Yale Journal of Law & the Humanities

Volume 3
Issue 2 *Yale Journal of Law & the Humanities*

Article 3

January 1991

Contractarian Methods in Political and Legal Evaluation

Kim Lane Scheppele

Jeremy Waldron

Contractarian Methods in Political and Legal Evaluation

Kim Lane Scheppele and Jeremy Waldron

The discussion of John Rawls's work over the last twenty years has made contractarianism a familiar term in political theory.[1] But although Rawls's work was rooted in the familiar social contract theories of Locke, Rousseau and Kant and although other theorists have made some use of the approach, the general discussion of the *concept* of contractarian argument in the modern literature has remained focused on Rawls's particular *conception* of it.[2] Criticisms of Rawls's theory have been assumed to be criticisms of contractarianism in general, and the limitations in Rawls's use of the "social contract" idea have been assumed to be limitations that any contractarian would encounter. In part, this is because Rawls himself has contributed so much in his more recent writings to the critical discussion of the methods used in *A Theory of Justice*.[3] We think it is time, however, for the discussion of contractarianism to be detached from the analysis of that particular work, so that it can be considered on its merits as a general approach to political and legal evaluation.

Our aim in this article is to present contractarianism in an attractive light. But we do not assume that there is just one contractarian method. There are many, and a consideration of contractarianism as a general theoretical approach involves a consideration of the differences among these various methods and the choices that must be made in their design. In this article, we consider some of those choices—between negative and positive contractarianism; hypothetical, tacit and actual consent; holistic and particular evaluations; rational choice and Rousseauian assumptions about the motivation of the contracting parties, and so on. These choices

1. J. RAWLS, A THEORY OF JUSTICE (1971). *See also* D. GAUTHIER, MORALS BY AGREEMENT (1986); D. RICHARDS, A THEORY OF REASONS FOR ACTION (1971); Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103 (B. Williams & A. Sen eds. 1982); M. LESSNOFF, SOCIAL CONTRACT (1986).

2. For the distinction between *concept* and *conception*, see J. RAWLS, *supra* note 1, at 5-11 and R. DWORKIN, TAKING RIGHTS SERIOUSLY 103, 134-136 (1978).

3. *See* Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980) [hereinafter *Kantian Constructivism*]; Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) [hereinafter *Political not Metaphysical*].

raise issues with which any particular contractarian conception must deal.

Before moving to an analysis of the various elements of the contractarian approach, it is important to get a grip on the general idea of contractarian evaluation and on what the various conceptions share in common. Historically, the idea of the social contract took political obligation and the legitimacy of government to be rooted in, and limited by, the consent of the governed rather than by tradition, *iure divino*, *de facto* power, utilitarian expediency or other sources of authority. The advocates of the extreme versions of this approach took government to be an actual construction of the people with no greater authority than the people had chosen previously, or than they chose presently, to confer on it. In more realistic and moderate versions, however, the consent of the governed was viewed not as an historical hypothesis but, in Kant's words, as "an idea of reason" in terms of which political judgments might be expressed.[4] The evaluation of a law or a constitution might be facilitated by considering whether, given certain assumptions, the people who were to be bound would have chosen to obligate themselves in this particular way, even if the evaluator knew that the people who were to be bound had had no actual opportunity of undertaking such deliberations. In the modern literature, the more modest approach has prevailed.[5] The advocates of this approach maintain that the actual origins of government are uninteresting from the point of view of normative theory. Contractarianism as a basis for present evaluation stands apart from such concerns and has more to do with the abstractions of various sorts of decision paradigms in the understanding of politics than with any speculations about its historical provenance.

In general terms, the modern contractarian idea may be expressed as follows. To resolve a normative disagreement on some political or legal issue, it may be helpful to ask what the people involved in the dispute would have agreed to do about the issue had they considered the possibility of disagreement before reaching the point at which the actual disagreement took place. This "thought experiment" has the feature of asking people to stand back from their current deadlocked positions in order to consider what arrangements might have been designed to prevent such deadlocks from arising. It asks us to take, as our touchstone of political and legal evaluation, a conception of what people would agree to in advance as a framework for constraining the way they organize their lives and resolve their disputes. The thought is that institutions and arrangements, actual or proposed, that can be presented in this light have a greater claim to legitimacy and a greater claim on our support than

4. *See* I. KANT, KANT'S POLITICAL WRITINGS 79 (W. Reiss ed. 1970).
5. J. RAWLS, *supra* note 1, at 12-13.

those presented simply as "better" or "more useful" without the mediation of any idea of consent.

