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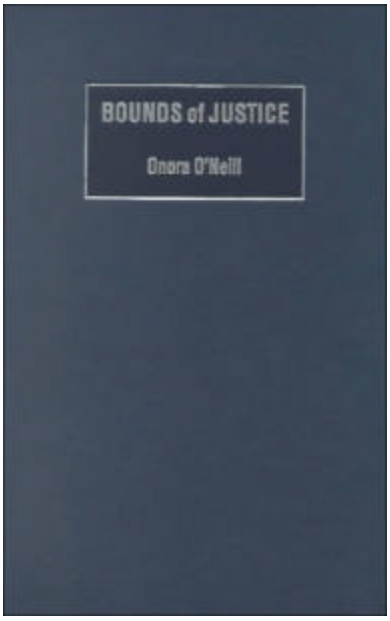

Loosening the Bounds of Human Rights: Global Justice and the Theory of Justice

By Christina Jones-Pauly

A review of Bounds of Justice by Onora O'Neill.
New York: Cambridge University Press, 2000. 219pp.

Onora O'Neill, Professor of Philosophy at Newnham College, Cambridge, is well known for her many writings on ethics and political philosophy. She is especially known for her universalist and cosmopolitan standpoint. In this volume she presents a collection of essays that have individually appeared elsewhere. But they have been revised in order to present a coherent view on the role of ethical and political reasoning in defining the boundaries of justice.

This volume can be best understood in the context of John Rawls' Theory of Justice. O'Neill seizes upon certain aspects of Theory of Justice in order to point out certain weaknesses from a cosmopolitan point of view, in the context of globalization. She assumes, however, that the reader is familiar with the Rawlsian theory of justice. We need to understand that Rawls was attempting to replace the utilitarian theory of justice, which did not take into account the principle of equal chances of opportunity. In particular, Rawls' work emphasized the indifference of classical utilitarian theory with regard to how benefits are distributed. As an alternative, Rawls offers the "difference principle," whereby "social and economic inequalities are to be arranged so that they are…to the greatest benefit of the least advantaged" (Rawls 1999, 65).

While Rawls explicitly presented a theory of justice as an alternative to the utilitarian theory, O'Neill has no such intentions with regard to Rawlsian theory itself. Its aim is to question some of the assumptions on which John Rawls' theory of justice rests. O'Neill asserts that one such assumption is that the theory of justice is intended to apply only to the *citizens* of a given society. Rawls uses the term "citizens" often, and he does not consider the issue of non-citizens' chances for equal opportunity.

On the basis of the assertion that the assumption of citizenship limits the scope of Rawls' theory of justice, O'Neill characterizes his theory as "bounded." Justice itself is bound to (and by) the

citizens of a given society, and the bounds of this society are the bounds of state sovereignty. This provides O'Neill with grounds for pointing out the ethical weakness of the Rawlsian theory of justice. Ethically, she says, a theory of justice based on a bounded state does not allow a critique of such a system by the very persons who are excluded from this state: non-citizens. O'Neill is seeking an account of justice that queries the justness of political and social exclusion on the basis of citizenship (p. 4) and, by extension, exclusion from citizens' debates on justice. In effect, she is querying the justice of the political system of state sovereignty versus global justice. She is positing bounded state justice against "unbounded" justice. The only implicit borders that she sets on unbounded justice lie in her definition of who are the agents and objects of unbounded justice. She identifies them as the relatively "weak" and "vulnerable" among outsiders and insiders—citizens and non-citizens (p. 7).

Is this initial critique of John Rawls' theory of justice accurate? How does he define the problem of injustice? For Rawls, injustice consists of social and economic inequality, despite whatever political equality may exist in any given society. Justice—as postulated in his difference principle—consists of a social order that furthers the prospects of the better-off only if this is to the advantage of the less fortunate (Rawls 1999, 65). Frankly, I see little substantial difference between O'Neill's category of "relatively weak and vulnerable" and Rawls' "less fortunate." The difference seems to lie in the contexts in which O'Neill and Rawls write. In a sense, the context in which John Rawls wrote his theory was itself bounded. He was addressing classical utilitarian theory, which emerged in a European context of economic prosperity and colonialism. He gave an alternative to this theory at a time when certain groups of citizens in the U.S. were being treated as second-class citizens, almost as though they were non-citizens. In contrast, the context in which O'Neill is writing is less bounded. She is addressing a global reality, a world in which there is much more consciousness about the fact that the disadvantaged are in the majority, post-colonial world—a world in which formal political equality between sovereign states does not adequately address unequal distribution of social and economic advantages between states and their societies.

