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THE NATURE OF THE CONTRACT ARGUMENT*

David Lyons†

As truth is the first virtue of belief, so justice is of social institutions. That is John Rawls's view,¹ and it seems true, at any rate, of the law. Official acts, laws, and legal arrangements generally are characterized as just or unjust, while other moral categories are much less frequently invoked. Justice seems inseparable from good law. It is therefore striking and important that justice has recently been regarded by prominent legal theorists as rationally disreputable—as, in Kelsen's words, "an irrational ideal."² Many divergent conceptions of social justice have been propounded, and it is held that there is no rational basis for selecting among them. At the extreme, it is said that the principles of justice express basic moral convictions which are merely conventional or subjective, a matter of arbitrary commitment or irrational sentiment.

Such moral skepticism is not, of course, confined to legal scholars, nor is it bounded by the law. It passes for conventional wisdom in our time; it pervades the academies; it seems an essential element of tough-minded intellectual sophistication. One finds it grasped tenaciously by students, including some who balance it delicately, if unreflectively, with deep moral concerns about the practice and uses of law. But the rational credentials of moral skepticism are themselves uncertain, for cogent supporting arguments have always been elusive. The most one can say, perhaps, is this: skepticism about moral judgments seems better grounded than skepticism about, say, physical science. Moral knowledge still seems an open question.

I wish to consider Rawls's theory of justice as opposed to moral skepticism. This is not, of course, the only way it can be taken. It is important if only because Rawls develops a conception of justice

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¹ J. RAWLS, *A THEORY OF JUSTICE* 3 (1971).

² H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 13 (A. Wedberg transl. 1945). See also C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (J. Petrie transl. 1963); A. ROSS, *ON LAW AND JUSTICE* (1959).

that can compete on equal terms with utilitarianism, which many have found objectionable, but which recently has had no serious challengers. But it is also important, I believe, because Rawls offers arguments for his principles, at least as opposed to such alternatives as utilitarianism. These arguments can thus be taken in two ways. At the very least, Rawls claims to show the superiority of his conception of justice to, say, utilitarianism; and, if this claim can validly be made, then the principles of justice are not *simply* arbitrary. Rawls might even be thought of as fully justifying basic moral principles. If Rawls succeeds in the second way, then moral skepticism is shown to be untenable. His theory merits our attention, then, not simply because it may accurately express our fundamental moral inclinations, but also because it may vindicate them by defending corresponding principles.

Two arguments run side by side in Rawls's book. What I shall call the "coherence argument" involves Rawls's claim that his principles of justice are more congruent with our most considered moral judgments than are the alternatives, such as utilitarianism. His principles are supposed to express our shared sense of justice by according best with our impartial, intuitive, and most confident moral judgments.³

Arguments of this type have been used from Plato onward, sometimes with negative effect. Indeed, Rawls's theory of justice seems to have been motivated at least in part by his initial dissatisfaction with utilitarianism and its supposed conflicts with some of our considered moral judgments.⁴ But coherence arguments have also been used to give moral principles positive support.

A coherence argument is unlikely to be conclusive, even as an explication of our shared sense of justice. It is unlikely that any intuitively plausible and illuminating set of principles will mesh neatly with a predetermined set of considered moral judgments. To achieve a satisfactory fit between judgments and principles, so that the latter can seem to ground the former and to extend them in an acceptable way, the principles must be modified, some judgments must be discounted, or both. As a consequence, and because our considered moral judgments will cover a very limited range of cases, alternative explications of our shared sense of justice are quite possible. And the decision as to which explication among the alternatives is the best must be made in the absence of clear rules,

³ J. RAWLS, *supra* note 1, at 46-49.

⁴ *Id.* at viii. ♦

or guidelines. Thus, Rawls cannot and does not claim either that his principles provide a perfect match with our most considered moral judgments or that utilitarianism is ruled out conclusively.