That is how we understand the concept of a contractarian approach. It is very general and abstract, and it leaves a number of questions unanswered.

First, what sorts of disagreements are to be approached in this spirit—disagreements about the general framework of constitutional law and broad social structure, or disagreements about particular legal rules and social policies? Rawls believed, for example, that contractarian argument could not settle even the particular question of the desirability of private property in the means of production, but could only address the more general issue of what the terms of that debate ought to be.[6] Was he right about this? Or can contractarianism provide insights into very specific social, political and legal problems?

Second, if we are asking what people *would* have agreed to before they became involved in some actual disagreement, we also have to ask how long before the disagreement, in how much abstraction from its particular terms, and under what conditions are we to imagine them deliberating? Some disagreements in politics involve a clash of self-interests; others involve a clash of altruisms or of competing moral ideals. Often these motivations are intermingled. Are we to imagine an agreement among egoists or altruists or moralists or what? Should such people consider what they would have agreed to on the basis of their own particular interests and ideals? Or does the thought experiment require them to stand back from their beliefs and pose the more abstract question of what people with potentially conflicting interests and ideals (whatever these turned out to be) would have agreed to do in the abstract about such conflicts when they arose? It is essential to the contractarian idea that we imagine ourselves standing back *some* distance from the actual fights in which we are presently involved or else we simply duplicate the deadlocked dispute. But are the interests and ideals we bring to the dispute part of the conflict from which we are to distance ourselves or part of the *persona* who are to undertake the distancing experiment?

Third, when we imagine people deliberating in advance of actual conflict, what sort of conclusions are we to imagine them coming up with? Should we imagine them agreeing on what *must* be done or merely on what *may* be done? How much room is our thought about their *imagined* deliberations to leave us for our *actual* deliberations? When we involve ourselves in political conflict in real life, we do not always or necessarily resolve the matter through force. We make and listen to arguments, debate issues, strike bargains, count votes, and so on. Indeed, the procedures which contractarians imagine are only an idealized form

6. *Id.* at 265-273.

of political procedures that sometimes actually take place. So what is the relation between actual and imagined deliberation? Does the latter preempt the former? Does it leave issues unresolved which are to be settled only in the heat of actual political debate? Or is there some more subtle, internal relation between the two, so that contractarian argument is thought of as a resource to be used in political argument rather than as something which constrains or sets boundaries for the realm of politics?

This last set of questions is particularly interesting inasmuch as it raises the issue of the relation between contractarianism and democracy. In some ways, democracy itself is a contractarian idea—seemingly the clearest expression of government by and with the consent of the governed. But democracy and contractarianism have their tensions, too: the contingencies of democratic politics leave issues of principle at the mercy of the play of political forces; and in its majoritarianism, democracy seems at odds with the contractarian idea that the consent of *each person* is needed before *she* can be said to have assumed an obligation or before power can legitimately be exercised over *her*. At a further remove, these are also questions about the overall utility of the contractarian approach. In our general formulation, we said neutrally that "to resolve a normative disagreement . . . *it may be helpful* to ask what the people involved . . . might have agreed to do" if they had been considering the matter in advance. It may be helpful, but it may not be conclusive. It may just exercise an influence on our political arguments rather than determining their outcome. Still, it is worth considering. The idea of using self-assumed obligation as an evaluative paradigm in politics and in law has been so resilient in our tradition that it is unlikely that an adequately formulated contractarian argument can simply be dismissed out of hand. So we have to ask how contractarianism stands in relation to other models of political argument and what forms of discourse a contractarian should regard as an appropriate complement to her own.

