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ARGUING ABOUT RIGHTS

Charles M. Yablon*


Fifteen years after the publication of his only book, A Theory of Justice,¹ John Rawls' work remains central to the debate about the nature of justice in a liberal society.² Rawls' theory continues to engage the attention not only of philosophers, but of political and social theorists and lawyers, and has even been cited in some recent judicial opinions.³ The publication of Professor Rex Martin's new book, Rawls and Rights, provides a good opportunity to consider the nature of Rawls' influence and the continuing appeal of a "Rawlsian" approach to questions of social justice. Martin's work is, I believe, the first book about Rawls that is neither a critique nor an exposition of A Theory of Justice. Rather, it is an independent work that seeks to expand and make explicit the implications of Rawls' work in areas Rawls himself leaves vague, particularly the concept of "rights." Martin also attempts, when possible, to improve on Rawls' arguments and meet the objections of his critics. Thus, Martin's book represents an important step in the development of a "Rawlsian school" of philosophy.

The fact that Rawls' work continues to play such a central role in current debates about political and moral philosophy is itself an inter-

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2. The basic outline of Rawls' project is well known. He attempts to describe justice as the principles that would be chosen in a hypothetical "original position" in which individuals, although rational and knowledgeable generally about human nature and human society, have no knowledge of their own place in society or even their own talents and abilities. Such individuals, Rawls says, would choose an equal distribution of all the "social primary goods" — liberty and opportunity, income and wealth — unless an unequal distribution of one of these goods is to the advantage of the least favored member of society. Id. at 303.

3. A recent computer search revealed 181 citations to A Theory of Justice in recently published law review articles and notes. References to Rawls can be found not only in pieces dealing with jurisprudence or constitutional law, but in discussions of promissory estoppel, Farber & Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake," 52 U. CHI. L. REV. 903, 936 (1983); bankruptcy, Carlson, Philosophy in Bankruptcy (Book Review), 85 MICH. L. REV. 1341 (1987); and education law, Yudof, Effective Schools and Federal and State Constitutions: A Variety of Opinions, 63 TEXAS L. REV. 865, 878 (1985). The computer search also showed that, although the Supreme Court has never cited Rawls, his book has been referred to five times in opinions of United States Courts of Appeals.

871
esting phenomenon. His book has been subjected to careful examination and criticism by numerous philosophers and political theorists, who have claimed to reveal serious flaws in his premises and in the consistency of his arguments. For example, Nozick argues that Rawls' treatment of individual talents and abilities as the common assets of society is inconsistent with Rawls' commitment to treating individuals as ends and not means. Arrow and Harsanyi have questioned whether the "maximin" principle, that inequalities are to be arranged to maximize the welfare of the least advantaged member of society, is the rational choice for individuals in the original position. Wolff points out that Rawls' argument shares with utilitarianism the questionable premise that human lives involve plans by which individuals seek to maximize various theoretically unknowable and morally equivalent "goods." Sandel questions Rawls' premise that justice is the "first virtue of social institutions," arguing that such a claim relies on a peculiar and unappealing concept of the individual. These critiques demonstrate that Rawls' continued popularity is not based on the incontestability of either his premises or conclusions, or on their acceptance by other political theorists.

Yet it would be equally wrong to view Rawls' work as popular simply because it potentially provides a comfortable justification of the contemporary American liberal state. It is not at all clear that Rawls' vision of the just society, with its powerful egalitarian presumptions, bears much resemblance to contemporary American society, even in its more idealized forms. Martin's book, which argues that Rawlsian principles require that the lowest economic class in a society (he suggests the lowest quartile) has a "basic right" to income supplementation (pp. 120-22), certainly does not make Rawls seem like an apologist for the status quo. Moreover, utilitarianism and intuitionism can be equally comforting defenders of the prevailing system.

Rather, three factors seem primarily responsible for the continuing popularity of Rawls' work. The first, of course, is the excellence of *A Theory of Justice* itself, which contains much fine philosophical argu-

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7. M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 30-34 (1982); SEE NOTE 42 INFRA.
9. A DIFFERENT VERSION OF THIS ARGUMENT WOULD CLAIM THAT WHAT RAWLS HAS PROVIDED IS NOT A JUSTIFICATION OF THE STATUS QUO, BUT OF THE AMERICAN LIBERAL POLITICAL IDEOLOGY. THIS IS PROBABLY CLOSER TO THE TRUTH, BUT IT IS ALSO CLOSER TO RAWLS' DECLARED GOAL OF CLARIFYING AND JUSTIFYING A VISION OF THE JUST SOCIETY THAT IS SHARED BY MANY AMERICANS. SEE NOTES 35-38 INFRA AND ACCOMPANYING TEXT.
ment and also represents, at least for this generation, a contractarian
tradition in political theory that goes back at least as far as Hobbes.\textsuperscript{10}
The second is the extraordinary ability of Rawls' work to stimulate
and provoke creative responses from those who differ with him. For
example, both Nozick's \textit{Anarchy, State and Utopia}\textsuperscript{11} and Michael
Walzer's \textit{Spheres of Justice}\textsuperscript{12} were apparently in part the outgrowth of
a course the two jointly taught in Rawls' philosophy.

The third factor, which has received comparatively little attention
in the critical literature, is the method and style of argument Rawls
adopts in \textit{A Theory of Justice}. Rawls rejects a logical deductive argu-
ment method in favor of the "reflective equilibrium" method, a style of
argument which favors persuasion and agreement rather than logic
and proof. Some of the most impressive aspects of that book are
Rawls' explicit discussion of the methodological difficulties of putting
forward and defending a philosophical concept of justice, and his rec-
ognition of the limitations of any such philosophical system. Rawls
purports only to be presenting "a" theory of justice, and he expressly
recognizes that his work can only succeed to the extent he formulates
principles which provide a good "match" with the existing moral
judgments of his readers.\textsuperscript{13} Thus, Rawls recognizes that moral philos-
ophy, at least as he intends to pursue it, is a matter of persuasion
rather than rigid deductions from first principles.\textsuperscript{14}

This is a method of thinking and arguing about ethical issues that
is more familiar to lawyers than philosophers. In the first section of
this piece, I want to consider in some detail Rawls' methodology in \textit{A
Theory of Justice}, to show how Rawls' argument relies neither on
purely deductive logic nor empirical claims but on a form of argumen-
tation similar to that of lawyers. This analysis leads to an appreciation
of Rawls' philosophy for providing not so much a specific vision of the
just society as an account of arguments about justice, an elucidation of
the kinds of claims that must be made about an institution to persuade
others that it is just.

