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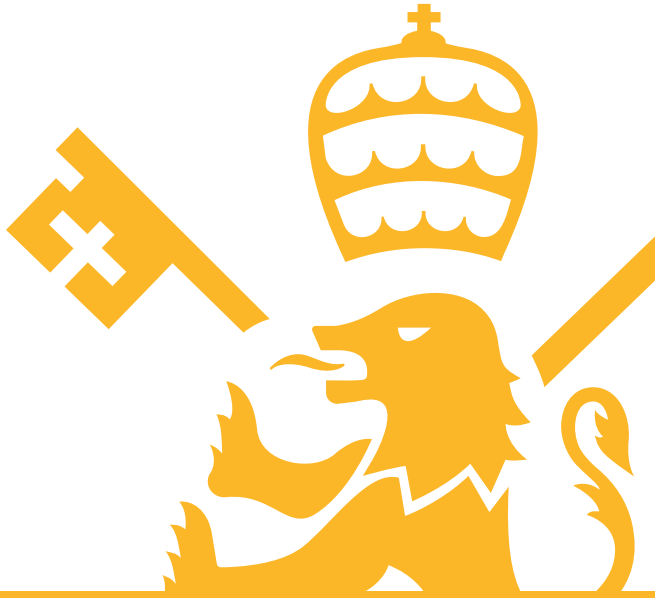

Speech for the Investiture Ceremony as Doctor Honoris Causa of Dr. D. Enrico Gabrielli and D. Jeffrey W. Stempel

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Investiture Ceremony as Doctor Honoris Causa
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Comillas Pontifical University

“Rediscovering Rawls to Repair Law”

A Humbling Experience*

At the outset, I want to thank Comillas for this special occasion and its recognition. I am humbled to be on the same platform with such distinguished company. Special thanks go to Abel Benito Veiga Copa and the faculty, staff and leadership of Comillas Universidad Pontificia. It is an honor not only to be here today but also to have had the opportunity to work with Abel, Miguel Martinez Munoz, and the law faculty at Comillas.

In addition, I owe a lifetime of gratitude to persons too numerous to mention, beginning with family, friends, and teachers from my (long ago) youth in Minnesota and continuing through the many people who have done so much for more than 40 years to support me in my career at the University of Nevada Las Vegas, Florida State University, and Brooklyn Law School. I am particularly indebted to my wife, Professor Ann McGinley, one of America's preeminent scholars of labor, employment, and jurisprudence, as well as to our children, whose busy professional lives prevented them from being here today.

The American Judiciary's Unfortunate Underappreciation of Scholarship

I am especially honored to be at this magnificent university that has contributed so much to learning. But at the risk of casting some shadow on this celebratory occasion, I want to address a troubling trend,at least in the United States: insufficient attention by lawmakers and judges to the insights offered by the academy. Both lawmaking and adjudication are too often done without sufficient consideration of scholarly research and thought.

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* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas In addition to those thanked in text, I thank Erik Knutsen, the Lee family, and colleagues at the American College of Coverage Counsel, the American Law Institute, and Boyd Law.

To be sure, some judicial opinions in the U.S. do expressly incorporate scholarly work and of course academic learning may silently inform judicial decisions even if works are not expressly cited. But the climate in the American judiciary and legal profession has for the past two decades been one of anti-intellectualism and even belittling of the academy.

For example, U.S. Supreme Court Chief Justice John Roberts has openly dismissed legal scholarship as irrelevant or impractical. He has essentially said that there is nothing to be learned from legal scholarship. As you might expect, I think he is wrong. I hope those familiar with his majority opinion in *Trump v. United States* will agree that it could have been vastly improved and differently decided had there been greater consideration of academic work by the Court.

The *Trump v. United States* decision may not have made news in Spain but I can summarize it quickly. The U.S. Supreme Court – or, more precisely, two-thirds of its members -- sided with former President (and now President-Elect) Donald Trump, who made a claim for immunity from criminal prosecution in connection with his alleged subversion of the 2020 U.S. Presidential election, an event now known in the U.S. simply as "January 6" because it took place on that date in 2021 as the U.S. Congress was preparing to certify the election results.

The Supreme Court majority declared that Presidents have absolute immunity for misconduct so long as the misconduct – no matter how heinous – is committed during the course of an "official act," with the term defined broadly by the Court.