These are the questions we shall explore. Maybe they have no right answers (although we believe that there are better and worse ones for many of them). These questions, taken together with the formulation that gave rise to them, identify the *concept* of a contractarian argument. Each particular set of answers that one gives, along with the reasons for those answers, define a particular *conception* of that concept—the contractarian method that a particular theorist is using.

The remainder of our paper is divided into three parts. Part I addresses contractarianism in general. It asks what reasons there might be for approaching political disagreements in the spirit we have just outlined. Part II considers what one might call the "internal mechanics" of a contractarian argument: the range of issues that are considered, the conception of the deliberators, the nature of their deliberations, and the sort of conclusions they are conceived to come up with. Part III

addresses the application of contractarian arguments, and the implications for this approach of modern debates about the relativism or universalism of theories of political and legal morality.

I. WHY CONTRACTARIANISM?

Why should anyone be tempted to think in contractarian terms about politics or about law? Temptation arises from two main sources. The first is a cluster of ideas about individual freedom and its relation to the ordering of social life—ideas that take consent as the pivotal term which reconciles individual freedom with social action. The second main source of temptation is a cluster of ideas concerning equality and impartiality—ideas that require us to think in a way that puts our own claims on the same basis as those of other people. Both clusters of ideas need to be examined in detail.

The tradition in which contractarian ideas developed was one that put enormous emphasis on individual freedom without ruling out the various benefits which might arise from the actions of individuals with or upon each other in ordinary social life. Thus, for example, liberals have always stressed principles of self-ownership and the integrity of the person against outside interference, but they have taken *consent* or *permission* as the main way in which an individual acting freely can allow others to benefit her by encroaching on her person in various ways (from sex to sport to surgery). The link with contractarianism lies in the view that since governments characteristically encroach on the persons of those subject to them (for instance, through the use of coercion and punishment), government action can be reconciled with freedom only if these encroachments can be represented as plausible subjects of consent. The same tradition also emphasizes the idea of self-assumed obligation as a way of reconciling individual liberty with the constraint that social life invariably involves. If the rules of our society can be represented without too much distortion as things we have promised to obey, then the constraint associated with our obligation to obey them becomes a product of our own free action rather than an oppressive imposition from the outside.

The second cluster of ideas tempting us to think in contractarian terms concerns equality and impartiality. Morality, in the broadest sense, involves taking seriously the claims and interests of others and giving them the same weight in moral argument as one gives claims and interests of one's own. Impartiality requires a person to distance herself from the heat of her particular involvement in a disagreement and to try to evaluate the impasse from the points of view of all the others involved with or affected by it. There is an optimism in liberal thought, expressed

most strikingly by Rousseau,[7] that people who do this can be expected to agree, to converge on a single view of what should be done about the issue. Such commentators do not think of political morality as a set of principles whose validity is independent of what people believe; rather the principles of political morality *just are* the conclusions on which people would converge if they were to think impartially about the initial disagreements in which they were involved. In this way, contractarianism captures both the reciprocity of contract—the *quid pro quo*—and also the underlying identity of interests that all the contracting parties share in common.

Clearly, these ideas call for some more detailed exploration, since in spite of their connection to the contractarian approach, they do not all pull in the same direction. Let us begin with the ways in which consent can enrich an account of personal freedom.

Our paradigm of self-assumed obligation is the promise—an undertaking given by one person to another with the specific intention of creating not only an expectation in the other person, but also a norm or standard by which the subsequent conduct of the promise-giver may be judged. There are several competing analyses of the nature of promissory obligation, but all of them give prominence to the connection between the voluntariness of the undertaking and the moral force of the obligation that flows from it.[8] Though promises bind—and though their bindingness is felt when they operate as a constraint or limitation—still, promising, specifically with that implication, is a free act.[9] As a result, it provides an attractive model for those who wish to justify social constraint while maintaining a commitment to freedom. If the obligations of social and political life—the rules and principles we are to live by and to which we are to submit our disputes even when it is irksome to do so—can be represented somehow as the subject matter of promises we have given, then our being bound by them will seem less of a derogation from our freedom than it might otherwise appear.

