

BOOK REVIEWS

A THEORY OF JUSTICE. By John Rawls. Cambridge, Mass.: Harvard University Press, 1971. Pp. xv, 607. \$15.00 (clothbound), \$3.95 (paperback). Reviewed by H. J. Rogers.*

"We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*." Henry Summer Maine, *Ancient Law*.

If John Rawls has accomplished nothing else with *A Theory of Justice*, he has managed to resurrect the contract theory from near oblivion and to make the discussion of social ethics once again philosophically respectable. Rawls has taken the political theories of Rousseau, Kant, and Locke, social doctrines that profoundly influenced the Founding Fathers, but which of late have been considered chiefly of historical interest, and breathed powerful new life into them. His theory provides a basis for regarding the Constitution of the United States as something more than an ad hoc compromise which occurred at a particular point in time.¹

The vast outpouring of reviews and critical articles about *A Theory of Justice* in popular,² legal,³ and philosophical⁴ periodicals bears articulate witness to the vast influence which this book has had in the relatively brief period since its publication. The impact of the book is in part due to its scope. There have been few political theorists since Plato who have had the audacity to approach so grand a theme as justice and who possess the nerve and brilliance to successfully deal with the subject.

Furthermore, in recent years the various forms of positivism have dominated the study of philosophy and jurisprudence,⁵ while the great

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¹ See generally M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913); R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1781* (1955).

² See, e.g., *Hampshire*, BOOK REVIEW, *THE N.Y. REV. BOOKS*, February 24, 1972 at 34; Cohen, BOOK REVIEW, *N.Y. TIMES BOOK REV.* July 16, 1972, at 1.

³ See, e.g., Brock, *The Theory of Justice*, Dworkin, *The Original Position* and Hart, *Rawls on Liberty and Its Priority* in *Symposium: John Rawls' A Theory of Justice*, 40 *U. CHI. L. REV.* 486 (1973); Feinberg, *Justice, Fairness and Rationality*, 81 *YALE L.J.* 1004 (1972); Fried, Book Review, 85 *HARV. L. REV.* 1691 (1972).

⁴ See, e.g., Arrow, *Some Ordinalist—Utilitarian Notes on Rawls' Theory of Justice*, LXXX *J. PHILOSOPHY* 245; Nagel, *Rawls on Justice*, LXXXII *PHILOSOPHICAL REV.*, No. 2 (April 1973).

⁵ The present state of jurisprudential thought is, perhaps, best illustrated by the classic debate in the *Harvard Law Review* between H. L. A. Hart and Lon Fuller. See Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958). For a more

majority of those who have thought seriously about questions of social justice in recent years have adopted some variant of the principle of social utility—the greatest possible happiness for the greatest number. This latter group has agreed for the most part with Jeremy Bentham that those who speak of the “natural rights of man” are, in the philosophical sense, speaking purest nonsense.⁶ John Rawls stands, for the moment

complete exposition of their respective positions, see H. L. A. HART, *THE CONCEPT OF LAW* (1961) and L. FULLER, *THE MORALITY OF LAW* (1964).

Hart is generally considered to stand for the proposition that the law as it *is* must be clearly distinguished from one's notions of what the law *ought* to be. This doctrine was clearly set forth by Austin:

The existence of law is one thing; its merits or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 194 (1954). According to this view the study of the law is as dispassionate as the study of molecular biology, and the methodology of the legal scholar becomes indistinguishable from that of any other scientist. Free from notions of what is “right,” the legal scholar's task is simply to ascertain what “is.”

Hart's position is much more complex than this, and he does indicate that there are some instances “where the law seems to take too little note of moral principles.” H. L. A. HART, *THE MORALITY OF THE CRIMINAL LAW* 53 (1965). However, to those who would argue that he is saying that there is both too much morality in the law and too little, Hart has this reply:

For it is perfectly consistent to urge that the law should only be used to repress activities which do harm to others and also to insist that in doing this it should observe certain principles of justice between different offenders: to insist that these principles should be observed in the course of punishing people for the harm which they do, does not concede that people may be punished even if they do no harm.

Id. at 53-54.