The second section of the piece deals more specifically with Mar-
tin's book, \textit{Rawls and Rights}. It considers Martin's attempts to defend
Rawls against the criticisms of the last fifteen years and to clarify and

\begin{itemize}
\item \textsuperscript{10} See generally Rosenfeld, \textit{Contract and Justice: The Relation Between Classical Contract
\item \textsuperscript{11} R. NOZICK, supra note 4.
\item \textsuperscript{12} M. WALZER, \textit{SPHERES OF JUSTICE} (1983).
\item \textsuperscript{13} J. RAWLS, \textit{supra} note 1, at 50.
\item \textsuperscript{14} In his latest writings, Rawls has increasingly stressed the importance that persuasion and
consensus play in his theory. \textit{See} Rawls, \textit{Justice as Fairness: Political not Metaphysical}, 14 PHIL.
& PUB. AFF. 223 (1985); Rawls, \textit{The Idea of an Overlapping Consensus}, 7 OXFORD J. OF LEGAL
STUD. 1 (1987). While these works support the view of Rawls' methodology being put forward
in the first part of this essay, I have chosen to try to support my argument with quotations from
\textit{A Theory of Justice} itself to show that the method I am describing was an integral part of Rawls'
philosophical method as set forth in that book, rather than a subsequent change in his theory.
\end{itemize}
concretize the implications of a Rawlsian system, particularly with respect to individual rights. The former project, I think, succeeds fairly well. The latter is frustrated by an overly determinate and oversimplified concept of law and the nature of legal argument.

I

John Rawls thinks like a lawyer. I want to defend this highly controversial claim by considering three of the distinctive features of Rawls' philosophy: (1) the concept of "reflective equilibrium," (2) the nature of the argument in the original position, and (3) Rawls' recognition of the indeterminacy of the principles of justice and the need for additional arguments about justice as one reaches more specific stages of social organization.

A. Reflective Equilibrium

Traditionally, the task of moral philosophy has been conceived as the attempt to establish the truth of certain moral positions. In attempting to do this, moral philosophers have generally relied on deductive forms of argument. They have sought to prove the correctness of a moral position by demonstrating that it necessarily follows from more fundamental ethical premises. If the task of moral philosophy is perceived in this way, any inconsistency between premises and conclusions is fatal.

Another approach to moral philosophy conceives its task as the discovery, clarification, and elucidation of existing moral beliefs. These philosophers rely on a more inductive form of argument, seeking to derive insights into the "good" and the "right" from moral judgments people actually make. For these philosophers, a demonstration that people do not use moral terms or make moral judgments in the way their theory claims is fatal to the argument.

Rawls' notion of reflective equilibrium is an attempt to describe the goal of moral philosophy, and formulate a method of moral argument, that steers a middle path between these two conceptions and avoids the pitfalls of both. For Rawls, moral philosophy is neither a deduc-

15. Justifying such fundamental premises was, of course, the most difficult part of these arguments. Kant, for example, puts the categorical imperative forward as a nonempirical principle, required by the faculty of reason. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (J. Ladd trans. 1965). Mill does not claim the same self-evidence for his utilitarian principle, but bases it on what he believes are universal psychological traits. Mill is equally concerned to show that correct moral actions may be derived deductively from his principle. J.S. MILL, UTILITARIANISM (1863).

16. This was the project of the ordinary language school of philosophy, which sought to understand how people used words like "good" and "right." R. HARE, THE LANGUAGE OF MORALS (1952); Stevenson, The Emotive Meaning of Ethical Terms, 52 MIND 14 (1940). It is also, in a somewhat different sense, the project of intuitionist schools of moral philosophy, which base their moral theories on claims about the moral beliefs people actually have, rather than those they should have. Strawson, Ethical Intuitionism, 24 PHIL. 23 (1949).
tive nor an empirical study, but a dialectical progression between the two methods. It involves a continuous process of checking the implications of proposed moral principles against our preexisting considered moral judgments, modifying each in light of the other until a state of "reflective equilibrium" is reached, a state in which a set of moral principles "matches" our considered moral judgments.\(^\text{17}\)

Every moral theory, of course, depends to some extent on its "fit" with our preexisting moral judgments. Consider the following two premises as alternative bases for a system of justice:

(1) A just society is one which maximizes the greatest possible benefit for the greatest number.

(2) A just society is one which maximizes the greatest amount of chocolate ice cream for the greatest number.

I am quite certain that neither of these premises can be shown to be true on the basis of some more fundamental moral principle; they must be taken as axioms of the system. I am also quite certain that I can apply premise number two in a far more consistent and determinate fashion than I can premise number one. (After all, it is much easier to tell if something is chocolate ice cream than if it is a "benefit."\(^\text{1}\)) Nonetheless, premise one is at least a plausible basis for a conception of justice, because it seems to capture some aspects of our preexisting moral judgments, while premise two does not.

In Rawls' concept of reflective equilibrium, however, considered moral judgments act as more than just a check on the plausibility of an independently deduced moral system. They play an active part in developing moral principles. Rawls believes that moral principles may be induced from our considered moral judgments as well as deduced from fundamental premises. He is willing to use both methods together to develop his moral system. Rawls analogizes this interplay between principles derived from moral judgments and judgments derived from principles to the interplay of inductive and deductive method in scientific thought.\(^\text{18}\)

Rawls does not create any clear priority between deductive principles and considered moral judgments. He does not argue, like the intuitionists, that any moral claim that does not comport with our existing moral beliefs must be discarded, nor does he believe, like certain utilitarians, that we must abandon intuitive moral judgments that conflict with an overarching moral principle. Rather, Rawls recognizes a certain malleability both in our considered moral judgments and in our formulation of principles. He is aware that a powerful argument from principle can sometimes alter our existing moral judgments, and that a powerful intuitive judgment can cause us to modify

\(^{17}\) J. RAWLS, supra note 1, at 46-53.

\(^{18}\) Id. at 20 n.7.
or create an exception to a moral principle. Moral argument for
Rawls involves a continuing juxtaposition of proposed principles
against considered judgments with each having the power to alter the
other.19

This notion of reflective equilibrium does lead to a certain ad hoc
quality in some of Rawls' argument, and has contributed to a lack of
clarity some have criticized in A Theory of Justice.20 Since there is no
clear priority between proposed principles and considered moral judg­
ments, the system does not flow deductively from a few simple prem­
ises, but must be separately worked out at each step of social
organization. More important, the absence of a priority between
moral principles and considered judgments means that one cannot ab­
stractly predict which will prevail in a given situation. The only way
the dialectic of reflective equilibrium can progress is by evaluating the
actual strength, the persuasive power of the particular arguments
made, and seeing which one succeeds.