Now it is important to stress that in politics, the bindingness of an obligation has two aspects: on the one hand, there is the question of whether the person is morally obligated by virtue of having promised, and on the other, the issue of whether the promise may rightfully be enforced at law should the person fail to meet its terms. Few of us think that all obligations should be enforced by the power of the state; but *political* theory, obviously enough, is particularly concerned with discerning the kinds of obligations subject to enforcement, and in general with the use of force, threats, violence, and manipulation by agents of the

7. J.J. ROUSSEAU, THE SOCIAL CONTRACT bk. II (G.D.H. Cole trans. 1973).

8. *See, e.g.*, Raz, *Promising and Obligations*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART (1982).

9. Roughly, the more binding the promise is to be, the more free the act must have been.

state to get people to fulfill their obligations. This second aspect of bindingness raises what we can call the issue of political legitimacy; if consent is relevant here, it is relevant not as a means of generating obligations but as a way of getting around what would otherwise be strong and binding prohibitions on the use of violence and coercion against persons. Just as consent to a surgical procedure turns a grievous wound into a legitimate operation, so consent, in advance, to the state providing welfare services turns the demand for taxes into a legitimate request rather than theft by the state.

The two uses of consent—as a source of obligation and as a source of legitimacy—have much in common. Both are highly individualized ideas. One cannot be constrained by another's promise, nor can an assault on one person be legitimated by the consent of another except under very special conditions. This is important from a political point of view, for it provides a sharp contrast between contractarian and majoritarian approaches to justification. Since consent affects only the freedom of those who have given it, one cannot be voted into a social contract by a majority—even an overwhelming majority—of others.

There are, however, important differences between the ideas of legitimacy and obligation and important ways in which they may come apart.[10] Hobbes illustrated one such way in his claim that persons facing imminent death have no obligation to submit to it, even in cases where its imposition on them is legitimate. A group of traitors being led justly to execution has no moral obligation whatever to refrain from conspiring to escape.[11] Similarly, the state may act legitimately to restrain or disable a dangerous maniac, even though the maniac's sanity was so far lacking that no serious question of her obligation to obey the law could arise (because she is incapable of conforming her actions to a norm).

From a contractarian point of view, the most important difference between legitimacy and obligation is this: a person cannot be actually obligated by a *hypothetical* promise she *might have* entered into. The idea of promising requires the free assumption of an obligation that has no other basis except in the actual consent of the person assuming it. So consideration of what people would have agreed to, in circumstances where clearly they have *not* agreed to that or anything else, tells us nothing about their promissory obligations. With the consent that confers legitimacy, however, the situation is slightly different. Consent here is related rather more closely to an objective sense of *interests* than it is in the obligation case. If an unconscious person needs urgent surgical attention, the surgeon's actions may be legitimated by an affirmative answer to the question of whether the patient *would have* agreed to the

10. *See* R. DWORKIN, LAW'S EMPIRE 176-224 (1986); Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987).

11. T. HOBBES, LEVIATHAN 270 (C.B. Macpherson ed. 1981).

operation if she had been conscious, and this hypothetical consent can be assumed more readily when something is clearly in the hypothetical consenter's interest. Hypothetical consent, in other words, can sometimes legitimate even though it can never actually obligate. This is important, for it suggests that modern contractarianism—with its emphasis on hypothetical models—is an unhelpful tool for telling us much about what our obligations actually are (unless, like Rawls, we think there is an *independent* obligation to support institutions that a contractarian model shows to be just). At the end of the next section, however, we shall argue that hypothetical models may still be useful for telling us what our political obligations are *not*.

Classical contract theorists were anxious not to call into question either the existence of a general obligation to obey the law or the general legitimacy of government, and they were therefore fairly relaxed about what counted as actual consent; submission at the point of a sword was sufficient for Hobbes[12] and the mere use of a country's highways counted as tacit consent for Locke.[13] It is easy to ridicule these claims, but for the classical theorists, the point of the consent idea was to stress not the contingency of each person's potential obligation, but the idea that submission to the state must be seen as a rational individual act, intelligible in the case of each person in terms of some benefit she expected to receive. "A Rational Creature cannot be supposed when free, to put himself into subjection to another, for his own harm," wrote Locke.[14] For these writers, the attraction of the contract model was not only the way it reconciled freedom and government, but also the way it presented government as an arrangement whose legitimacy was tied intimately to its being to the benefit of each and every individual bound by it.