Professor Fuller is probably one of the few remaining “natural” lawyers with a non-theistic orientation, but his position is extremely limited when compared to the vast sweep of some of his predecessors-in-interest. Basically, Fuller argues that substantive and procedural justice tend to go together and that a system which adheres to his procedural requirements, such as the publication of laws, their universal application, and the absence of *ex post facto* laws, will afford not only procedural justice but substantive justice as well. L. FULLER, *supra* at 152-86.

This view seems to confuse the internal consistency, or, as it were, the “integrity” of a legal system with the normative content of a society's laws, and there is a real question whether or not an internally consistent system of laws necessarily leads to substantive justice. The *apartheid* laws in the Union of South Africa, or the “justice” meted out in the various municipal courts of this land, demonstrate that substantive and procedural justice do not always go hand-in-hand.

The trend of academic philosophy in this century has been towards logical positivism and linguistic analysis which, by and large, dismiss moral arguments and arguments about the proper ends of action as “emotive” exhortations, and therefore beyond the reach of philosophical scrutiny. See, e.g., L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1953) and N. CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* (1965).

Consequently, *A Theory of Justice* is part of what many would consider to be a retrograde movement away from a fundamental skepticism about the rational bases for ethical precepts. See C. STEVENSON, *ETHICS AND LANGUAGE* (1944).

⁶There are many variants of utilitarianism and the theory has been continually revised. For a discussion of the general evolution of utilitarian theory, see H. SIDGWICK *THE METHODS OF ETHICS* (7th ed. 1907). The great historical works include DAVID HUME, *A TREATISE OF HUMAN NATURE* (1739); ADAM SMITH, *A THEORY OF THE MORAL SENTIMENTS* (1759); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789); and JOHN STUART MILL, *UTILITARIANISM* (1863).

at least, against the tide, and *A Theory of Justice* is forcing drastic re-evaluation of many modes of contemporary thought.

The legal community has acquiesced in the general dismissal of the contract theorists, arguing that a mythological or theoretical contract is, in the legal framework, simply no contract at all.⁷ There have been a few legal scholars, such as Professor Fuller, who, by attempting to separate the requirements of procedural justice from those of substantive justice, have tried to defend the principles of natural law. But these efforts have not been especially successful and, at any rate, have reduced the grand sweep of natural law to the pro forma requirements of procedural due process.⁸

Justice Holmes's statement that the law is simply a prediction of what a court will do in a given case⁹ appears to be the underlying philosophy of not only the active practitioner, who is perhaps justified in the adoption of this crass principle, but of the legal scholar as well. The prime difficulty with legal positivism, as an operative principle, is that it flies in the face of many of our intuitive moral—and legal—sentiments.¹⁰

To take but one example, the familiar saying, "It is better for 100 guilty persons to go free than one innocent man to be imprisoned," is antithetical to most utilitarian principles, as well as being almost entirely outside of the ambit of respectable jurisprudential thought. And yet, a substantial number of laymen, and a surprising number of lawyers, will advance this precept as one of the prime axioms of the American legal system. How does one reconcile a widely held intuitive concept, such as the foregoing, with the realities of legal practice and with the theoretical underpinnings of our legal system? John Rawls not only gives us a ringing defense of the contract theory in *A Theory of Justice*, but also provides a philosophical justification of many of the common sense axioms of the Anglo-American legal system.

Rawls denominates his theory "justice and fairness" and lays out the

⁷ Professor Dworkin of Oxford University, among others, advances the purely legalistic argument: "His contract is hypothetical, and hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. *A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.*" Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 501 (1973) (emphasis added). This argument can, perhaps, be met on its own terms. Once a person has relied on the provisions of a contract, he may be estopped to deny that he is a party to the contract, and is therefore bound by its provisions. See, e.g., RESTATEMENT OF CONTRACTS § 90 (1932).

⁸ L. FULLER, *supra* note 5, at 33-94.

⁹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

¹⁰ Although Rawls argues strongly against "intuitionism" (*i.e.*, the idea that there is a plurality of first principles and that one simply makes arbitrary ad hoc decisions when confronted with a conflict between first principles) he frequently alludes to "intuitive judgments," which, in his usage, are often starting points for a more detailed analysis.

