least, cleared that up.

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