Of course, both Locke and Hobbes had gone far beyond the early contractarian idea of government as a contract between prince and people. Both embraced the more sophisticated version in which the contract was among the people themselves to set up a government, and the obligations were owed primarily to one another. Political society, in other words, was seen as an arrangement of reciprocity and mutual benefit. People were willing to submit themselves to governmental power in return for the benefits that might accrue from the equal submission of others. And people agreed to constrain their conduct to make cooperation possible on condition that others would obligate themselves by similar constraints.

These ideas of equality and reciprocity can be developed in a more abstract direction in relation to the second cluster of ideas we mentioned—ideas about moral consensus, impartiality and universalizability. Morality, in the broadest sense, involves taking seriously the claims and

12. *Id.* at 251 *et seq.* (Ch. 20).
13. J. LOCKE, TWO TREATISES OF GOVERNMENT 392 (P. Laslett rev. ed. 1965) (3d ed. 1698).
14. *Id.* at 423.

interests of others and giving them the same weight in moral argument as one gives claims and interests of one's own. Impartiality requires one to distance oneself from the heat of one's particular involvement in a disagreement and to try and think about it from the points of view of all the others involved with or affected by it. Universalizability calls on us to consider a disagreement not only from our own point of view but also from the points of view of others who are involved in it. Though in the heat of a particular conflict we may oppose their interests or ideals, we should nevertheless consider what it is like to hold those interests and ideals, and what one's own interests and ideals must look like from the opposite point of view. Sometimes the nature of the dispute makes that easy; sometimes it is a difficult task. Suppose the dispute concerns the law of fraud and nondisclosure in real estate contracts: I know something about my house which, if I were to disclose it to a prospective purchaser, might persuade her to abandon the deal or offer a lower price. Though her interests and mine conflict in this case, it is easy for me to put myself in her shoes since I too will be a purchaser on another occasion and will have interests, on that occasion, more or less exactly similar to hers. The interests that divide us in this conflict are interests associated with roles that are readily and commonly reversed.[15] In other conflicts, identification with an opposing party may be much more difficult. It requires considerable imagination for a person born to wealth to identify with the predicament of those poverty-stricken people who are constrained by the wealthy individual's property rights. And when disagreement and conflict involve racial and gender issues, where we have next to no experience of role reversal, and where, for example, a white male's identification with a black or a woman involves imagining not just a different body but a whole different history in which attitudes are forged, pain felt, and fears crystallized, impartiality becomes suddenly a very demanding, though not impossible, ideal.

Even if one succeeds in putting oneself in another's shoes, the process of impartial moral thinking cannot stop there. So far, it merely reveals the complexity of moral disagreement, leaving open the question of what should be done next once the successful identification with the interests and ideals of one's antagonists has occurred.

There are two well-known answers to this question. The first is R.M. Hare's and it leads directly to utilitarianism:

> When I have been the round of all the affected parties, and come back, in my own person, to make an impartial moral judgment giving equal weight to the interests of all parties, what can I possibly do except advocate that course which will, taken all in all, least frus-

15. For a discussion of nondisclosure and fraud in cases like this one, see K. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 109-178 (1988). For a different example of the general problem, see also *Matthew* 18:23.

> trates the desires which I have imagined myself having? But this (it is plausible to go on) is to maximize satisfactions.[16]

If maximizing satisfactions is an appropriate thing for a person to do in regard to her own interests and preferences, it is, on this account, also an appropriate thing for an impartial person to do across the whole array of *other's* interests and preferences with which she has managed to identify.