This is perhaps the most intriguing aspect of Rawls' method: his
emphasis on the importance of persuasive argument rather than logi­
cal demonstration or refutation. Rawls does not expect to be able to
prove his system in the rigorous manner of a logician or even an em­
pirical scientist. Rather, his method requires him to persuade the
reader by making a convincing argument, appealing at times to con­sidered moral judgments, at others to proposed principles, and relying
at all times on the belief that the reader's evaluations of the relative
strengths of these arguments agree with his own.21 As he says, "[s]o
for the purposes of this book, the views of the reader and the author
are the only ones that count. The opinions of others are used only to
clear our own heads."22

By now, most lawyers will have noticed the similarities between
Rawls' method and the familiar characteristics of legal argument, par­
ticularly common law arguments involving precedent. The interplay
Rawls envisions between inductive and deductive methods is quite
familiar to lawyers, who easily move back and forth between arguments
in which they seek to derive and justify rules of decision based on prior
cases, and arguments which seek to overturn or modify precedent by
applying a more consistent or clearer legal rule. Like Rawls' concep­

19. "By going back and forth, sometimes altering the conditions of the contractual circum­
stances, at others withdrawing our judgments and conforming them to principle, I assume that
eventually we shall find a description of the initial situation that both expresses reasonable condi­
tions and yields principles which match our considered judgments duly pruned and adjusted." Id.
at 20.

20. See, e.g., R. WolfF, supra note 6, at 3 ("The logical status of the claims in the book never
becomes entirely clear, despite Rawls's manifest concern with matters of that sort.").

21. At one point, Rawls describes the requirements of the original position as setting "rea­
sonable constraints on arguments for accepting principles." J. RawLs, supra note 1, at 446.

22. Id. at 50.
tion of moral philosophy, law involves a continuing process of altering rules in light of cases and cases in light of rules, seeking a consistency that is never finally achieved; and like Rawls, lawyers are much more concerned with persuasion than logical demonstration.\textsuperscript{23}

B. \textit{The Original Position}

Another controversial feature of Rawls' work is the epistemological status of the argument from the original position. One of Rawls' central claims, of course, is that his principles of justice are the principles that would be chosen by individuals in the original position. Rawls describes the original position by telling us what attributes the individuals in that position share with us (\textit{e.g.}, rationality, ability to formulate desires and life plans) and which attributes they lack (\textit{e.g.}, envy, knowledge of their individual talents and abilities). The question is what kind of claim Rawls is making when he states that such hypothetical individuals would choose a particular conception of justice.

In answering this question, Rawls faces a dilemma that parallels his problem in choosing between a deductive and an empirical method of moral philosophy. He might seek to show that, given the attributes of individuals in the original position, his principles are the only ones that could be rationally chosen. Indeed, some critics have perceived Rawls' argument that way, and have attempted to refute it by showing that principles other than Rawls' could be rational choices given the constraints of the original position.\textsuperscript{24}

But if all Rawls is claiming is that his principles must necessarily be chosen given the attributes of individuals in the original position, he is not saying very much about justice. I too can justify my principle of the maximization of chocolate ice cream, by postulating an original position in which individuals have no knowledge or desires other than that chocolate ice cream exists and is delicious. My principle is the one that would necessarily be chosen in my original position, but it is not very persuasive as a conception of justice.

\textsuperscript{23} This emphasis on persuasion also enables Rawls to withstand attacks that would be fatal to either a purely deductive or purely empirical system. To the extent that Rawls' theory is justified by our considered moral judgments, he is not as concerned as a purely deductive theorist would be in defending the incontrovertibility of his premises. He can even tolerate a certain level of inconsistency, since the method of reflective equilibrium may require the adoption of certain exceptions to general rules or ad hoc rules for special cases. Similarly, it is not crucial to Rawls that his principles comport in all respects with our considered moral judgments, since there are grounds, under reflective equilibrium, to claim that the principles should alter our considered judgments.

\textsuperscript{24} See, \textit{e.g.}, Harsanyi, \textit{supra} note 5, at 596-97; Rae, \textit{Maximin Justice and an Alternative Principle of General Advantage}, 69 AM. POL. SCI. REV. 630 (1975); Wolff, \textit{supra} note 6, at 142-79. Wolf believes, based primarily on a reading of Rawls' earlier works, that Rawls originally conceived of his principles as being proven deductively as the solution to the game-theoretic situation created in the original position. \textit{Id.} at 16-34.
One of the strongest parts of Martin's book is his emphasis and elucidation of the "nondeductive" nature of Rawls' argument. As Martin states:

One does not literally deduce the principle(s) of justice from a description of the original position. For such a program would be at cross-purposes with Rawls's contention that the desired outcome of the deliberation is a ranking of eligible conceptions of justice. A logical deduction of the two principles from a description of the original position would not count as ranking them ahead of competing conceptions, such as average utility; rather, it would count as rendering those other conceptions wholly ineligible. Indeed, if the Rawlsian two principles were to emerge deductively from a description of the original position, then Rawls would legitimately be open to the charge that he had built the two principles into that description in the first place. [p. 16]

But if the statement that the two principles would be chosen in the original position cannot be true as a matter of deductive logic, neither can it be true in a contingent or empirical sense. After all, the original position does not exist. No individuals ever had the attributes Rawls ascribes to the individuals in the original position. How can Rawls possibly make contingent or empirical statements about people who don't exist, or know what such hypothetical people would actually choose? In what sense, then, can Rawls possibly justify his claim that these are the principles that would be chosen?

The answer, I believe, is that Rawls seeks to justify his claim by convincing the reader that his principles are the principles the reader would choose, if the reader approached the problem with the same attributes as a person in the original position. Notice the kind of attributes we are talking about. The reader cannot choose out of motives of personal gain or revenge, since the person in the original position has no knowledge that would enable him or her to formulate such motives. Rather, the person in the original position makes decisions based on a regard for the good of all members of society, a general knowledge of human nature and human social relations, and basic rationality. It is Rawls' claim that such a person would find the.

25. It is natural to ask why, if this agreement is never actually entered into, we should take any interest in these principles, moral or otherwise. The answer is that the conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection.

J. RAWLS, supra note 1, at 21.

Rawls, of course, is not the first philosopher to recognize that the persuasiveness of moral argument must ultimately rest on an assumption of shared conceptions between the author and the reader. I am grateful to Professor Jacobson for pointing out such an assumption in the Introduction to Hobbes' Leviathan:

He that is to govern a whole nation, must read in himself, not this or that particular man; but mankind: which though it be hard to do, harder than to learn any language or science; yet when I shall have set down my own reading orderly, and perspicuously, the pains left another, will be only to consider, if he also find not the same in himself. For this kind of doctrine admitteth no other demonstration.

T. HOBBES, LEVIATHAN 6 (M. Oakeshott ed. 1944).
ments in favor of Rawls' principles more persuasive than those of competing conceptions of justice.

Once again we find that the key to Rawls' claim is not that he has proven his conception of justice, but that he has elaborated the most persuasive argument in favor of it. Indeed, the attributes we have just defined as characterizing decisionmakers in the original position — rationality, lack of personal motives, general knowledge of human nature and society, and regard for the good of all members of society — are very close to the attributes we would hope to find in an ideal judge. The original position may be conceived then as an attempt to invoke in the reader those same attributes of idealized judging and then to persuade the reader, by convincing argument, that Rawls' conception of the fundamental principles of justice is to be preferred over competing conceptions.