"main idea" in the first few pages of his book. It is a purely contractarian theory, with the added gloss of what Rawls terms "the original position." The original position is the hypothetical construct in which Rawls places the parties to the social contract. His principles of justice are those which free and rational people would have chosen if they had to select certain social principles. The standard to be applied is that of fairness. The principles chosen must be fair to all concerned, and that which is fair is *ipso facto*, that which is just. Hence, justice as fairness.

Rawls imposes one basic requirement on the parties in the original position. Their choice of societal principles must be made behind "a veil of ignorance," which means that the parties must make their election of principles in a situation of complete ignorance of their own personal traits, abilities, talents, and status or position in the society in which they live. In the original position, they are even ignorant of their psychological propensities and their conception of the "good."

Rawls obviously utilizes this simple device to eliminate all considerations of a personal and individual nature from the judgments arrived at by the parties in the original position. They are not, in any way, prohibited from furthering their ideas of self-interest, enlightened or otherwise, but the veil of ignorance clearly makes it extremely difficult for those in the original position to advance anything other than the generalized interests of humanity. For example, it is quite unlikely that a person in the original position would advance a theory of racial or masculine superiority, when he did not know the racial group to which he belonged or the gender which he would assume when the veil of ignorance was lifted. Furthermore, it seems equally unlikely that a person in the original position would long argue for an aristocratic or meritocratic society, if he did not know that he was endowed with a particular social position or personal attribute, such as intelligence or diligence.¹¹ On the contrary, it would appear to be highly rational—and Rawls so argues—for the parties in the original position to initially adopt a strictly egalitarian principle, such as the following, as their general concept of justice: "All social values—liberty and opportunity, income

¹¹ Rawls is quite adamant in the condemnation of what he terms to be "the liberal interpretation" of justice, *i.e.*, the allocation of distributive shares of a society's wealth upon some principle of personal merit, ability or worth.

... even if it works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents ... distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune.

J. RAWLS, A THEORY OF JUSTICE 73-74 (1971) [hereinafter cited as RAWLS].

and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."¹²

Rawls does not spend a great deal of time discussing this general conception of justice, but rather advances what he terms a "special interpretation" of the concept, the discussion of which comprises the bulk of *A Theory of Justice*. This special interpretation consists of two principles, the first of which is: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."¹³

A common sense version of Rawls's first principle might be the oft-heard assertion, "Your freedom of action stops at the point of my nose."¹⁴ Hence, Rawls' first principle, although it places limitation upon liberty is aimed at achieving a maximization of personal liberty. The basic contractarian idea—which is the reciprocity of obligation—shines through this formulation. In many ways, this principle appeals to one's notion of procedural fairness.¹⁵ A person cannot legitimately claim a right or privilege unless he is willing to extend that right or privilege to all other members of society. This argument becomes especially telling when advanced in the original position, where each person's personal vision is clouded, as it were, by the veil of ignorance.

An example can possibly illustrate some of the far-reaching implications of Rawls's hypothetical construct. Absent the concept of the original position, those who favor legislation against obscenity might argue: "I do not want to read this filth. Furthermore, I do not think that anyone should be permitted to read it. Therefore, I am quite willing to cede, in perpetuity, my right to peruse novels that the responsible authorities have deemed obscene, and I can legitimately insist that others do

¹² RAWLS at 62.

¹³ RAWLS at 250.

¹⁴ Philosophers frequently use the adjectival phrase "common sense" to denote an idea or concept that has a certain general currency. It normally has slightly pejorative connotations.

¹⁵ "The notion of pure procedural justice is best understood by a comparison with perfect and imperfect procedural justice." RAWLS at 85. As an illustration of perfect procedural justice, Rawls utilizes the hoary example of a number of men dividing a cake, with the one who wields the knife receiving the last piece. In this instance, there is both an independent standard for deciding which outcome is just and a procedure which directly leads to the proper conclusion.

"Imperfect procedural justice is exemplified by a criminal trial"; this is because it is impossible to "design the legal rules so that they will always lead to the correct result." RAWLS at 86. "The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it." RAWLS at 86.