The difficulties with this route into utilitarianism are well known. It assumes that identifying with each in turn is the same as identifying with all at once. And in its analogy between prudential and impartial maximization, it pays insufficient attention to the fact that some interest may have the force it does for its holder because it gives her life the only meaning it has. To maintain that *inter*-personal maximization across interests of this sort has anything in common with *intra*-personal prudence is obviously a serious distortion.[17] It ignores the distributional aspects of the problem and may result in particular individuals finding themselves so seriously disadvantaged that it becomes impossible to tell any consent story for them which would have that outcome as a plausible ending.

The other approach is the one that leads from impartiality to contractarianism. Instead of imagining myself in *everyone's* position, I imagine instead that I know I am going to be in *somebody's* position but I do not know whose, and I try to think of what resolution I would opt for if I were considering the matter from that perspective. The critical point here is that being a person means living a *particular* life, not a life on average or a life of aggregated experiences. And if I am trying to decide how a conflict should be resolved or a policy formulated or a society structured, I will want, on this view, to worry about how *each individual* is treated when the actual decision is put into effect. After all, I may turn out to be the individual who ends up in the worst (or any) position, and I will want to ensure that the result for that person will be bearable and seem fair to her then in light of what could have been done. If I don't know which person I will be in advance of the particular outcome, I shall certainly want to focus on the position of the person I would least want to be, to make that the best I can manage to arrange in the event that things turn out for the worst.[18] And, in general, I will want to ensure that *each* of the positions defines a life that is bearable.

Now if everyone has this view of how to make decisions about political arrangements in advance, then all will have the same incentives to worry about the potential for disaster hidden in the allocation of social positions or in the fallout of particular political arrangements. Everyone should

16. R.M. HARE, FREEDOM AND REASON 123 (1963).

17. For a similar argument, see S. SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM Ch. 3 (1982).

18. This is, of course, the maximin strategy discussed by J. RAWLS *supra* note 1, at 150-161.

then also agree on which decision would be best to take, since each individual will focus on the same criterion for what constitutes a desirable outcome and will have reason to make as bearable as possible the circumstances of every person affected by the scheme. This gets us a long way toward the consensus that contractarianism requires. Each individual will be removed from the particular constellation of interests and ideals that accompanies her actual current social position, and she will be required to think seriously about the consequences of a decision for each particular hypothetical individual who may very well turn out to be herself. If everyone thinks like that, consensus is much easier to achieve than it is in circumstances where everyone approaches the decision problem bringing only her own present interests and ideals to the situation. Such a thought experiment produces much the same results as direct rights-based arguments, but it does so through a mediating device that allows a person to imagine from the force of possible personal experience what it would be like to live without such guarantees.

The idea that contractarianism might be developed in this way out of underlying hunches about freedom and equality is of course not new. In *Taking Rights Seriously*, Ronald Dworkin argued that Rawls's contractarianism was a device for expressing the force of deep rights-based principles.[19] And in his own more recent work, Rawls has conceded that the contract model is, so to speak, an *intermediate* construction in moral theory, intermediate, that is, between deep values and political judgments:

> The *original position* is a third and mediating model-conception: its role is to establish the connection between the model conception of a moral person and the principles of justice that characterize the relations of citizens in the model-conception of a well-ordered society. It serves this role by modelling the way in which the citizens in a well-ordered society, viewed as moral persons, would ideally select first principles of justice for their society. The constraints imposed on the parties in the original position, and the manner in which the parties are described, are to represent the freedom and equality of moral persons as understood in such a society.[20]

Does this imply, then, that the contract idea can be dispensed with entirely, and the argument pushed (if it has any validity at all) to the final answers directly from the deep values? This is an unhelpful suggestion for two reasons. First, the contract model may be the best or most fluent way we have of expressing the relation between the deep values of freedom, equality, impartiality, and common interest that are said on this account to underpin it. It may give us the most direct route we have

19. R. DWORKIN, *supra* note 2, at 150-183.
20. *Kantian Constructivism*, *supra* note 3, at 520.

from those premises to our conclusions. Second, even if the contract model is strictly redundant, it preserves an imagery of politics which is both normatively attractive and historically significant.