C. The Indeterminacy of Justice

Even though he has attempted to describe the fundamental principles of justice, Rawls is under no illusion that he has thereby defined a just society. Rawls is well aware that his principles are sufficiently abstract and general that they may be used to justify a multitude of differing institutional arrangements, some of which may be substantially preferable to others. Accordingly, Rawls envisions the development of just social institutions as involving at least four stages, each involving agreement among participants with progressively greater knowledge of the specific facts about their particular society, and each stage relying on the more fundamental principles that have been developed in the preceding stages. These stages are: (1) agreement on fundamental principles of justice (the original position), (2) agreement on basic political institutions and liberties (the constitutional convention), (3) agreement on specific social rules and policies (legislation), and (4) agreement on the application of the preceding rules to individuals (adjudication).

What Rawls envisions is a series of debates, at different levels of social specificity, over the justice of societal institutions. As the debate becomes more specific, the range of justifiable social choices becomes more limited for at least two reasons. First, as more contingent facts about the society are known, the ability to characterize certain institutions as just pursuant to the two principles may change. For example, in a feudal society in which land is the primary productive asset, a system of taxation based on real property holdings may be just under Rawlsian principles. If the society is one with an industrial capitalist economy, however, a system which taxed real property but not other

forms of productive wealth would be quite unjust.27

In the second place, the institutional arrangements agreed to at the more general stages supply additional rules for making normative choices at the more specific stages. For example, it may be perfectly just, at the constitutional level, to agree on a criminal justice system in which all trials are conducted before judges. But if a constitution has already been agreed upon, and it provides for a right of trial by jury, one can nonetheless say, at the legislative and adjudicative levels, that deprivations of that right are unjust.

Even when the most specific level of social decisionmaking has been reached, however, Rawls does not expect his system to yield determinate answers to every question of social justice. Rawls recognizes that at every stage in his theory there may be equally persuasive arguments that justify differing social institutions. As he states:

Of course, this test is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate. . . . This indeterminacy in the theory of justice is not in itself a defect. It is what we should expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and if it singles out with greater sharpness the graver wrongs a society should avoid.28

In the same way that Rawls does not believe the principles of justice can be deduced from the original position, he does not believe that the structure of a just society can be deduced from his principles of justice. Rather, the principles of justice, and all the subsidiary principles arrived at in the subsequent stages of social organization, serve to describe and limit the kinds of arguments that can be persuasively made to establish that a particular social arrangement is just. By arguing for the preferability of his principles over competing concepts like utilitarianism, and by establishing a careful “lexical order” among his own principles, Rawls’ system enables us to reject certain types of arguments as unjust.29

What Rawls has provided in *A Theory of Justice* is neither a deductive demonstration of the principles of justice, nor a determinate vision of the just society. Rather, it is an account of how to argue about questions of justice. He provides us with a means of clarifying and extending our considered moral judgments and of evaluating and ranking arguments about justice.30 The power of Rawls’ work rests

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27. *Id.* at 200. Again, there is an interesting parallel to legal argument, which often proceeds by trying to reduce normative questions to factual ones.

28. *Id.* at 201.

29. See, *e.g.*, *id.* at 380 (describing those arguments that may be used to justify conscription).

30. For example, under Rawls’ system one could not justify a city’s refusal to permit a demonstration by neo-Nazis on the grounds that the costs of police protection would be prohibitive. While such an argument might be accepted by a classical utilitarian, who would be willing to
neither on its logical rigor nor on empirical verification, but, as Rawls himself recognizes, on its ability to convince and persuade.

This provides one key to understanding how Rawls' work has maintained its vitality in spite of the powerful attacks of his critics, and its continuing appeal to lawyers as well as philosophers and social theorists. Because Rawls is not putting forward a deductive theory, he can withstand a certain amount of inconsistency and a recognition of exceptions and special cases in the application of his principles. Because he is not seeking empirically to verify his theory, he can tolerate the observation that his system is based on a conception of human nature that is controversial and unprovable. Because he recognizes the inability of arguments about justice always to yield a determinate result, he need not worry overmuch about attacks on the vagueness of his theory in application. Finally, because Rawls' work is based on a process and a way of thinking about justice, rather than on a single premise or key insight, it can accommodate theorists who may take quite different views of the justice of various institutions, based on their differing perceptions of the facts, and on their perceptions of the relative power of principles and considered moral judgments at the various stages in Rawls' process. Like a good legal brief, Rawls' theory does not require you to accept every argument it contains. Rather, it seeks to provide a general framework for thinking and arguing about these issues, and within that framework to provide at least some argument that persuades.

We return then, to the lawyerly quality of John Rawls' method. He is able to bring to the consideration of fundamental moral questions much of the lawyer's sense of the interplay between inductive and deductive modes of argument, the malleability and fact-centeredness of much normative argument. But he is also able to bring, to weigh the benefit to the neo-Nazis against the savings to the city, Rawls' lexical ordering concept and the absolute priority of liberty require the rejection of any argument that seeks to deprive someone of liberty on economic grounds. Nonetheless, while that particular argument fails, the prohibition could be justified, under Rawls' model, by an argument that the deprivation of the neo-Nazis' right to demonstrate is required to prevent a greater loss of liberty to others, say, by preventing a likely outbreak of physical violence.

Notice that Rawls' method again has the interesting effect of turning many questions of justice into factual disputes. Both arguments for and against the neo-Nazi demonstration can be put forth consistently with Rawlsian principles. The question then seems to resolve into the factual one of whether sufficient police presence at the demonstration is likely to prevent serious violence.

By seeking to clarify the kind of attributes a social arrangement would have in order to argue it was just, Rawls is able to reduce many normative questions to factual ones. For example, Martin believes that the relative justice of public and private ownership of productive economic property is, for Rawls, a factual question to be determined by an evaluation of the relative efficiency of the two systems. Pp. 171-73.

31. Philosophy, after all — at least in its current Anglo-American mode — has a rather impoverished concept of truth. Statements, if true, are either true necessarily or contingently, and that is pretty much that. Lawyers, who view truth through the perspective of argument, have a far richer vocabulary. To them, statements may be true as a matter of law, true as a matter of fact, presumptively true (rebuttably or irrebuttably), true for the sake of argument,
those who debate and argue questions of social justice at the legislative or adjudicative level, a framework that helps them to formulate and evaluate such arguments and to understand the more fundamental conceptions of justice from which such arguments may derive their power to persuade.