Such complications aside, the justificatory force of a coherence argument is unclear. Rawls regards our sense of justice as "a skill in judging things to be just and unjust, and in supporting these judgments by reasons."⁵ A skeptic will of course deny that characterization. But even one who supposes that there are valid principles of justice might regard a coherence argument as explicating our shared sense of justice, in the sense of giving concise expression to our basic moral convictions, without implying anything about the *validity* of the resulting principles. A coherence argument seems to move us in a circle, between our current attitudes and the principles they manifest. To regard such an argument as *justifying* moral principles seems to assume either a complacent moral conventionalism or else a mysterious "intuitionism" about basic moral knowledge. It is a form of argument whose legitimacy has never clearly been established.

It is natural here to compare principles in ethics with theories in science, for the coherence argument, when viewed as a justification of moral principles, looks like a method of "verification" analogous to the testing of scientific theories. Theories in science can be used to generate statements that can be tested by observations. Such observations are used to verify, or at least to falsify, theories that imply them. And, unless one is a most radical skeptic, one will agree that observation statements are either true or false and thus that scientific theories can be counted as true or false too. But what are the data in ethics against which principles are to be tested, the data corresponding to observation statements? Under the coherence argument, they are our most considered moral judgments. Since these are impartial, intuitive, and most confidently made, they can be assumed faithfully to express our basic moral convictions. But skeptical doubts about the objectivity of moral judgments apply to these considered judgments as well as to general principles; one can wonder whether they express any more than arbitrary commitments or sentiments we happen to have. This is why the coherence argument seems to assume either conventionalism or intuitionism: the data used to test moral principles consist of either the judgments we happen to share, or the expression of intuitive insights. Skeptical doubts about the rational

⁵ *Id.* at 46.

tenability of ethics could hardly be dispelled by such coherence arguments alone.

This suggests the importance of Rawls's second line of argument, his main support for the principles of justice, the so-called "contract argument." Under this argument, the principles of justice are supposed to be what "free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."⁶ Within the contract argument, no appeal is made to considered moral judgments. The parties to the contract reason solely on the basis of self-interest. The argument is designed to yield determinate results in a rigorous manner. I shall discuss this notion in stages, in order to emphasize the significance of some of its features.

We are to imagine that a number of individuals who realize that they can benefit from cooperation seek agreement on the distributive ground rules for their social arrangements. If they can all agree on one set of principles, then, Rawls claims, those principles are certified as *the* principles of justice.⁷

What is the basis for Rawls's claim? What bearing can such an imaginery agreement have on us? Why should we think ourselves bound by it, obliged to judge our institutions by the principles that are agreed to in such a manner, and to act accordingly? An obvious difficulty is that any group of individuals is likely to be misinformed about, or at least ignorant of, some relevant facts, and may not be very rational. How absurd to suppose ourselves bound by principles that may be grounded in ignorance or bad reasoning! Rawls avoids these objections by assuming that the deliberators have full knowledge of all the relevant general facts and scientific laws⁸ and that they are also rational—at least in the sense that they can make decisions on the basis of their long-term self-interest.⁹

Even so, an arbitrarily selected group of individuals is unlikely to agree, or may very well agree on some distributive ground rules that specially favor some rather than others. Each person will seek principles to serve himself best, given his own special talents, interests, needs, and condition in society. To avoid this source of contention, Rawls places the deliberators behind a "veil of ignorance" that deprives them temporarily of information about them-

⁶ *Id.* at 11.

⁷ *Id.* at 118-19.

⁸ *Id.* at 137.

⁹ *Id.* at 143.

selves, their specific conditions, and their social circumstances.¹⁰ Then they cannot serve their separate, divergent interests, so they must select principles on the basis of their general knowledge of human beings and social institutions. They consider only the distribution of so-called "primary goods," things it is reasonable to assume that anyone would want, such as income and wealth, power and authority, liberty and self-esteem.¹¹

These features of Rawls's hypothesis simplify the argument enormously, for they mean that the deliberators reason alike from the same premises. An incidental effect is that this is a "contract argument" in the most attenuated sense, since no room is left for disagreement, bargaining, or even relevant differences among the parties. At any rate, an important consequence is that the parties cannot disagree in their selection of principles. Each reasons alike from the same premises, so if the information made available enables any one of them to rank alternative principles, it enables them all to do so, and in that case unanimity is guaranteed.¹²