One of the real strengths of the concept of the original position is that it does afford both an independent criterion for determining what is fair and a procedure which directly leads to the result.

the same." It would seem that this argument is largely precluded to a person in the original position, because, quite apart from the very real difficulties entailed in determining what is literature and what is pornography, a person in the original position would not know whether he would be incarnated as a libertine or as a bluenose when the veil of ignorance was lifted.¹⁶ All that he would know is that he *might* have some passing interest in the printed word, and therefore, it would seem to be irrational for him to impose any restrictions whatsoever upon the materials which appeared in the various publications of his society.¹⁷

If Professor Rawls had not advanced his argument beyond his first principle, it might have been possible to have written him off as a simple-minded egalitarian whose theories have little or no application to the world that we inhabit. If he had not gone further, *A Theory of Justice* could have been as easily dismissed by legal philosophers as the statement that all men are created equal in the preamble to the *Declaration of Independence*. These noble sentiments fly in the face of one's daily observations of the world, for it is only in the most narrow and limited sense that people possess even the most basic political equality. Even in this narrow sense (e.g., the right of universal adult suffrage), the genetic and social lottery that determines personal identity inevitably produces a "natural" disparity between individuals as vast and unbridgeable as that of the most caste-ridden society. Some people are simply more valuable to the functioning society than other people; certain tasks are more pleasurable than other tasks; and the chief mechanism by which society rewards or punishes its members is by its allocation of social and economic goods. Therefore, unless a theory of social justice can explain the vast disparity which exists between the life situations of its members—the Dive and the Lazuruse¹⁸—then the theory should properly be dismissed as utopian and quite at odds with any practical notion of earthly justice.

It is with the argument that he advances in behalf of his second principle that Professor Rawls makes a quantum leap from other theorists who have argued the contractarian position. His second principle is: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the

¹⁶ If one has fairly certain notions about what is obscene, a reading of *United States v. One Book Called Ulysses*, 5 F. Supp. 183 (1933) *aff'd* 72 F.2d 705 (1934) or *Miller v. California*, 413 U.S. 15 (1973) is a suggested remedy.

¹⁷ It is conceivable that the people in the original position might possibly adopt some limitations on free speech, such as a limitation against the sale of pornographic materials to minors or against "pandering." Cf. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Ginsburg v. United States*, 383 U.S. 463 (1966).

¹⁸ *St. Luke* 16: 19-31.

just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."¹⁰ Rawls parts company with the egalitarians—simply by permitting social and economic inequalities—and with the utilitarians, since his concept is completely antithetical to the principle of utility, in all of its many formulations.²⁰

In *The Brothers Karamazov*, one of the characters asks whether a just man could accept a society which required, as a condition precedent to its establishment, the slaughter of an innocent child. The question was answered in the negative because the child's scream would echo throughout all of history, as a continual and eternal reminder to all people of the murderous predicate of their society. Dostoyevsky's question and the answer are, of course, couched in literary terms, but the dilemma, however phrased, poses a great problem for the utilitarian, because his philosophy requires him to answer in the affirmative. The acquiescence in the murder of an innocent child, if that murder would somehow ensure the happiness of all society, is a concept which a good utilitarian must accept.

The counter argument can be made that the so-called dilemma is arbitrary in its premises and that the factual situation is so extreme that it would never arise in the "real world," but if the question is squarely presented, it must be squarely answered. As Albert Camus once stated,

¹⁰ RAWLS at 302. Because of space limitations, the "just sayings principle" will not be discussed in the body of this review. Essentially it deals with the question of justice between generations. An example of the application of the principle might be the Marxian dogma which requires the privation of the present generation(s) for the happiness of future generations. Under Rawls' formulation, the people in the original situation (who do not know to which generation they belong) would determine the proper allocation of resources between generations, *i.e.*, they would decide in advance how much of the society's gross annual product was to be allocated to the consumers and how much was to be re-invested, as it were, into production for the benefit of future generations. RAWLS at 284-93.

²⁰ Classical utilitarianism, according to Rawls' restatement of Henry Sidgwick, basically holds that a society is just "when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it." RAWLS at 22.