II

In *Rawls and Rights*, Rex Martin seeks both to defend the Rawlsian theory of justice from many of the criticisms that have been leveled against it in recent years and to extend and clarify the Rawlsian analysis in specific areas where Rawls' own treatment has been vague or cursory — particularly on the issue of rights. Martin brings to this task great familiarity with Rawls' work, including his writings subsequent to *A Theory of Justice*. *Rawls and Rights* is not an exhaustive restatement of Rawls' theory. It might rather be considered a sort of "selected topics in Rawlsian philosophy," and it assumes a reasonable familiarity with Rawls' theory. Much of the book is based on Martin's previously published articles, which he has rewritten and integrated with new material. While this gives the book a somewhat episodic feeling, Rawls' philosophy lends itself to such an approach, since it too considers various topics at different levels of abstraction.32

Martin claims to be expounding Rawls' philosophy, rather than his own (pp. 207-08), but he is referring to that curious form of philosophical interpretation in which the interpreter is more concerned with formulating the best or most defensible version of someone else's argument than with attempting a faithful summary or explication of the arguments actually made. Accordingly, Martin has no compunctions about telling us to dispense with statements Rawls makes describing rights as social primary goods, because such statements are "deeply confused and misleading" (p. 30); he jettisons the "maximin version" of Rawls' difference principle because of "doubts about [its] efficacy" (pp. 103-05); and he, unlike Rawls, is willing to classify certain economic rights, namely the right to income supplementation, as a primary right subject to lexical priority, rather than a distributive matter subject to the difference principle. Martin therefore quite appropriately refers to the theory propounded in his book as "Rawlsian" philosophy, rather than the philosophy of John Rawls.

Where Martin's book succeeds, and it succeeds to a considerable

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32. *A Theory of Justice* itself is, to a considerable degree, a reworking by Rawls of his previously published articles.
degree, is in clarifying the nondeductive nature of Rawls' theory and the central role that argument plays in that theory. Using this insight, Martin is able to meet many of the criticisms that have been leveled against Rawls, often by making major revisions in the specific arguments set forth in *A Theory of Justice*.

Where Martin is less successful, however, is in setting forth a "Rawlsian" theory of rights. That failure is largely due to his adoption of an overly positivistic view of law. Martin believes that legal decisions are reached and legal rights maintained by deductive arguments applying authoritative legal principles to specific situations. This is unfortunate because — while such a view can be found in Rawls (and indeed seems to predominate when he writes specifically about law) — Rawls' work is also compatible with a more sophisticated view of law which recognizes the power of specific cases to alter preexisting legal rules, the potential applicability of many authoritative rules to any specific situation, and both the centrality and indeterminacy of legal argument.

Many of the strengths of Martin's approach can be seen in his discussion of the justification of the "difference principle," the Rawlsian principle of distribution which requires that social and economic inequalities be arranged so that they are to the greatest benefit of the least advantaged members of society (p. 89). In *A Theory of Justice* Rawls attempts to justify this principle through the "maximin" argument. He argues that people in the original position, not knowing what position in society they will occupy or how they will fare in the distribution of wealth, talents, or abilities, will opt for the distribution that maximizes the benefit to the least well off.

This is an argument that has come in for considerable criticism over the years. It assumes a degree of risk aversion on the part of individuals in the original position that does not appear to comport with people's general decisionmaking processes under uncertainty and which does not seem appropriate under various game-theoretic models. Harsanyi points out, for example, that under the maximin principle, if a small amount of some drug were available, which could either be used marginally to prolong the life of a poor and seriously ill patient, or indefinitely to extend the life of an otherwise healthy individual, the drug should go to the terminally ill patient. 33 Wolff has demonstrated that maximin is only a rational decision strategy when the payoff matrix of possible outcomes is configured in a certain way. 34

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33. Harsanyi, supra note 5, at 596. Rawls, in response to such counterexamples, has emphasized the multistage nature of his theory, arguing that the principle is not meant to apply to social decisions at that level of specificity. Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. PAPERS & PROC. 141 (1974). This has also been attacked as a weakness of the principle. See Nozick, supra note 4, at 204-08.

34. R. Wolff, supra note 6, at 168-70. Wolff points out that Rawls' argument assumes that individuals will have an almost right-angled utility function of the sort reproduced below:
Martin handles these criticisms in the most effective possible way: he suggests we discard the maximin argument completely (pp. 103-04). He argues that Rawls' difference principle does not need the maximin argument to justify it; rather, it can be justified in a different way, by viewing the talents and abilities of each member of society as the common assets of all (pp. 103-04). This too is an argument that appears in Rawls.35 Martin, however, creates a new decisionmaking principle out of it. Rather than maximize the benefit to the least advantaged member of society, says Martin, locate all the Pareto-optimal (he calls them "pareto efficient") distributions of goods for a particular society, and then choose the most egalitarian such distribution (pp. 91-101). He demonstrates that, given one important additional assumption, this will lead to the same results as the maximin version of the difference principle.36

If $S$ is a point not quite sufficient for survival, and an individual is offered the certainty of $DP$ or a 50-50 chance of either a gain to $F$ or a loss to $C$, he will of course choose $DP$, since even a small loss in primary goods will cost more in lost utility than will be gained by a large increase. But if one is at point $B$ and is offered a reasonable gamble of $A$ or $C$, or if one is at point $E$ and offered the same gamble to reach $D$ or $F$, there seems every reason to accept the gamble if the odds are even slightly in your favor. Wolff concludes that for maximin to be a rational strategy, the decision matrix of possible outcomes must be configured around point $DP$.

35. J. RAWLS, supra note 1, at 101-05.

36. The Pareto-efficiency egalitarian principle is always equivalent to maximin in a two-person or two-class universe. P. 93. Once more than two groups are involved, however, equivalency requires the assumption of "chain connection" within the society, the condition that "whenever the expectation of the least-advantaged group is increasing (as a result of increasing the expectation of the most-favored group), the expectations of all the other intermediate groups are also increasing." P. 94.

Rawls believes it "plausible" that chain connection often exists with respect to benefits that are widely diffused in society, but he also notes that "[t]he difference principle is not contingent on these relations being satisfied." J. RAWLS, supra note 1, at 82. For Martin, however, the difference principle is contingent on the existence of chain connection, yet he does not believe that chain connection always holds. Rather, he states that cases in which it does not hold are the "unusual ones," where the application of the difference principle is "problematic." P. 96.

Martin seems, unlike Rawls, to have no principle of justice to apply in such cases. But he then says: "And where chain connection fails to hold, transfer payments to the adversely affected intermediate group(s) could be employed — precisely as they are now in the case of the least-well-off group." P. 97.

This last statement seems quite inconsistent with Martin's previous elaboration of his principle. It seems to imply that there is another state of distribution (the one after the transfer payment is made) that is also Pareto-efficient, but more equal than the previously existing situation.
But is Martin's Pareto-efficient egalitarian principle any easier to justify? Martin does not argue that his principle, rather than maximin, would be chosen in the original position. If he did, he would likely run into all the criticisms leveled against the maximin argument. But Martin recognizes that he does not have to make such an argument. Given the nondeductive nature of Rawls' argument, he does not have to claim that his principle is the only rational choice in the original position. He need only argue that it is the best choice, the principle that other members could be persuaded to adopt. Martin thinks that the argument that can persuade them to adopt it is the argument that talents and abilities are the common assets of all members of society (p. 106).