The problem of choice would still be extremely complex, so Rawls simplifies it further, increasing the likelihood that it has a rational solution. For example, instead of considering all questions of social justice, the deliberators limit their attention to the basic institutions of society; instead of choosing principles to suit all possible circumstances, they initially assume that their society actually conforms to whatever principles they select and that everyone there tries his best to serve justice.¹³

When all such qualifications are imposed, deliberation can proceed. Rawls has the deliberators compare alternative principles. He argues, first, that given the special conditions that have been imposed, rational individuals who are choosing basic distributive ground rules would adopt a "maximin" strategy, which aims at maximizing the *minimum* outcome. The worst-off members of society can fare better or worse, depending on the circumstances and the social system. The best principle, according to the maximin rule, is the one that does not allow the worst-off members of society ever to fare as badly as they might fare under other principles.¹⁴ Given this connecting link, Rawls reasons that his principles would be preferred to others, since they favor the least advantaged

¹⁰ *Id.* at 137.

¹¹ *Id.* at 62, 142.

¹² *Id.* at 139-40.

¹³ *Id.* at 8.

¹⁴ *Id.* at 152-57.

members of society. It would be agreed, he holds, that primary goods "are to be distributed equally unless an unequal distribution . . . is to everyone's advantage,"¹⁵ and furthermore, that, when conditions permit the effective establishment and exercise of extensive personal liberty, equal basic liberty should be maximized and held inviolable.¹⁶ The deliberators would choose such principles over, say, average utilitarianism, which might provide a higher average standard of living but might also permit some persons to benefit at others' expense, and would never hold liberty inviolable.

Let us now step back and ask what all this accomplishes. Although Rawls provides only an elaborate sketch, he suggests that a rigorous argument is possible.¹⁷ If that is right, then, from a logical standpoint, the contract argument is more powerful than a standard coherence argument. More important, the contract argument might also be thought to possess greater justificatory force, because it avoids the suspicious circularity of the coherence argument by grounding principles not on moral convictions that we happen to have, but on the independent theory of (self-interested) rational choice and facts about the human condition. Rawls, at any rate, claims that this argument justifies his principles.¹⁸

However, it is not obvious that the principles of justice are to be viewed as the solution to a problem of (self-interested) rational choice—or that, when they are so viewed, they have been certified as *moral* principles. Rawls does not adequately explain this aspect of his argument. And there are at least some possible grounds for thinking that he may have missed the mark and brought forward something other than a conception of justice.

That is, one can construe Rawls's principles as a rational (self-interested) departure from an egalitarian norm, where equality, and not Rawls's explicit principles of distribution, serves as the conception of justice *per se*. This interpretation is encouraged by the fact that one can find in Rawls the suggestion of an argument for egalitarianism, in addition to another argument, on rational (self-interested) grounds, to depart from that norm. In the first place, Rawls maintains that distributions flowing from or based on natural or social contingencies alone are "arbitrary from a moral point of view."¹⁹ Although he seems to believe there is a valid

¹⁵ *Id.* at 62.

¹⁶ *Id.* at 152.

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 15, 72.

distinction between just and unjust distributions, he seems at first to deny that there is any valid *moral* basis for discriminating among persons when conferring benefits and imposing burdens. This points, at least on the surface, to a strict egalitarianism.²⁰ But, in the second place, Rawls also believes that devices such as incentives can benefit all,²¹ though they do so unequally.²² When they do, it seems rational to accept them and irrational, from a self-interested point of view, to refuse them. Thus, it seems rational, in general, from a self-interested point of view, to accept such departures from strict egalitarianism. One cannot lose; one stands only to gain. In this way, Rawls's position can seem like an amalgam of a moral egalitarianism and a non-moral acceptance of beneficial inequalities.

The temptation so to view Rawls's principles is reinforced by what I imagine would be our shared, considered moral judgment of a test case: Suppose that a society has been organized on egalitarian lines by a unanimous agreement, freely entered into. Suppose, further, that its members realize they could improve their material conditions by accepting Rawlsian inequalities, which benefit everyone. But, despite this, they freely and unanimously reaffirm their commitment to egalitarian institutions, thus refusing possible benefits. Now, from a self-interested standpoint, they might well be regarded as irrational. But there seems little reason to call them, or their institutions, unjust, or in *any* way defective from the standpoint of justice.²³ Since they would be defective according to Rawls's principles, those principles seem miscast as principles of *justice*, even if they can be supported by the special argument from rational self-interest in the original position.

