

The Hart-Rawls debate: libel, privacy infringement, reflective equilibrium

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Abstract. H.L.A. Hart objects to John Rawls's liberty principle by drawing attention to how our legal system accepts the restriction of liberty to protect against other harms than liberty-deprivation, such as by laws against slander, libel, and publications which grossly infringe privacy. What is the solution for John Rawls, faced with this criticism? One solution is, by the reflective equilibrium method, to justify abandoning the judgment that these actions are immoral.

"As I was reading The Golden Bough

I heard you, your wife and your mistress row!"

John Rawls's system of recommended principles has a liberty principle as its first and foremost one – "foremost" meaning accorded priority here. This liberty principle grants all adult citizens a set of basic liberties, such as the right to freedom of speech, to freedom of movement, and to run for public office. The priority that this principle holds within his system is that basic liberties can only be sacrificed for greater equal basic liberty, rather than for realizing some other principle. Notably, given the minimum level of affluence needed for liberalism, one cannot sacrifice some of these rights for economic gains. Now H.L.A. Hart criticizes the liberty principle by drawing attention to how we sometimes restrict liberty to protect against harms which are not about the deprivation of liberty, such as slander, libel, and publications which grossly infringe privacy. Our current laws do not conform to Rawls's vision of restricting basic liberty only for the sake of greater equal basic

liberty, rather there are sometimes restrictions for other reasons. How can the Rawlsian respond?

It will be useful at this stage to quote from the Oxford jurist:

It would be extraordinary if principles of justice which Rawls claims are in general in harmony with ordinary considered judgments were actually to exclude (because they limited liberty otherwise than for the sake liberty) laws restraining libel or slander, or publications grossly infringing privacy... (1973: 548)

Now here is an argument which is not that far off the argument Hart is making, a simpleton sibling even:

- (1) We should only accept Rawls's system of principles if it entails all of our considered moral judgments.
- (2) Rawls's system does not entail all of our considered moral judgments, because it does not entail our moral judgments in favour of laws restricting liberty to slander, to libel, and make publications grossly infringing privacy.

Therefore:

- (3) We should not accept Rawls's system of principles.

But Hart himself is probably not best interpreted as relying on a premise as sweeping as (1). Anyway, I suspect there is a Rawlsian who will respond to Hart's argument in much the same way as to the sibling. I should warn any readers in search of cleverness that this is mostly an obvious response.

The Rawlsian is going to say, "I do not quite accept (1). We have these considered moral judgments: moral judgments which we have made in suitable states of mind. And we should test a proposed system of general principles against these. If there is conflict with many of these judgments, then that is a problem for the proposed

principles. But if it entails many, though not all, there is the option of abandoning any judgments which conflict, rather than revising or abandoning the proposed principles.” (See 1999: 18)

How does all that apply to the laws that are our focus? More fully: “Are you, Rawlsian, going to say that the moral judgments underpinning laws against slander and libel and publications grossly infringing privacy are exceptions to be abandoned, along with the laws themselves? A fair system of general principles has been proposed, in your eyes. It entails various considered moral judgments of ours but unfortunately not these and it is better to abandon these, you think, than revise or abandon the proposed principles?”

I worry that there is a Rawlsian who is just going to stick out his chest, or her chest, and say, “Yes, just abandon those judgments getting in the way!” Hart himself sounds aware, or half-aware, of this response but he thinks it a crazy option to take. Well, what he calls it is “extraordinary.” Anyway, the gain of deciphering the real Hart seems very limited if we end up with the same, “Yes, just abandon those judgments getting in the way. Slander, libel, grossly infringing privacy: now okay!”

Abandoning may not be easy. One imagines an unpleasant training, until one gets accustomed to these three—until one shrugs one’s shoulders at moral outrage, even regarding these as “Part of life”!(I think “extraordinary” might be an allusion to newspaper men talk, by the way. I am withdrawing my attribution of a modernist cover to *The Mail on Sunday*!)

References. Hart, H.L.A. 1973. Rawls on Liberty and its Priority. *The University of Chicago Law Review* 40: 534-555; Rawls, J. 1999 (revised edition). *A Theory of Justice*. Cambridge, Massachusetts: Belknap Press.