If one views people's talents and abilities in that way, it is certainly plausible to argue that they should be used in the most effective way possible (Pareto-efficiently), and the fruits of those talents then divided as equally as possible (the egalitarian principle). Martin thus argues that the common-asset argument can be used to justify his new version of the difference principle (p. 106).

But how good is the common-asset argument? It too has come in for a considerable amount of criticism. It hinges on the notion that individuals with natural talents and abilities do not deserve them, but are simply the recipients of good fortune. As Rawls argues:

No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up a social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.

Nozick has analyzed this argument in some detail, questioning both its premises and its conclusion. His main attack is on Rawls'
assertion that no one deserves his natural talents and abilities. Nozick
distinguishes between the talents themselves and the benefits that flow
from the use of those talents, and argues that even if the former are
undeserved, one may still be entitled to the latter. As he states:

If people have \( X \) and their having \( X \) (whether or not they deserve to
have it) does not violate anyone else’s (Lockean) right or entitlement to
\( X \) and \( Y \) flows from (arises out of, and so on) \( X \) by a process that does
not itself violate anyone’s (Lockean) rights or entitlements, then the per­
son is entitled to \( Y \).40

Nozick argues, for example, that a painter is entitled to keep his
painting, that Rawls is entitled to praise for _A Theory of Justice_, even if
they cannot be shown to deserve their talents. As he states, “[i]t
needn’t be that the foundations underlying desert are themselves de­served,
all the way down.”41

Martin, like Nozick, accepts a distinction between desert and enti­
tlement, but it is different from Nozick’s. Martin wants to reserve the
term “entitlement” for holdings that a person legitimately has without
having taken any action to obtain them. His paradigm example is the
Prince of Wales, who is entitled to be King of England by his birth­
right, although he has done nothing to deserve it. Notice the distinc­
tion between Martin’s examples of entitlements and Nozick’s. Prince
Charles is undoubtedly entitled to be King of England, but that enti­
tlement rests on a whole series of facts about English law and society
which are highly contingent and morally arbitrary. We would tend to
say that his entitlement is a legal but not a moral claim. If England
were to adopt a republican form of government, or crown the Stuart
pretender on the ground that he had the better legal claim, we might
be surprised, but we would not feel that Charles had been deprived of
something he morally ought to have.42

In contrast, when Nozick asserts that a painter is entitled to his
painting, he is referring to something more fundamental and of more
direct moral significance than the property rules of a particular legal
regime. If a law were passed confiscating certain paintings so that
they could be put on permanent public display, Nozick would not sim­
ply view this as a change in legal entitlements (the way Martin would
view a change in the succession laws of England). Rather, he would
claim that the state was taking something to which it was not entitled;
it would be subject to moral attack on that basis.43

40. _Id._ at 225.
41. _Id._ (emphasis omitted).
42. This ignores, of course, such morally based concepts as reliance or estoppel.
43. In making this distinction between moral and legal claims, I do not mean to imply that
the determination of legal claims can never hinge on moral arguments. Indeed it can, as I will
Martin recognizes that his concept of entitlement presupposes an existing set of social and legal institutions in a way that Nozick's does not. Martin chooses, however, to emphasize the similarities between his argument and Nozick's, rather than the differences. Martin argues that a Rawlsian can (and that Rawls himself does) accept Nozick's premise that "people are entitled to their natural assets" and can therefore accept his conclusion that people are entitled to the holdings they develop through their natural talents and abilities (p. 167).

Thus, Martin demonstrates that Rawls, like Nozick, can justify an economic system in which those with greater than average talents receive greater than average gains. To some extent this is a refutation of Nozick, in that it shows that the intuitive notions of "entitlement" he appeals to can be accommodated and accounted for in a Rawlsian system. But the arguments the two philosophers would make to justify greater returns for those with greater abilities are quite different — and as every lawyer knows, the argument made in support of a result can be as important as the result itself.

Nozick's concept of entitlement is both fundamental and directly normative. People are entitled to their natural talents and abilities because they have such natural talents and abilities, and have them without infringing anyone else's liberty. They therefore should (in a strong normative sense) have the fruits of those talents. Martin's concept of entitlement is derivative of a particular social and legal system and only marginally normative. People are entitled to the fruits of their natural talents and abilities if those are the returns appropriately established under the legal and economic regime created in accordance with principles of justice. If the organizing principles of the society are just, such returns may be said to be just. As Martin states:

> Desert is a moral notion, but it is not a first-order one in this theory. It is subordinated . . . to the principles of justice and to the institutions of the basic structure of a particular well-ordered society. Thus, we should not say that individuals have the returns that they are entitled to because they deserve them but, rather, that whatever the returns are, under the conditions specified, they could be said to be deserved in the relevant sense. [p. 167]

Martin uses the multistage nature of Rawls' system to defuse Nozick's argument. Because he locates concepts of desert or entitlement not as fundamental principles, but as derivative concepts within a preexisting legal and economic system, those concepts lose their abil-
ity to function as critiques of the fundamental structure of society.44

Martin's discussion of Rawls' theory of rights is less successful. Although Rawls speaks of rights in a number of different contexts in A Theory of Justice, he never sets forth a coherent account of rights. Indeed in Rawls, as in many other theorists, there is a tendency to move back and forth between accounts of rights as legally enforceable claims and as normative arguments in support of certain claims.45 Martin attempts to sharpen and render coherent the Rawlsian account of rights. In so doing, unfortunately, Martin uses an overly determinate model of legal decisionmaking, and he insufficiently recognizes the role that claims about rights can play in formulating legal arguments that seek to change the prevailing response of legal institutions.

Martin recognizes the ambiguity of using rights to describe both moral aspirations and legally enforceable claims. He tries to get around the problem by defining a "proper right" as containing both a moral and legal component. As he states:

There is, we see on reflection, an irreducible duality to human or natural rights. On the one side, they are morally validated claims to some benefit or other. On the other side, such rights require recognition in law and promotion by government of the claimed way of acting or of being treated. Neither side is dispensable in a human or natural right. [p. 39]

What about rights that are recognized but not enforced by the legal system of a certain country? To Martin, these are merely "nominal rights." As he says, they give "no normative direction to the conduct of other persons in fact; such persons act as if the right did not exist even on paper" (p. 34). A right which is neither recognized nor enforced is to Martin "merely a morally valid claim" (p. 38). For Martin, "[t]he crucial issue . . . is whether appropriate practices of recognition and promotion are in place for that kind of right. For without such social recognition and maintenance, whatever was said to be justified, on moral grounds, would not be a proper right" (p. 39).