One of the leading variants is usually denominated "average utilitarianism," which takes the position that society should maximize the average *per capita* utility, rather than the total utility of society. See Hartanyi, *Cardinal Utility in Welfare Economics and the Theory of Risk Taking*, 61 JOUR. OF POL. ECON. 434 (1953). Rawls seriously considers the possibility that people in the original position might choose the principle of average utility but seems to conclude that they would prefer his formulation instead:

Thus the expectation finally arrived at in the reasoning for the average principle seems spurious for two reasons: it is not, as expectations should be, founded on one system of aims; and since the veil of ignorance excludes the knowledge of the parties' conception of their good, the worth to each of the total circumstances of others simply cannot be assessed. The argument ends up with a purely formal expression for an expectation but one without meaning. This difficulty about expectations is analogous to that concerning the knowledge of probabilities. In both instances the reasoning carries on with these notions after the basis for their legitimate use has been ruled out by the conditions of the original position.

RAWLS at 175.

"It is always easy to be logical. It is almost impossible to be logical to the bitter end."²¹

Or, to take a less extreme example alluded to earlier, a utilitarian could easily argue that it is far better that an innocent person suffer imprisonment, than for a hundred criminals to go free. The adoption of this principle would discourage crime by increasing the relative likelihood of conviction.

Rawls's second principle allows us to answer these questions in a fashion which more closely approximates our intuitive concepts of justice than do the superficially plausible answers of the utilitarian.²² On its face, the second principle would seem to preclude the murder of the innocent child, but that is such an extreme situation that the parties in the original position, if the question were squarely put to them, could well choose to permit the murder of the child, if that would ensure the future happiness of all other persons. Under the theory of rational choice which Rawls utilizes, the possible benefits are so great and the relative likelihood of any given person in the original situation being the child (a possibility which the veil of ignorance forces one to consider) are so very small that reasonable people might ultimately come to the same conclusion that utilitarians automatically reach in this particular case.²³

The other example—the hundred to one chance of an apprehended criminal being convicted—would, for obvious reasons, present a lesser

²¹ A. CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 7 (1955).

In his later works, Camus seriously wrestled with the question of the justifiability of murder. He turned for his model to the "fastidious assassins" of pre-revolutionary Russia and concluded that *if* political murder is ever justifiable it is only in those circumstances where the assassin (or politician, one is tempted to add) exchanges his life for that of his victim. That way, Camus says, at least one can know that the decision to take another's life is a serious one. A. CAMUS, *THE REBEL* 164-73 (1956). Although Camus is more properly classified as a novelist rather than as a philosopher, the conclusion that he reached in this instance has very decided contractarian overtones, and one supposed that Professor Rawls's disembodied souls in the original position would not find Camus' position completely antithetical to their principles of justice.

²² One of the crucial difficulties with most forms of utilitarianism is that they seem to conflict, to some degree at least, with the ancient legal maxim that no person should be the judge of his own case.

It could be argued that there is no one to make the disinterested judgment as to which policies make for greater social utility, since everyone is a part of society and, therefore, has certain interests to advance or protect. Some variants of utilitarianism attempt to answer this objection with the concept of "the impartial spectator," a fictional entity who organizes the desires of all persons into one coherent system of desire. "Endowed with ideal powers of sympathy and imagination, the impartial spectator is the perfectly rational individual who identifies with and experiences the desires of others as if these desires were his own." RAWLS at 28. This construct, unlike the concept of the original position, would appear to beg the question in the most egregious fashion. Who, pray tell, *is* the impartial spectator?

²³ It should be noted that a strict application of the "maximim" rule, which is discussed in Note 24 would preclude those in the original position from agreeing to the sacrifice of the child.

dilemma for those in the original position. Without attempting to fully answer this question within the framework of Rawls's theory of justice, one can easily imagine a party in the original position accepting this ancient maxim of legal folklore as an operative principle, because of the very pragmatic fear that, if he opted for another principle, he would be the innocent party consigned to the penitentiary with the hundred malefactors.²⁴

One might argue that those in the original position would opt for some form of anarchy, but let us assume for the moment that they would agree with Thomas Hobbes that life in the state of nature (or the original position) would be "solitary, lonely, nasty, brutish and short" and that they would, therefore, choose to have some governmental structure, however skeletal, and that there would be some societal mechanism, however minimal, for enforcing the judgment of the community against its recalcitrant members. At the bare minimum, one can suppose that they would agree that an individual in the society who persisted in wantonly slaughtering all those that he encountered should, in some sense, be dealt with on a communal basis. And once the decision to have some sort of governmental structure is reached, those in the original position grapple with the more difficult questions of how their "leaders" are to be chosen and the manner in which they are to be compensated, directly and by the perquisites of office, for the performance of their societal duties.