Rawls does not, of course, present his conception of justice as a compromise between morality in the form of egalitarianism and rational self-interest. His conception is supposed, rather, to embody the notion of "reciprocity,"²⁴ which corresponds closely to the notion of a "fair exchange." It seems a fair exchange, indeed, for the less advantaged to allow others extra benefits when everyone

²⁰ See *id.* at 100-01.

²¹ In other words, the worst-off members of the society with incentives will then be better off than anyone in the egalitarian society.

²² *Id.* at 78.

²³ Rawls's principles of justice require a departure from equality if that departure would benefit everyone. See note 25 *infra*. But Rawls's special terminology seems to bow in the direction of our contrary intuitions. Thus, egalitarianism under such conditions would be called "just throughout, but not the best just arrangement." J. RAWLS, *supra* note 1, at 79.

²⁴ *Id.* at 102-03.

will benefit as a consequence, and for the more advantaged to restrict their extra benefits to whatever will be useful to others. But Rawls's principles go well beyond this intuitive notion of fairness, since the intuitive notion merely *allows* such fair exchanges and does not require them. Rawls's principles *require* them, in the name of justice.²⁵

These remarks are intended not as objections to Rawls's substantive principles, but as suggestions that his contract argument lacks moral force. It must be granted, however, that I have only given reasons for doubting that Rawls's principles fall neatly into the traditional category of *justice*; even if this were true, it would not follow that they do not describe the most important virtue of social institutions, as Rawls claims they do. Furthermore, I believe that much can be said in defense of Rawls's contract argument.

Let me deal first with a couple of unsatisfactory defenses of it. Someone might concede that the contract argument does not generate moral principles, but then assert that it is not supposed to. The coherence argument identifies certain principles as expressing our shared sense of justice, and the contract argument is supposed only to confer on those principles independent rational force, not moral certification. But, if nothing more were said, even that rational force would be problematic, since none of us seems likely to be found in circumstances resembling the original position.

Alternatively, it might be held that the contract argument has moral force because of certain constraints imposed on it that I have not yet mentioned. For example, Rawls restricts the alternatives that are to be considered by the hypothetical deliberators to what he calls "recognizably ethical" conceptions.²⁶ But this restriction would not help the argument at all. Once again, it would not explain how such principles are binding on us, or at least rational for us, here and now. Indeed, from a self-interested point of view, such restrictions would only serve to weaken the contract argument, for they would limit the choices of deliberators and might exclude principles that would otherwise be favored. Finally, these restrictions might account for the impression I have already de-

²⁵ Unless Rawls's principles *required* such "reciprocity," thus guaranteeing that prospects under them would be better than under egalitarianism, they might also compare unfavorably with utilitarianism and thus fail to be selected in the original position. This suggests another basis for questioning Rawls's *actual* argument for his principles, which is not to be confused with the *general* notion that principles are grounded only in a fair procedure, that is, the notion of "justice as fairness." For other doubts about the success of Rawls's actual argument, see Lyons, *Rawls Versus Utilitarianism*, 69 J. PHILOSOPHY 535-45 (1972).

²⁶ J. RAWLS, *supra* note 1, at 125; see *id.* at 130.

scribed, that Rawls's principles are an amalgam of morality and self-interest.

