

Social Contract as a Basis of Norms: A Critique*

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In this note I will argue that social contract theories aimed at establishing norms for personal and community life are inadequate. Briefly, I show that in Kant and Rawls the alleged contractual basis for the legitimacy of law and government is supplemented with the very strict requirement of self-consistency of the resulting norms. Once, however, Kant's and Rawls's own framework for the social contract thesis is abandoned, as it ultimately will have to be for various reasons, what is left is not a social contract but rationality as the basis of norms.

Kant stated explicitly that the "idea [of social contract] alone enables us to conceive of the legitimacy of the state."¹ He made clear that the social contract would be a "mere idea of Understanding, which has, nonetheless, its doubtless (practical) reality" in that it "obligates every lawgiver to advance his statutes so that they could have emerged from the united will of the whole people, and to consider every subject, as regards his desire for citizenship, as though he had been party to accepting that will. For that is the basis of the legitimacy of every public enactment."²

Kant's idea was recently revitalized by John Rawls by way of the hypothetical social contract that is to be conceived of as having been formed behind "a veil of ignorance."³ There are other, more Hobbesian, versions of social contract theory, but the Kant-Rawls version has become most prominent among contemporary political philosophers.

Why is this idea so appealing to many of these philosophers? It seems to be suited to the task they have undertaken, namely, to provide an explanation of the moral content of the laws they prefer, because of some important assumptions. These assumptions arise from a long tradition of empiricist bias. They include such ideas as: that human actions must be explained by reference to motives (as distinct from purposes, for example); that nature provides no guidance to judging something good or bad; that morality is mainly a social institution; that people lack freedom

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of the will, at least from the scientific, practical point of view, and their conduct is neither morally right nor morally wrong except as a matter of their relationship to certain social goals; etc.

This general empiricist-scientific viewpoint favors the idea that prior to being bound by their own choices (which in the last analysis come to hypothetical revealed preferences, so as to accommodate empiricist standards), members of a social group are not bound by moral standards. With the demise of the classical idea of natural law, that human life has an end or purpose and that right conduct should further this, this hypothetical social contract had the best chance of resurrecting some semblance of respect for moral and legal principles.⁴

Yet even social contractarians seem to eschew simple conventionalisms of the kind this approach produces. This is one reason why, for many, Hobbes's approach is inadequate. A look at Kant and Rawls will illustrate the point.

Both Kant and Rawls invoke more than mere agreement in their efforts to make the contract supply us with moral and legal standards which can be considered binding. Kant believes that the contract which arises must be self-consistent. Rawls believes that it must be confirmed by intuitively acceptable moral conceptions placed in rational equilibrium.⁵ Why is a mere agreement not sufficient? If no other source of norms is available—especially in the case of Rawls—why not simply insist that norms come from human choices, rational, self-consistent, irrational, arbitrary, or whatever?

In the case of Kant the "united will of a whole people" seems to be required only because he is convinced that this will secure the ingredient of consistency. Consistency appears to be a necessary feature of the source of moral norms, distinct in principle from the actual contract. For Kant the act of will on the part of everyone is one, while the unison among all of them is another indispensable feature of the social contract. For Kant consistency comes from the united act of consent, but in a non-Kantian philosophical framework it might come from some other source.

Rawls introduces the idea of the veil of ignorance so as to establish for himself a basis for consistency. Consistency would be thwarted if the contractors had important individual characteristics, so Rawls makes all the contractors uniform. At any rate, in Rawls the element of consistency comes from the veil of ignorance provision. The consent, in turn, seems to be based on the intuitions which Rawls imposes on the contractors.

Rawls clearly rejects any basis for morality other than the hypothetical social contract. From what we have seen, Kant would agree although he appears to be confining this view to how *social* morality and law must emerge. Despite this belief in the social contractarian foundation of at least political morality, both philosophers have built into the contract an element, namely, rationality, that could stand independent of contracts, at least when we approach the situation from different philosophical positions. Why do Kant and Rawls not simply rest their social and political morality on an analysis of rationality rather than bother about some admittedly illusive, fictional social contract?

Rawls and Kant both reject any sort of metaphysical or ontological grounds

for morality. Rawls was very clear in his Eastern Division APA Presidential Address when he stated: "Now my thought is this: much of moral theory is independent from the other parts of philosophy."⁶ Kant, too, locates morality in pure reason, without external foundations: "Every action is right which in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action, according to a universal law."⁷ With reference to social morality, Kant held, furthermore, that we should all "act externally in such a manner that the free exercise of the will may be able to coexist with the freedom of all others, according to a universal law."⁸ (Kant wished to deduce every legal judgment from pure reason.) For example, "If a man and a woman have the will to enter on reciprocal enjoyment in accordance with their sexual nature, they *must necessarily marry each other; and this necessity is in accordance with the juridical laws of pure reason.*"⁹

Now in Rawls's case the attempt to reject personal and social morality's dependence on other parts of philosophy cannot succeed for reasons I have noted elsewhere.¹⁰ Briefly, any effort to explicate the Rawlsian task to specify the nature of moral obligation begs for philosophical clarification from the non-normative branches of the discipline.