One can easily imagine a particularly self-interested person in the original situation (although individual self-seeking is, of course, proscribed by the terms of the construct) crying out to all those who advocate a retreat from the strictest sort of egalitarianism, "What's in it for me?" An English Leveller or Jacksonian Democrat might assert, "Why should I assent to permitting the President to make \$200,000 per year when I make only \$5,000. Why should I permit a heart surgeon to live a life of physical ease when I have to eat my bread in the sweat

²⁴ One of the first questions that a colleague of mine asked after reading *A Theory of Justice* was, "Why does Rawls assume that people are so conservative?" The criticism is quite valid, because Rawls does appear to assume that the people in the original position are inordinately risk-averse. They adopt the "maximin" rule for choice under uncertainty. The maximin rule counsels one to choose the "best-worse" situation when confronted with a choice between two or more alternatives, *i.e.*, a person at the choice point is to elect the alternative, the worst possible outcome of which is superior to the worst possible outcome of the other alternatives. For a general discussion of this rule, see R. LUCH and H. RAIFFA, *GAMES AND DECISIONS* 275-326 (1957).

To a large extent, the law also adopts extremely conservative principles in somewhat analogous situations, such as the requirement that a trustee must act prudently and cautiously in the management of trust funds and have, as his primary objective, the preservation of the principal of the trust. See generally, A. W. SCOTT, *ABRIDGMENT OF THE LAW OF TRUSTS* 434-58 (1960).

of my brow. They're no better than I am. No sir, I am not going to agree to that kind of arrangement."

Despite the seeming crassness of this argument, it does illustrate one of the chief strengths of social contract theories in general and Rawls's theory of justice in particular: The validity of the contract depends in toto upon its being accepted unanimously. Any party to the contract may decline to accept its terms and thereby, at the very least, force a renegotiation of those provisions which he finds objectionable. The veto power which each party has to the social contract is but another way of stating the fundamental Kantian principle of universalization, *i.e.*, when a person makes a moral choice, he should choose as if he were choosing for all of humanity.²⁵

These two moral formulations would appear to be but statements of the same principle from different points of view. A Kantian is willing to accept as universal those moral principles upon which he acts, while a contractarian would insist upon a consensual universalization before he acts. The the untutored eye, it would appear to come to the same thing.

Thus, when the self-seeking individual in the original position asks "What's in it for me?", one of the patiently rational will be able to explain to him precisely why, under Rawls's second principle of justice, he should agree to certain social and economic disparities. Just as an elementary teacher lectures the class dullard, it will be demonstrated that the seeming economic and social advantages of the heart surgeon will work out to the greatest benefit of the least advantaged. "Don't you see, if we require other people to prepare his tax returns and carry out his garbage, he will be able to perform more operations." Reasoning in this manner, Rawls argues, people in the original position would permit certain social and economic inequalities, if, and only if, all persons would directly benefit from those inequalities. They would also allow certain individuals to hold high office, since all persons, and especially the least advantaged, would benefit from this arrangement. They would permit these inequalities, even if it turned out that they inhabited the lower depths of the society because, they would still emerge as ultimate winners. The social and genetic lottery that they would enter, once the veil of ignorance was lifted, might possibly catapult them into a position of power and influence, and, if it did not, any citizen would still be

²⁵ According to Rawls, it is a mistake to emphasize the place of generality and universality in Kant's ethics, since these ideas are hardly new with him. However, Kant serves as a convenient peg on which to hang these concepts, since Kant systematized them far beyond any of those who went before him. See generally, L. W. BECK, *A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON* (1960).

in a better position than he would have been if he had not permitted the social and economic disparities, because of the preconditions which Rawls affixes to them.