To develop a more satisfactory contract argument, one must combine some suggestions made by Rawls that are either never explicitly put together, sufficiently emphasized, or adequately developed. One such suggestion made by Rawls is that the principles of justice can be regarded as emerging from a fair procedure.²⁷ The original position is supposed to guarantee just that. But, to understand the force of this claim, one must explore what Rawls has to say about the notion of "pure procedural justice."²⁸ In addition, one must take seriously Rawls's idea that we can enter the original position at any time.²⁹

"The idea of the original position," Rawls says, "is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory."³⁰ In the original position, no one enjoys an unfair advantage over another; no one is able, for example, to exploit his knowledge of the facts in order to serve his own special interests at others' cost. The veil of ignorance prevents that.³¹ When full knowledge of general facts and sound reasoning ability are also conferred on the deliberators, they all stand as equals. If they freely concur, that agreement will be fair. But what they agree to is how goods should be distributed in their society. Thus, a fair procedure is used to determine just distributions. This, I take it, is the root idea of "justice as fairness."³²

Let us suppose, for the sake of argument, that a fair agreement is reached in the original position. Why should it follow that the principles agreed to are adequate criteria of justice? Rawls's answer involves his use of the notion of "pure procedural justice." According to Rawls, "pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed. This situation is illustrated by gambling."³³ We might consider another example: Suppose that during an epidemic medical supplies are scarce relative to need; they cannot usefully be

²⁷ *Id.* at 12, 120, 136.

²⁸ *Id.* at 85-86.

²⁹ *Id.* at 138-39.

³⁰ *Id.* at 136.

³¹ *Id.*

³² *Id.* at 120.

³³ *Id.* at 86.

divided among all the persons who need them. We can think of everyone in need as having an equal claim; or, if this violates the conditions assumed for pure procedural justice, we can suppose that no one has any claim to the supplies. In such circumstances, a fair lottery might legitimately be used to decide who shall obtain the medicine. Whatever the procedure chosen, if it is fair and properly followed, then the outcome can be regarded as fair. Rawls's idea must then be that his hypothetical deliberators *cannot* invoke any *independent* criterion of just distribution. If they are to have one, they must forge their own. They themselves must choose among the possible bases for social organization.

But this seems to imply that *there simply are no* independent criteria of social justice.³⁴ It is not that the veil of ignorance deprives one of, or prevents one from discovering, moral knowledge, but rather that it forces one to *create* it.

It has not yet been shown how the contract argument could have any bearing on us. We are not in the original position; we are imperfect reasoners; we lack full general knowledge; and we know at least some of our own special circumstances. Why should we suppose that the principles some imaginary deliberators would accept under circumstances very different from ours are the principles of justice that we should judge with, and act by, here and now? Why should we suppose they have any rational force for us? Rawls replies that we can enter the original position at any time. All it takes is a willingness to deliberate about basic principles while accepting certain restrictions on our deliberations. The main restriction that Rawls seems to mean is impartiality: we must not allow ourselves to be swayed by considerations of special interest. This mirrors the veil of ignorance and is, presumably, part of its justification.

But that does not take us far enough. Suppose we *can* enter

³⁴ By virtue of his use of the idea of pure procedural justice, Rawls seems committed to denying that there could be any independent arguments for principles of social justice, for any such arguments would amount, in effect, to independent criteria. Rawls does not explicitly make such a claim, but it should be noted that he designs his contract argument to ensure that its results will not conflict with those of the coherence argument. *Id.* at 19-21. Because of this, as well as Rawls's unargued commitment to such values as fairness and impartiality, it is possible to construe the contract argument as a special branch of the coherence argument. In other words, the contract argument may be a way of working out the implications of certain values that we happen to share. I have refrained from viewing the contract argument in this way because, in view of the weakness of any mere coherence argument, the result would be to compromise, to undermine the integrity and independence of, the contract argument, and thus to strip it of any justificatory force that it otherwise might have. But I am not sure that Rawls would agree with me here.

the original position, so to speak, at any time. Why should we bother to do so? Part of Rawls's answer must be that the notion of pure procedural justice applies to us and not merely to the imaginary deliberators. Rawls seems to grant to moral skepticism the most he could possibly grant—without giving up morality entirely—by claiming that just distributions cannot be founded on natural or social contingencies alone. According to Rawls, then, the grain of truth in moral skepticism—which is not negligible—is that *we must make* our own moral principles. We cannot look elsewhere to discover the proper basis for a just society. Skeptics conclude that our principles must be arbitrary. But, in Rawls's view, this does not follow. We can not only make our own principles, we can also certify them ourselves. At least, we can rationally choose among the alternatives. We can do this by using a fair procedure. Indeed, if the skeptic's main point is granted, we cannot *discover* valid moral principles, for we must *make* whatever moral principles we are to have. But the fact that there exist no valid moral principles *independent* of fair procedures for selecting them is precisely what entitles us to invoke the idea of pure procedural justice and to rely entirely on a fair procedure. On this view, justice will conform to the outcomes of fair procedures; nothing else, at this most elementary level where basic principles are at stake, can be its source. Arguments about basic principles that conform to the constraints placed on deliberation in the original position are, then, a fair basis for justice.