Another Rawlsian presumption that O'Neill tackles relates to defining the subject of justice. In Rawls' account, the subject of justice is the "basic structure," which he defines as a "public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds" (Rawls, 74). In contrast, for O'Neill the subject of justice consists of agents as persons who reason about action and autonomy (p. 29). Autonomy, says O'Neill, is a necessary pre-condition for exercising rights (p. 32). Rawls presumes autonomy when he says that each has claims to a share in the proceeds of society. The distributive outcome depends on certain preconditions. First, there has to be a criterion for just distribution, a rule specifying entitlements, and a procedural framework (Rawls, 74). Second, citizens must not feel any obligation to obey an unjust regime (Rawls, 96-97), implying that they will overcome odds and take action to realize their claims (Rawls, 342). O'Neill poses even more fundamental and practical questions: Can we presuppose that people possess an ability to act, and are capable of acting autonomously? (p. 49) But acting just for the sake of autonomy poses a moral issue relating to the cause of the action. Is the action an expression of a rational maxim that is universally adoptable by all, or is it an expression of a specific person? Is it institution-specific? Is it driven merely by preference and inclination? (p. 47).

Where O'Neill and Rawls converge again is on the question of setting rules for actions. Rawls, as already mentioned, says that justice is preconditioned by agreement on a public set of rules. O'Neill argues too that principles and rules can guide action, but do not provide a complete guide (p. 55). She does not agree with conclusions of others such as Bernard Williams that any ethically-based rule or obligation is "morally flawed" just because "any agent committed to multiple obligations will find from time to time that these conflict" (p. 58). Saving a life is expensive; to feed the hungry, the Sabbath must be breached. According to O'Neill, the solution to the dilemma is not to stop thinking in terms of principles (p. 59), but to find "ways in which we cope with and forestall possible and actual contingent conflicts of principle" (pp. 60, 62, footnote 13, citing Ruth Barcan Marcus). The key is to find which institutional structures and practices help or hinder living up to principles. Accordingly, structural reform is constantly needed. At the same time O'Neill suggests that there are limits to institutional structural solutions. A change in attitude instead may be required, such as a readiness to apologize or to provide restitution (p. 63). For Rawls, however, the key seems to lie in a procedure for choice of government and for enacting laws that ensure equality of opportunity (Rawls, 243).

In regard to the applicability of the Rawlsian principles, O'Neill challenges their global adequacy. She asks how the Rawlsian principle of "fair equality of opportunity" (Rawls, 68) and the "difference principle" can be extended to all citizens of the world, beyond bounded societies. She asserts, "[t]here is no international analogue of the difference principle [viz., the advantaged may not be promoted unless that promotes the disadvantaged], and hence no account of trans-national economic justice." (p. 133) Certainly, it is true that Rawls has not addressed the issue of whether his principles are internationally applicable. He is concerned with whether they are universal. Whether and how he would distinguish international from universal is not clear. Rawls believes that principles, in order to be principles, have to be universal in application (Rawls, 114). Universal means "holding for everyone." That means that all potential claims are ordered and settled independent of the claimants' social position or ability to intimidate (Rawls, 116). Universality also means, in Rawls' view, "publicly agreed to" (Rawls, 221). But for Rawls, even of a principle were to meet the criteria of universality, universality *alone* would not justify the *contents* of that principle. The contents of the principle are the result of rational choice. What becomes important is to study the procedure whereby the conception and outcome of a decision are defined as rational (Rawls, 221).

In fairness to Rawls, however, O'Neill cites writers such as Charles Beitz and Thomas Pogge, who have tried to extend Rawlsian principles of justice to include the distribution of global resources. This approach does not satisfy O'Neill. It is not adequate for solving the global problem, which she defines as the situation wherein the economically advantaged and powerful set the rules of economic life and so, to some extent, cause the suffering of the poor and powerless (p. 131). Beitz and Pogge justify their position with a libertarian argument that "justice requires non-interference in the liberties of the powerful" (p. 131). And the investors and aid donors are constrained by their own interests and do not act according to the principle of an ethical obligation to secure fair allocation of resources. The reason seems to be that wealthy donor states and investors still have a kind of "welfare state" mentality towards the poor of the world. They secure and pay for welfare rights and benefits at home and so are blinded to the underlying problem of fair allocation of resources. But if one extends the social justice theory beyond the bounded state, then one does not find a global "welfare state" which would allow claims for securing and paying for welfare rights

and benefits. The reason is that the bounded social justice theory breaks down. It does not determine "against whom the claims may be lodged" in a global context (p. 135). Enforcement of the right to food requires positive action, but from whom, from which institution? What is the solution?