The decision is a bad one, irrespective of whether one supports or opposes Trump. Immunizing Presidents of any political party or whatever ideology is bad law and blameworthy as a matter of legal doctrine alone (e.g., for every right a remedy; a presumption that those breaking the law will be held accountable; no person is above the law, etc.).

It is also blameworthy if one considers history (the U.S. was born in a revolution against a King and expressly rejected the royalty model

of government), comparative law and politics (countries where leaders are not accountable to law generally are worse places than those that adhere to a rule of law), economics (authoritarian regimes generally have weaker economies and finances), and sociology (citizens in rule of law societies are generally happier) as well as the topic I want to address today – philosophy.

Giving political leaders absolute immunity for misconduct during their official duties violates an important criterion for decision that I want to advance today – self-conscious application of the approach to justice championed by legal philosopher John Rawls.

A Rawlsian Response

Fifty years ago, Rawls, a Harvard professor, gained significant attention in the academy with the publication of his book *A Theory of Justice*.[1] It was widely cited in scholarly literature and even became the source material for some law school seminars and scholarly symposia.

But knowledge of and attention to Rawls among rank-and-file law students, lawyers, policymakers, and judges has always been insufficient as compared to the attention Rawls received in the upper echelons of the academy.

For example, since *A Theory of Justice* was published, it has been cited in ***only 27*** judicial decisions (despite being cited in more than 7,000 books and law review articles). By comparison, during this same 50-year time span, legal philosophers like

Jeremy Bentham (cited in 203 cases and nearly 7,000 secondary sources);

John Stuart Mill (cited in 201 cases and 8,000 secondary sources); and

Ronald Dworkin (cited in 70 cases and more than 10,000 secondary sources)

1 John Rawls, A Theory of Justice (1970)(revised edition published in 1999).

have enjoyed substantially more but still insufficient judicial attention, as has scholarly work in general in U.S. Courts. Underutilization of scholarship pervades American law across disciplines, even that favorite of conservative jurists – economics.[2]

The apparent underappreciation of Rawls in the courts is particularly pronounced – and discouraging. Prominent as Rawls may be in the philosophical and legal academy, academic journals and law review articles lack the real world power of judicial decisions, regulations, or statutes. Despite the impressive intellectual following of Rawls, his work has been and remains seriously underappreciated by actual decisionmakers such as legislators and courts.

At the risk of over-simplifying a complex body of philosophical literature, I focus on two main precepts of Rawls: (1) the "original position" and (2) the "veil of ignorance." The original position simply asks that in addressing an issue, an adjudicator or policymaker begin from a neutral position in which the decisionmaker has no vested interest to defend. The veil of ignorance then asks the analyst to assess an issue not knowing the analyst's position in society. It requires that resolution of a legal question be done without regard to one's current or anticipated socio-economic position. Inquiry and decision should be made without regard to whether one is rich/poor; black/white; male/female; vendor/consumer; government/citizen and the like.

These are powerful tools that if rigorously applied should prompt a lawmaker or adjudicator to reach a result that serves the greater good over

2 For example, there is also relatively limited citation to the work of prominent economists like Milton Friedman (cited in 28 cases and 1,878 secondary materials), John Maynard Keynes (33 cases and 1,416 secondary materials), Paul Samuelson (48 cases and 1,013 secondary materials), William Nordhaus (5 cases and 414 secondary materials) Lester Thurow (2 citations and 258 secondary materials), Robert Shiller (3 cases and 398 secondary materials), and Joseph Stiglitz (52 cases, some as an expert witness, and 4,275 secondary sources). Even John Forbes Nash, the subject of an award-winning popular film directed by Ron Howard and starring Russell Crowe (*A Beautiful Mind*) appears in only 5 cases and 181 secondary sources) while Daniel Kahneman, a best-selling author (*Thinking Fast and Slow*) as well as the subject of a popular Michael Lewis book (*The Undoing Project*) appears in on just 59 cases but 5,377 secondary sources.

the long term. In this sense, Rawls, despite being criticized by some as too far left, is simply advocating for a refinement and operationalization of the Golden Rule -- "do unto others as you would have them do unto you" -- a philosophical stance so old and widely accepted that it is reflected in the Bible[3] and other ancient literature. Simple as this concept of equanimity may be as further refined by Rawls, it has been under-utilized in American law.