It is an exaggeration, however, for Rawls to say that we can enter the original position as he describes it. He suggests that we can do so if we have the will, and to some extent this may be possible. We can, perhaps, constrain ourselves to reason and deliberate impartially. But we cannot reproduce at will other central features of the original position. Even with the best will in the world we cannot simply confer on ourselves either full rationality or full knowledge of all the general facts, of the laws of human nature and of social institutions, and of whatever else is relevant. Nevertheless, I do not regard this as a defect in the contract argument idea. We can always be mistaken, and an account of anything aspiring to be moral knowledge which did not acknowledge this would be much less plausible. We should think of the hypothetical contract argument as an ideal that we can only approximate in practice. The outcomes of our best efforts at deliberations about basic principles are always subject to correction in the light of scientific discovery and better reasoning.

Rawls believes, then, that moral knowledge is possible, though

it is remarkably unlike knowledge in other spheres. Moral principles are products of human civilization, but they are still subject to rational criticism. Principles are defective and rationally indefensible if they are grounded in ignorance, based on faulty reasoning, or could not otherwise be accepted by all parties in a condition of equality. The principles that could, ideally, be agreed upon are grounded in full knowledge of the relevant facts to which rational criteria have been applied in a fair, impartial procedure. These are the principles that determine the justice of our institutions here and now.

Having completed a brief sketch of what I take to be a sympathetic interpretation of Rawls's idea of a contract argument, I shall conclude with two points that seem worth emphasizing and a final reference to moral skepticism.

As I read Rawls, the entire weight of the contract argument rests on the notion of pure procedural justice. The use of a fair procedure is predicated upon the absence of an independent criterion of social justice. This means, I think, that Rawls must reject any other possible form of argument for principles of justice. To support this, Rawls seems to offer only the bare claim that distributions flowing from or based upon natural or social contingencies alone are arbitrary from a moral point of view. One would like to see a full explanation and defense of that position.

Even if it can be shown that justice rests on fairness, as Rawls claims, it is not clear that his conception of a fair procedure is the only one possible. For one thing, Rawls seems to assume that principles can be ranked only on the basis of self-interested considerations. But even if, for the sake of a powerful argument, we exclude considerations such as altruism, which may seem to presuppose moral sentiments, it does not follow that only self-interest is left. A fuller explanation of the appeal to self-interest would be desirable. And conceptions of fairness that are different in other ways may also be possible.

What effect does all this have on moral skepticism? I suggested at the outset two degrees of skeptical challenges to principles of justice. The more moderate skeptical claim is simply that there is no rational basis for ranking alternative conceptions of justice. I believe that Rawls has done enough to suggest that this view can be successfully rebutted; there are grounds closely connected with the very notion of rationality on the basis of which it seems possible to rank principles of justice.³⁵

³⁵ It is plausible to suppose that long-range considerations of self-interest are bound up

It is not so clear, however, that Rawls has answered the more radical skeptical challenge, which claims that moral principles are, at bottom, arbitrary. Rawls's contract argument *presupposes* certain values that can be classified as "moral," namely, fairness and impartiality. These are admittedly construed as constraints upon arguments, deliberation, reasoning, and procedures generally, and are not applied directly to acts or institutions. Thus, it may seem that the unargued commitment would be minimal. But to make the argument work, Rawls must nevertheless make such a commitment, and must provide such vague notions with definite interpretations. He must take a stand on the corresponding values as opposed to others. The skeptic can demand a justification for assuming *any* such constraints. It remains to be seen whether further argument is possible.

with the notion of rationality, and Rawls's contract argument employs such considerations exclusively.