To Martin, rights are a sort of license or guarantee, usually granted by the government, that individuals will be permitted to engage in certain activities, or be safeguarded against injury by the activities of others. He rejects as incoherent Rawls' statement that there is a right to equal basic liberties in the original position. Since arguments in the original position are logically prior to any social or institutional arrangements, there can be no "proper rights" at that stage (p. 41).

44. Martin does not deal with the deeper question of whether Rawls — by subordinating concepts of desert, entitlement, and all other attributes of individuals, so that the individual's claim to justice in the original position is separate from and prior to any such considerations — is left with such a weak concept of the individual that it cannot function as the basis of a claim for individual rights and autonomy. See M. SANDEL, supra note 7, especially at 77-95. If Rawls has a way out of this criticism, it lies, I believe, not in analyzing the concept of the individual in the original position, but in the dialogic relationship between Rawls and his readers that is envisioned in Rawls' discussion of reflective equilibrium.

Martin's notion of rights as legally protected zones of action, which can be parceled out to individuals on an equal basis, is indeed a concept of rights that can be found in Rawls.\(^46\) But in attempting to elaborate and defend that concept, Martin relies on a determinate and deductive account of legal decisionmaking which, while present in Rawls,\(^47\) is not the only concept of normative decisionmaking available in his theory and is not a particularly plausible account of law—that at least as law is currently understood and spoken about in the United States. First, the account fails to consider the substantial degree to which legal rules are expressed in and rely upon moral concepts and moral language. A moral claim may not only be grounds for adopting a legal rule, but also may, under certain legal regimes, itself constitute a legal claim. For example, if I say that garnishing wages without providing a hearing is unfair and should be prohibited by statute, I am making a moral claim for the creation of a legal right. But if I say that garnishing wages without providing a hearing violates the due process clause because it is unfair,\(^48\) I am making an assertion about existing law which relies on a moral claim.

There are of course many rules in the American legal system which rely on moral concepts, particularly in the area of most interest to Martin—constitutional rights. This does not mean that it is impossible for us or Martin to distinguish conceptually between legal and moral claims, but it does cast doubt on the usefulness of that distinction in defining what Martin calls “proper rights.” If we believe that in our legal system a powerful moral argument can and should affect the way legal rules are understood and applied by governmental institutions, then why does Martin consider it improper to speak of having a “right” at the time that one is aware of a powerful moral argument that one believes can and should affect the way courts will apply the legal rules? Martin would apparently respond that such a right is not yet a “proper right” because we do not know for sure whether it will be enforced by courts or other governmental bodies. Such a view, however, fails to recognize the indeterminacy and malleability of legal argument, the way argument can change the prevailing understandings of rules, and the different levels of generality at which authoritative legal rules can operate.

Consider the situation of black schoolchildren in Alabama in 1953. Did they have a “right” to attend integrated schools? The fourteenth amendment—with its guarantees that no state could infringe the privileges and immunities of its citizens, or deny them equal protection of the laws on the basis of race—was a recognized and frequently

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46. It is most clearly apparent in Rawls' discussion of how basic liberties can be secured at the constitutional stage. J. RAWLS, supra note 1, at 195-211.
47. Id. at 348-49.
enforced part of the authoritative legal structure of the United States. Yet those general constitutional guarantees had not been translated, at the legislative or adjudicative levels, into a right to attend integrated schools. This was in part due to the Supreme Court's interpretation of the fourteenth amendment in *Plessy v. Ferguson*,\(^{49}\) that "separate but equal" facilities for blacks were constitutionally permissible, and in part due to a factual claim that separate schools for blacks were or could be equal. By 1953 powerful arguments existed (and by powerful I mean that many people, with and without legal training, found them to be persuasive) that both the legal and factual premises on which the constitutionality of segregated schools was based were incorrect. One who took such a position could plausibly state that blacks had a "right" to attend integrated schools in 1953, even though such a right had not been recognized by the United States Supreme Court. Such an assertion of rights would be a recognizably legal claim, not simply a moral one, since it would be based on authoritative legal materials.\(^{50}\)

Consider also whether a constitutional right to privacy existed in 1927, the year before Justice Brandeis, dissenting in *Olmstead v. United States*,\(^{51}\) invoked the existence of such a right. No such right is expressly stated in the Constitution, nor had it ever been declared by the Supreme Court, yet Brandeis, by analyzing prior Court cases that considered the propriety of particular governmental actions, argued that these cases, which surely represented "authoritative legal materials," demonstrated the existence of a "right" to privacy at the constitutional level. It is hard to characterize Brandeis' argument as simply a moral claim that a right should exist. Rather, he argued that a legal right did exist, as demonstrated by the prior actions of authoritative governmental bodies. Even though Brandeis was writing in dissent, his opinion changed the way those prior cases were perceived by judges and lawyers, and it is therefore plausible to say that his opinion gave rise to the constitutional right to privacy.

One can imagine Martin protesting at this point that the preceding arguments represent just the kind of sloppy thinking his more rigorous definition of "right" was intended to prevent. He might argue that my two previous examples muddy up the important distinction between rights that are recognized by authoritative materials at some level in the legal regime but are not enforced and those rights that are both recognized and enforced. Only the latter, he would claim, should be considered "proper rights." While the fourteenth amendment or the cases Brandeis cited in *Olmstead* could be considered authoritative legal materials that provided some recognition to the rights involved,

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\(^{49}\) 163 U.S. 537 (1896).

\(^{50}\) This, of course, was precisely the argument made to the Supreme Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

\(^{51}\) 277 U.S. 438, 471 (1928).
the fact remains that those rights were not being enforced by the courts at the times involved and thus should be distinguished from activities that were actually being protected by the legal system at those times.

The problem with this argument is that if the term "right" is restricted solely to those legal claims for which litigants can actually obtain judicial relief, it ceases to bear much resemblance to the way the term is actually used either in legal or ordinary discourse. Consider the question whether black schoolchildren in Alabama had the right to attend legally integrated schools in 1955. By that time Brown v. Board of Education had been decided, and, on most views, the legal "right" to integrated schooling had been definitively established. But in 1955 black schoolchildren in Alabama had virtually no hope of obtaining judicial enforcement of their "right." The Supreme Court had only required integration "with all deliberate speed" (and only with respect to the Topeka school system). While declaring the right, they had indefinitely delayed the remedy. Moreover, no matter what the Supreme Court said, no trial court in Alabama in 1955 was going to order integration. It was going to take a massive civil rights movement and years of further litigation before any such enforcement orders would be forthcoming. On Martin's definition then, blacks in Alabama had no more "proper right" to attend integrated schooling in 1955 than in 1953, yet most of us would agree that their legal position had changed dramatically in the intervening year.