A more controversial aspect of *A Theory of Justice* is the priority rules which Professor Rawls attaches to his two principles of justice. He proposes to arrange his principles in a serial or lexical order.²⁶ Simply put, Rawls assigns to his first principle, *i.e.*, "the principle of greatest equal liberty," an absolute priority over all other values, so that liberty may be restricted only for the sake of greater liberty and not for any other social value:

. . . I shall in fact, propose an ordering of this kind by ranking the principle of equal liberty prior to the principle regulating economic and social inequalities. This means, in effect, that the basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle.²⁷

The only prior requirement Rawls imposes before this priority rule would come into play is that the society must have attained a certain level of economic well-being.²⁸ This, of course, makes a certain intuitive sense, since it is largely pointless to discuss liberty with a starving man, who would gladly trade his birthright for a mess of pottage. It is Rawls's position that once this minimal level of economic development is reached, people in the original position will choose the absolute priority of liberty over all social and economic values. Liberty means to Rawls such basic things as the right to vote and to stand for office; freedom of speech and assembly; liberty of conscience and freedom of thought; and the

²⁶ The proper term is "lexicographical," which Rawls rejects as "too cumbersome." RAWLS at 42-43.

The first priority rule reads as follows:

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, (b) a less than equal liberty must be acceptable to those with the lesser liberty.

RAWLS at 302.

There is a "second priority rule," which is not discussed in this review, that deals with the priority of justice over efficiency and welfare. RAWLS at 302-03. The second rule applies to inequalities of opportunity and the proper societal rate of saving. Here, as with Rawls's other precepts, the differentials must be acceptable to those who are on the receiving end of the inequality.

²⁷ RAWLS at 43.

²⁸ RAWLS at 543:

. . . as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational from the standpoint of the original position to acknowledge a lesser liberty for the sake of greater material means and amenities of office.

right to hold personal property.²⁹ It appears, however, that Rawls eventually includes as liberties most of the rights enumerated in the Bill of Rights and ends up being as much an absolutist as Justice Black. "Congress shall make *no law* abridging. . . ." (Emphasis supplied.)³⁰ It is this absolute priority which Rawls assigns to liberty which has been the portion of his book which has received the most telling criticism to date.³¹

Professor Dworkin of Oxford University has suggested that a "tentative initial classification" of political theories which employ the social contract as an intermediate device might be made according to the "deep theory" upon which the theories are predicated. He then makes a tripartite division of deep theories into those which are (1) goal-based, (2) right-based, and (3) duty based.³² Examples of a goal based theory, which entails the posting of some ultimate social *summum bonum*, would

²⁹ RAWLS at 61:

The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the personal along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

It should be noted that Rawls does not argue that each person must possess an equal amount of personal property; inequalities here would apparently be permitted, but only insofar as they benefit the least advantaged, in accordance with his second principle of justice.

With regard to the question whether or not the means of production and the natural resources of the society are to be publicly or privately owned, Rawls takes no position.

Which of these systems and the many intermediate forms most fully answers to the requirements of justice cannot, I think, be determined in advance. There is presumably no general answer to this question, since it depends in large part upon the traditions, institutions, and social forces of each country, and its particular historical circumstances. The theory of justice does not include these matters.

RAWLS at 274.

³⁰ Hugo Black and William Douglas have, by and large, taken the position that this phrase is to be given a liberal reading, *i.e.*, the federal government is absolutely prohibited from passing any law abridging the first amendment guarantee of freedom of the press. Also, under their view the various state governments are likewise prohibited from enacting restraints on freedom of the press because of the "incorporation" of the first amendment into the fourteenth amendment. See *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (concurring opinion).

³¹ As was noted earlier, Rawls simply will not permit any trade off of liberty, however minimal, for social and/or economic advantages, however great. Furthermore, he does not attempt to differentiate between the various basic liberties which he enumerates, although it is obvious that a better case could be made for some, *e.g.*, liberty of conscience, than for others. It very well may be that Rawls has permitted one of his personal biases to affect the course of his argument, which does purport to rest upon a form of self-interest rather than idealism.

I think that the apparently dogmatic course of Rawls's argument for the priority of liberty may be explained by the fact that, though he is not offering it merely as an ideal, he does harbour a latent ideal of his own, on which he tactily draws when he represents the priority of liberty as a choice which the parties in the original position must, in their own interest, make as rational agents choosing from behind the veil of ignorance. The ideal is that of a public-spirited citizen who prizes political activities and service to others as among the chief goods of life

Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534-554 (1973).