Under a Rawlsian/Original Position/Veil of Ignorance/Golden Rule approach, the question any lawmaker (Legislator, Regulator, or Adjudicator) should ask is whether the rule or decision adopted would be deemed fair by an observer who did not know his or her future position in a dispute or the legal system. Without regard to wealth, age, gender, race, religion or property, the approach asks whether neutral observers would agree that the law, doctrine, or decision set forth is a logical, rational, fair and even-handed disposition of the issue. If the answer is affirmative, the rule, norm or decision satisfies the Rawlsian inquiry. Unsurprisingly, Rawls labeled his approach "Justice as Fairness."[4]

Correcting Lopsided Analysis and Achieving Sounder Legal Outcomes

Many U.S. judges contend that they give adequate consideration to public policy analysis in deciding cases. But they are often only "half-right" according to the Rawls yardstick. When making a policy assessment of competing legal rules or outcomes, too many American judges consider the benefits and detriments only as applied to the party making a motion before the Court, which is usually the party seeking to avoid accountability. The predicted effects of a legal rule or decision are too often seen primarily or even only through the lens of the accused inflictor and not from the perspective of the individual victim or the public at large.

3 *See* Matthew 7:12 ("In everything, do to others what you would have them do to you").
4 *See* John Rawls, Justice as Fairness: A Restatement (2001).

Consider the *Trump v. U.S*. immunity decision. The focus of Justice Roberts and the majority is on potential chilling effect or persecution of a former President by a succeeding administration. No serious consideration is given to the impact of an immunity rule upon potential victims of a former President's misconduct or upon the public interest in government accoundtability. A court making a disciplined Rawlsian inquiry would not make the same mistake.

Viewing law through the Rawls lens reveals many recent developments in U.S. law to violate the fairness principle. Immunity stands as a clear example. If one does not know whether one will be an immunized government official or someone injured by misconduct of the government official, my bet is that he or she would prefer a rule of no immunity.

This avoids granting the government actor carte blanche to intentionally or recklessly cause injury but hardly leaves presidents or policymakers undefended. They simply need to show that their conduct was reasonable, justified, and *legal*. This is hardly too much to ask of an armed police officer responsible for a death and certainly not too much to ask of a President possessed of vast legal, financial, administrative, and military resources.

Use of the Rawls template would also likely have avoided or mitigated other disappointing trends in U.S law such as:

- a reduced role of the jury;
- expanded and relatively unchecked power by trial judges relative to juries;
- an increasing number of decisions based on limited factual information;
- reduced litigant access to information;

- increased immunity not only for presidents but other government actors;
- heightened criminal procedure protections for corrupt politicians and white-collar criminals without similar lenity for others;
    - interpretation of statutes, contracts, and documents that ignores context;[5] and
    - procedural barriers to being heard on the merits such as constricted personal jurisdiction, unduly limited discovery, or forced arbitration mandated on the basis of unread form language on the back of a phone bill or credit card statement.

Legislatures have fallen prey to similarly disappointing lawmaking that includes caps on damages available for certain types of injuries or based on the identity of the damage-inflicting party. They also too often adopt unduly short statutes of limitation or statutes of repose.

Conclusion

In short, Rawlsian analysis tends to support legal rules that people without a specific stake in a dispute would agree are fair to disputants. A legal outcome that cannot meet this standard is suspect. To the extent that American law has drifted away from even-handed fairness in recent decades, the "cure" may be as simple as subjecting legal analysis to the fairness-forcing process of the Rawls approach.

More broadly, the failure of U.S. Courts and lawmakers to harness the Rawls perspective as a tool in making legal decisions is part of a larger systemic failure of adjudicators and policymakers to appreciate and apply the learning of the scholarly academy.

5 This applies as well to my primary field of insurance. A Rawlsian perspective prefers that disputes about the meaning of an insurance policy provision be determined upon consideration of not only the text of a policy but also the full context of the origin and purpose of the provision, its traditional application, and expressions of party intent as well as the words on the face of the document itself.

In the face of these real world failures, the high calling of this University and all higher education to continue the task of seeking enlightenment and defending its utility in the face of skeptics.

The task, however daunting, remains as Comillas and other universities continue the fight against ignorance, prejudice, and irrationality. That effort makes me proud to have been a small part of this educational effort and so humbled and grateful for this recognition. Thank you all so much.

November 27, 2024 | Alberto Aguilera, 23 | Madrid