Conversely, consider whether a criminal defendant today, charged with a capital crime, has a right not to be executed by the state. The correct legal answer is surely that no such right exists. The Supreme Court has made it emphatically clear during the last fifteen years that the death penalty itself does not violate constitutional restraints on cruel and unusual punishment. Yet if we look at the legal world from Martin's perspective and ask what activities governmental bodies will act to prevent, we find that there are many states with capital punishment statutes on their books that have not executed anyone in many years. In some of these states, courts, aware of the legal and factual uncertainties involved in such cases, are generally willing to grant motions for stays of execution. In others prosecutors do not often seek the sanction. In such states, authoritative governmental bodies are certainly enforcing morally based rules that prevent the imposition of capital punishment, yet we would not be inclined to say that a "right" against capital punishment is being enforced.

In short, one cannot identify "rights" with the orders actually is-

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52. For example, according to statistics compiled by the Justice Department, as of 1984 there had been no executions during the last twenty years in any of the states of the Northeast, although most of those states retained capital punishment statutes. Bureau of Just. Statistics, U.S. Dept. of Just., Capital Punishment 1984, at 3 (Table 2), 7 (Table 10) (1985) (National Prisoner Statistics).
sued by governmental bodies, since these can issue for hundreds of reasons, often with little or no relation to the substantive "rights" of the parties involved. Rather, "rights" tend to refer to a more general and hypothetical view of legal process; not what courts will actually order, but what they should order (assuming the case is timely brought, filed in the right court, properly argued, etc.). But once we move to this more general and normative level, the problems of the indeterminacy of legal rules and the malleability of legal argument return. I suspect that the very effort to define a "proper right" in such a way as to distinguish it from a strong legal argument is a misguided effort based on an overly positivistic view of law. What is clear is that Martin's definition does not enable us to make such distinctions, but, as we have seen, yields some rather bizarre conclusions about the existence or nonexistence of rights.

The difficulties with Martin's approach to rights are even more apparent when he deals with conflicts between rights. Here he extends his view of rights as zones of legally protected activities, giving them other physical characteristics such as scope and weight. He suggests that the way to minimize conflicts between rights is for the scope of each right to be carefully delineated, either at the constitutional or legislative stage, so that it is possible to determine, with respect to any activity, whether it falls within the protected zone.

He suggests, for example, that in delineating the scope of the right to free speech, one first must define speech as "all that is said, except incitement" and "all that is printed, except incitement" (p. 132). One can then narrow the zone of protected speech by excluding those activities which, although they are "speech" under the definition given, are not protected. The two activities Martin suggests are obscenity and libel (p. 132).

It is conceivable that by proceeding in this way the "right to free speech" could be clarified so that members of society would be able to predict, with greater certainty, whether a given action was or was not included. But Martin never considers whether such clarity is always desirable in legal rules, and particularly in formulations of rights. Under his proposed definition of speech, neither draft-card burnings nor campaign spending would be included. One might argue that a better formulation of the right to free speech would be one that was sufficiently loose or unclear to permit the argument that one or both of these activities were sufficiently like "all that is spoken or printed" to warrant protection. Similarly, although Martin mentions the rule against prior restraints (p. 136), it is hard to see how it can be justified on his account of free speech. If obscene or libelous speech is not within the protected zone, Martin seems to have no basis for justifying a rule that prohibits courts from enjoining the publication of libelous
or obscene speech. Rather, any such justification would seem to have to recognize certain zones of unclarity in which activities were neither fully protected nor fully unprotected.

Indeed, the notion that "clear" legal rules are always to be preferred over unclear legal standards is itself highly problematic. Every lawyer is familiar with instances in which a "bright-line rule" can be abused to achieve results quite contrary to those intended. The argument that legal standards must sometimes be sufficiently loose to take into account factors that cannot be specifically delineated, but that are required to do justice in the individual case, is a concept at least as old as the maxims of equity.

In order to resolve conflicts between rights, Martin must introduce the concept of the "weight" as well as the scope of a right. Weight is expressed as a test setting forth the countervailing conditions that would have to exist in order to abrogate the right. For example, Martin derives from Rawls the test that freedom of speech may only be abrogated on national security grounds when it presents "imminent and unavoidable danger of a 'constitutional crisis of the requisite kind' " (a more stringent reworking of the "clear and present danger test") (p. 135).

Notice that Martin has provided an account of adjudication which involves a purely deductive form of argument. The major premise, the "test" for determining whether the right may be abrogated, is independently and authoritatively established in the legal materials. Given the existence of such a test, all that remains is the empirical determination that an activity does or does not satisfy the test. Once such a determination is made, the conclusion — to abrogate the right or not — is logically compelled.

Again, one can question whether this purely deductive model of adjudication is either desirable or even possible. Certainly it does not describe the process of adjudication familiar to American lawyers. In large numbers of cases in our system, the "test" itself is a matter of dispute. It is not available from preexisting authoritative legal materials, and must be induced from case law. Such case law often presents numerous plausible formulations of the relevant test, or presents numerous conflicting tests that might be used to decide the case. Often,


54. For example, the standard justification of the rule against prior restraints is that such restraints create a "chilling effect" which inhibits publication not just of the (presumably unprotected) libelous or obscene speech, but of constitutionally protected speech as well. Note that such an argument presumes a significant amount of indeterminacy in the determination of rights, because it assumes that publishers will often be unable to tell whether or not their activities are legally protected.

55. See, e.g., Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1683 (1976); Bratton, Manners, Metaprinciples, Metapolitics and Kennedy's Form and Substance, 6 CARDOZO L. REV. 871 (1986); Shupack, Rules and Standards in Kennedy's Form and Substance, 6 CARDOZO L. REV. 947 (1986).
where a certain formulation of the test is recognized as authoritative, the formulation is sufficiently vague that the activities in question may be appropriately characterized as either satisfying or not satisfying the test.

It is unfortunate that Martin, who recognizes the nondeductive nature of Rawls’ argument and the problems of using purely deductive arguments generally to establish moral claims, should revert to a purely deductive model when giving an account of legal argument. There is available within Rawls’ work a richer model of argumentation which relies on both inductive and deductive modes of argument, is philosophically defensible, and is much closer to the way lawyers and others actually argue about rights in a legal context. It is to be found in Rawls’ own methodology.56

Despite its failings as a theory of rights, Rawls and Rights makes a significant contribution to the Rawlsian literature. Not only does it clarify important aspects of Rawlsian methodology, including the nondeductive nature of Rawls’ argument, but it also exemplifies the continuing vitality of that method by extending Rawlsian concepts and Rawlsian arguments in ways that respond to important criticisms of Rawls.

56. Indeed, Martin’s own justification for the nondeductive nature of Rawls’ argument in the original position can be used to critique his theory of rights. P. 16. If the appropriate response of the adjudicative body is deductively determined by the authoritative legal system, only one judicial response is possible and all the others are totally ineligible. But if legal argument, like the argument in the original position, is designed to provide (as Martin states) a “ranking” of possible outcomes, then there must be more than one outcome that is at least plausible under the prevailing legal regime.