³² Dworkin, *supra* note 7, at 522.

be utilitarianism and, perhaps, communism; examples of duty-based theories would be Kant's categorical imperatives and the Mosaic law, where the affirmative duty to obey a particular code or set of precepts is taken as fundamental. As examples of right-based theories, Dworkin cites Thomas Paine's theory of revolution and John Rawls's *A Theory of Justice*. Dworkin makes some interesting points in his discussion of right-based theories:

Right-based theories are, in contrast, concerned with the independence rather than the conformity of individual action. They presuppose and protect the value of individual thought and choice. . . . Right-based theories . . . treat codes of conduct as instrumental, perhaps necessary to protect the rights of others, but having no essential value in themselves. The man at their center is the man who benefits from others' compliance, not the man who leads the life of virtue by complying himself.³³

If this distinction has any validity,³⁴ it would appear to afford some rationale in support of the priority which Rawls assigns to the value of liberty, perhaps a better rationale than Rawls himself advances. In other words, the very nature of the theory which Rawls is advancing may require the priority of liberty, and, this, of course could constitute a serious defect, since, if true, it seems to require an a priori assumption of what Rawls is attempting to demonstrate logically. However, before the absolute priority of liberty is required by Rawls, the society must have attained a certain minimal economic level. Rawls's premise appears to be that once this "floor" has been achieved man would *necessarily* opt for personal liberty as the prime social good.

Rawls offers two chief examples of justifiable restrictions on personal liberty for the sake of greater liberty. The first is military conscription to defend the society against an external enemy; and the other is the restriction of an intolerant sect which threatens the security of the society. The first example is explicable within the terms of Rawls's theory, but the second would appear to be open to question. Would Rawls permit a religious sect to be abolished merely because it introduced "false divinities"? *A Theory of Justice* does not provide a firm answer to this fundamental question, although the terms of the original position would seem to preclude this action.

It is a fundamental point of Professor Rawls' book that the selection of the principles of justice by the parties in the original position is only

³³ *Id.* at 523.

³⁴ Professor Dworkin recognizes that his distinctions are "superficial and trivial as ideological sociology." However, they do have a certain usefulness: "My point is only to suggest that these differences in the character of a political theory are important quite apart from the details of position that might distinguish one theory from another of the same character." *Id.* at 524.

the first step of a four-stage process. Once this is done, the parties then move from the original position to a "constitutional convention" and, as the second step, they write a constitution which establishes the basic rights and liberties of the citizenry. The third stage is that of legislation, the enacting of statutes in accordance with the principles of justice adopted in the original position and with the constitution. The fourth and last stage is the application of these "statutes" to particular cases by the officials of the society.

If the reader at this point, should feel that Rawls's conception sounds suspiciously like American history, he is not without good company.³⁵ One wonders why Rawls did not go the full distance, like the South Vietnamese and require a bicameral legislature, or, like the Japanese, and establish a supreme judicial body to "interpret" the laws.

These few points are minor quibbles concerning some of the peripheral areas of an otherwise magnificent piece of work.³⁶ Rawls provides the most forceful theoretical defense that the constitutional form of government has received in a long time, and one only wishes that those who inhabit Langdell Hall would sometimes venture across Massachusetts Avenue to the Harvard Yard. They might learn something about justice.

³⁵ "One form of criticism has been expressed to me by many colleagues and students, particularly lawyers. They point out that the particular political institutions and arrangements that Rawls says men in the original position would choose are merely idealized forms of those now in force in the United States." *Id.* at 533.

³⁶ *Id.* at 533. In some general remarks about moral theory, Rawls makes this observation:

We need to be tolerant of simplifications, if they reveal and approximate the general outlines of our judgments. Objections by way of counter-examples are to be made with care, since these may tell us only what we know already, namely that our theory is wrong somewhere . . . All theories are presumably mistaken in places. The real question at any given time is which of the views already proposed is the best approximation overall.

RAWLS at 52. A contractarian should not object if he is held to his own standards. And for those who try to make some sense of the legal system in this country, *A Theory of Justice* would appear to be one of the very best approximations overall.