In Kant, of course, the attempt to secure the foundations of morality in pure reason, removed from that impossible field, metaphysics, is much more complicated since Kant devotes the better part of his philosophical work to showing that metaphysics is inherently impossible. But after all is said and done, it seems to me that the Kantian endeavor must fail, too, mainly on grounds of self-refutation. To wit: the transcendental character of human understanding cannot be established without initial reference to independently existing, objectively real *other* human beings who, on the Kantian scheme, can be identified only if that transcendental human understanding has been established. For this and many other reasons, the Kantian social contract theory is not the only source of moral standards for social conduct.

So we have Rawls's failure to establish the independence of moral theory and Kant's failure to develop a conception of (human) reason that is independent of metaphysics. Their social contract theories are, in turn, open to the criticism that the (hypothetical) contract they invoke is unnecessary for grounding social morality. Instead, they could explicate the demands of reason or rationality, quite independently of any agreement behind a veil of ignorance or act of will of the whole people.

Now common sense already suggests one serious problem with all kinds of social contract theories, Kantian, Hobbesian, or Rawlsian. This is that they cannot escape the force of a form of Moore's open question argument. It is always perfectly intelligible to ask whether what people (would have) willed either behind a veil of ignorance, in unison, or at some great convention *should* have been willed by them in the first place. It might first be replied that the social contract theory of grounding norms will render that kind of question unintelligible. But this will not do in the present case since the very nature of morality or ethics requires that its

provisions be applicable universally, which means that conduct preceding the social contract, including entering it, must be open to ethical assessment. In short, when someone considers entering a social contract, there must already be standards for making the right choice about doing so. That is an inherent requirement of ethics and social morality. (Rawls admits that some such standard might be discovered but he regards it obstructionist to wait for it.¹¹)

Then the fundamental egalitarian bias in social contract must be called into question. Why regard as equally worthwhile every will involved in forging the contract? If this were not a requirement, and if we took the possibility of prior standards seriously, then it might not be unthinkable that some social contracts were ill formed, should never have been entered into, etc. Thus one might provide oneself with the theoretical background for criticizing the Rawlsian system on grounds, at least in part, that no self-respecting individual should have agreed to the terms which grew out of the contract made behind the veil of ignorance—at least not until he or she became a bit more knowledgeable about various things.

The question that remains then is whether the social contract approach, given its shortcomings and given that from different philosophical perspectives it would not be necessary, is still required. Once the extreme pressure of empiricism and scientism has been lifted, I do not think so. Rawls's need for the contract stems from his view that people, driven by motives, cannot be placed under moral obligations to which they did not agree explicitly (within a hypothetical contract). And in Kant the phenomenal world of practical social life requires some sort of practical agreement for the law to be binding, even though that agreement must ultimately be based somehow on pure reason.

The orthodoxy of empiricism, in abandoning any hope for metaphysics, however, has lost not only its philosophical but also its social force. The field is wide open and new beginnings can be forged. It seems to me, in particular, that a reconsideration of the Greek conception of human nature, specifically Aristotle's, would provide greater promise for grounding justice than any such truncated approach as social contract theory.

What remains of social contract theory? Something very important: namely, the value of reaching agreement among human beings, and the justifiability of certain kinds of efforts to reach it. For instance, when participants in the *polis* (a human community guided by sound judgment) can agree on how to maintain and preserve the proper standards of social justice (and on who should administer the effort), something crucial to the lives of the participants may well be achieved—e.g., the efficient preservation of the conditions of proper social intercourse. But here the contract does not form the ultimate basis of norms. Instead it establishes the method by which norms can be upheld and interpreted in a social context. That method is always open to evaluation. When consented to, however, something enormously valuable has been achieved: the prospect of successful maintenance of social justice.¹²

NOTES

1. Immanuel Kant, *Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), p. 80.
2. Immanuel Kant, *Werke* (Bruno Cassier, 1914), 6:380-81. (My translation.)
3. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 36.
4. For a survey, see Shirley Robin Letwin, "Modern Philosophies of Law," *The Great Ideas Today, 1972* (Chicago: Encyclopaedia Britannica, 1972), pp. 105-53.
5. Immanuel Kant, *The Philosophy of Law*, trans. W. Hastie (Edinburgh, 1887), reprinted in *Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), 42:436.
6. John Rawls, "The Independence of Moral Theory," *Proceedings and Addresses of the American Philosophical Association* (Newark, Del.: University of Delaware, 1975), p. 5.
7. Kant, *The Philosophy of Law*, p. 398.
8. *Ibid.*
9. *Ibid.*, p. 419.
10. T. R. Machan, "A Note on Independence," *Philosophical Studies* 30 (1976): 419-21. Natural law and rights theories achieve what the veil of ignorance aims for, namely the securement of moral equality, but only for the purposes of understanding political life. They focus on human nature, something we all share.
11. Rawls, "The Independence of Moral Theory," p. 21.
12. For a full treatment, see T. R. Machan, "Individualism and the Problem of Political Authority," *The Monist* 66 (1983): 500-16. Why, for example, would it be wrong to contract for the use of some third party who has not consented? Because that party has rights and, independently of any contractual determination, it is wrong to violate rights.