O'Neill believes that the solution lies in institutions. Although she does not explicitly define the term, implicitly she seems to be speaking mainly of organizations and/or rule structures. Institution-building, she asserts, is needed to specify and allocate obligations to the needy (p. 136). The aim of such institutions is to discipline the actions of powerful investors, who, as O'Neill sees it, receive "excessive tax concessions" (although we don't know what "excessive" might mean),[1] and to limit the vulnerability of poor nation-states who often agree to terms of trade that are damaging (pp. 140-41). To achieve this aim, such institutions are to specify who is obliged to fulfil economic rights (p. 125). The institutions have to be made accountable—to whom or what is not specified, but presumably the specific contours of accountability would have to be worked out according to the situation.

Despite her emphasis on institutions, O'Neill is no idealist. She realizes that there is a major obstacle to developing institutions for the purposes she has postulated above. That major obstacle is the behavior of "non-idealized" agents (cf. p. 155) who are powerful, and thereby tempted to lean on the weak (p. 141). But one is not to despair. What evidence does O'Neill see for an impetus for realizing institutional change? It is the rapid growth in the last 50 years of trans-nationally operating institutions (corporations, international governmental bodies, banks, development agencies, non-governmental organizations), which show that institutional change can occur in a relatively short time and can coerce unjust agents to limit their coercion against the vulnerable (pp. 139, 141-142).

Combining theory and practical thought, O'Neill proposes steps for arriving at a framework in which such organizations and rule structures are to function. The first is to decide on principles of justice that would be universal. These are framed in the negative: to agree not to use deception, violence, and coercion. To be universal, the public must agree or consent to these principles. An important part of the public in this case consists of the vulnerable, who cannot benefit from non-coercive arrangements until the structure of their vulnerability is better understood. If they are caught in a set of arrangements that they can renegotiate, then consent is real. If "they cannot but 'accept' those arrangements" out of ignorance or victimization by more economically powerful agents or institutions, then the consent is not real. Justice, then, is finding the means for the vulnerable to express legitimate consent. This in turn requires institutions that secure the "option of refusal or renegotiation" (pp. 163, 166).

What consequences do the theses of Bounds of Justice have for human rights? First, the issue of universality is relatively easily disposed of. Universality of human rights has been assured only on one level of public consent. That is the level at which the majority of states have publicly accepted human rights norms. But the manner in which the people—especially the disadvantaged and vulnerable—can formally consent deserves more attention. First, according to O'Neill, it is

[1] Included in European guidelines as potentially unjustified state aid (Competition law in the European Communities, Vol. IIA Rules applicable to State aid, 30 June 1998, 6.

important to define which obligations which agents are to fulfill in order to meet the needs that form the essence of certain human rights, such as the right to a decent standard of living. Secondly, the moral emphasis on the development of human rights principles and practices should emphasize the just allocation of economic and social resources at a macro global level (or coordinated across state boundaries, p. 172), not just at the micro level because the problem is an unjust global division of power. The very terms of the Universal Declaration of Human Rights pose an obstacle to global justice. The Declaration circumscribes the individual's (especially the migrant's) rights to travel, work, vote, etc. by the boundaries of the state of citizenship and supposes that the state is the primary agent responsible for implementing human rights (p. 180). At the international level, there is no institution with sufficient power to coerce those states, societies, and investors to consent to the Rawlsian "difference principle" on a global scale. Hence, the organizations to be targeted are the networking institutions (banks, corporations, NGOs, internet), which are often outside the bounds of the state and therefore escape the bounded justice of the state, especially in the less-developed state.

The solution is not to bring these institutions back into the state. Rather, the state has to deal with them as being within the bounds of a global, rather than national, system of justice. This requires negotiation between the bounded state and the "boundary-less" (p. 174) non-state agents who are affecting the vulnerable in this world. Another kind of institutionalism put forth by O'Neill is "institutional cosmopolitanism" (p. 201). This does not mean necessarily a global government. It can also presumably mean state or bounded local institutions that adopt a cosmopolitan scope of responsibility for understanding the global roots of allocation disparities (such as in the Unocal oil company case, in which a "bounded" California court extended federal jurisdiction to hold a private investor potentially responsible for human rights violations in a distant place, Burma).[2]

Perhaps one of the most important contributions that Bounds of Justice makes to human rights lies in the concept of global justice. O'Neill does not see human rights as the ultimate criteria by which to judge actions of any agent. She subjects human rights to another criterion, that of global justice. This has moral and practical implications. Morally it means implementing human rights in such a way that institutions, agents or subjects acknowledge a widened moral responsibility (p. 189) for actions and inaction which harm or benefit, sustain or destroy "huge numbers of distant strangers" outside one's own state or community boundaries (p. 187). Practically, this means extending the scope of the subjects of human rights claims. Such claims are to include compensation for harm caused by exclusion from membership in a particular state or community (p. 202). Such an approach has significant implications for the human rights conditionality clauses in foreign aid agreements or international financial loan agreements for poorer countries. First, such clauses cannot be limited to bilateral aid agreements. They would have to be extended to insurance guarantees from donor countries for private investors as well.

[2] John Doe et al. v. Unocal Corp. et al., 963 F. Supp. 880 (1997), This is the ruling on Unocal's motion to dismiss—the case is ongoing. There has been no adjudication of responsibility as of yet.

Second, such conditionality clauses would have to be reciprocal; that is, they would have to be extended to cover the obligation of the more advantaged donor countries to take responsibility for what Rawls calls the "justice of economic institutions" (Rawls, 234) being imposed by the donor on aid recipients. Donors and financiers would have to take responsibility for ensuring that their promotion of the interests of the advantaged can only take place when they can prove substantive benefits for the disadvantaged and vulnerable (see for example the decision of the British High Court, which prohibited funding of the Pergau Dam in Malaysia because it did not help the poor).[3] In addition, there would have to be clauses relating to compensation claims from the vulnerable public against agents who cause harm and/or more impoverishment in the sense of a widening of the social and/or income gap. This raises a challenge for practical decision-making in aid and loan negotiations regarding the inclusion of liability for the consequences of economic decisions, especially in regard to unemployment and agriculture in developing countries.[4] This would require that there be some form of cosmopolitan jurisdiction in order to provide for such claims, which would also be negotiated as part of international loan and aid agreements. The morality of reciprocity may even go so far as to require an aid recipient to be more selective in its choice of donors. For example, if a country such as Tanzania or Zimbabwe has a better gender index than some Western European donors, should it not limit itself to those donors with a gender record just as good or better?

Even though O'Neill has not formulated a theory of justice to replace the Rawlsian theory, she has used ethical and practical thought to give insights into how *global* justice could be realized. She shows how Rawls' theory of justice, limited to citizen-states, has to be supplemented by global justice in an era of human rights. Global justice provides the ethical framework for expanding responsibility of state and non-state entities for recognizing how their actions have consequences for the realization or non-realization of the human rights of both citizens and non-citizens. From the point of view of practical thought, she shows how the theory of justice will remain only a theory without global practical outcomes unless the ability or non-ability of the vulnerable or disadvantaged to lay claims to human rights and to negotiate with the powerful is given careful consideration and the temptations of the powerful or advantaged realistically assessed.

Christina Jones-Pauly holds doctorates from the University of London and Harvard in comparative and public international law. Her current research at the ZEF (Center for Development Research, Bonn) investigates problems of institutionalizing human rights in pluralistic Islamic and African legal cultures.

[3] R v Secretary pf State for Foreign Affairs ex parte The World Development Movement Ltd. [1995] 1 All ER 611; [1995] 1 W.L.R. 386; Ivan Hare, "Judicial Review and the Pergau Dam" [1995] C.L.J. 227.

[4] On tests for incurrence of liability under European law, see Deufil GmbH Co. KG v Commission of the European Communities, Case 310/85, 1987 ECR 901; Bayerische HNL Vermehrungsbetriebe & Co KG and ors. v Council and Commission of the European Communities, Cases 83 and 94/76, 4, 15 and 40/77, 1979 ECR 1209; Competition law in the European Communities, Vol. IIA Rules applicable to State aid, 30 June 1998, 4. Accelerated Procedure; 6. Cooperation between national courts and the Commission in the State aid field.