In addition, the contractarian thought experiment is designed not just to represent formally how to get from deep moral premises to particular conclusions, but also to provide us with reasons to be convinced along the way. Developing a structure in which one's own interests and experiences can be used to fill in the informational gaps in a rigorous reasoning process is one way to accomplish this persuasion. The prospect of actual experience—imagining that it is oneself who will wind up with the short straw—carries with it the immediacy of interest and the force of authenticity. The belief that others are like us, that they will feel no better than we would about being deprived of important elements of a full social and political life, harnesses our self-interest and transforms it into empathy. We are persuaded of our conclusions not just by the force of logic, but also by the twin forces of interest and experience generalized to feel and understand the lot of others.

Above all, the proposal to "do without" the contract model if it is truly intermediate underestimates the complexity of direction in moral argument. People do not start with their value premises ready-made and reason linearly from them to their conclusions; nor do they start with their conclusions and find a way to support them from below. We come into moral argument *in medias res*, reasoning downwards from ideas we find attractive to premises we construct to underpin them from which we can in turn move upwards to other conclusions that might initially have seemed surprising. To jettison the contract device because it is neither, strictly speaking, the starting point nor the end point of a linear argument would deprive us of both resource and resonance in the enterprise of discovering what our starting points are and what our end points should be.

II. Choices for Contractarians

Once we opt for the contractarian approach, how are we to proceed? We are to approach political disputes in the spirit of ascertaining how the parties would have agreed to resolve them if they had given thought to the possibility of the disputes arising before they actually became involved. Obviously, this process involves a degree of abstraction from the pressures of the moment. But just how that abstraction is to be accomplished is something that must be decided in any contractarian analysis. What disputes, what parties, and what sorts of deliberations are we to imagine?

A. Holistic and Piecemeal Contractarianism

The first important issue concerns the sorts of disputes for which the

contractarian approach is thought to be appropriate. Rawls insisted the approach was to be used for the evaluation of nothing less than the basic structure of a society, taken as a whole:

> For us, the primary subject of justice is the basic structure of society or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation . . . . Taken together as one scheme, the major institutions define men's rights and duties and influence their life prospects, what they can expect to be, and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start.[21]

This we shall refer to as the *holistic approach*. An alternative is to use contractarian methods to evaluate particular laws or social arrangements, taking the rest of the system (though only for the time being) as given. We shall refer to this as the *piecemeal approach*.

On the face of it, either approach seems possible. Contractarianism is an approach for making evaluative judgments, and whether we take a piecemeal or a holistic approach should depend, surely, on the sort of judgment that we would want to make. A designer of constitutions—a Bentham, say, or a Rawls—will be interested in the holistic approach, for the disputes they want to resolve are disputes about the standards for judging the basic structure of society. An ordinary legislator, on the other hand, will have a less ambitious agenda. She knows that she cannot alter all the laws, but can only make a little bit of progress here and there. She will be interested, then, in using a contractarian approach to determine a fair resolution to a particular legislative problem she faces, whether the subject be abortion law reform, a modification of criminal procedure or whatever. A judge may be even more constrained; although she is inevitably engaged in lawmaking, her primary responsibility is to do justice to the parties before her. The contractarian question she asks herself (if she does) may be, "what rules would people have agreed to, to deal with disputes of this sort?" or "what would *these* people have chosen to deal with disputes of this sort?", but certainly not "what basic structure would people have agreed to for the society in which they were to live?" The latter question not only may not give specific enough answers for problems of the sort that judges address, but, in addition, such questions may also be entirely inappropriate for judges to ask within the limits of their role. It seems, then, that one can adopt a more or less piecemeal contractarianism depending on the nature and scale of one's concerns and the constraints and responsibilities of one's office.

---

21. J. RAWLS, *supra* note 1, at 7.

However, there are still considerations that will pull us in different directions here. The advantage of the holistic approach is that the rules and structures of society often operate as a *system* so far as people's well-being is concerned. My well-being—the goods and opportunities that I have, my life chances, and so on—are the *net* effect of the impact of *all* social rules upon me from time to time. We see this from the way in which the impact of one rule may be mitigated by another: imprisonment for a criminal offense, for example, is a somewhat greater harm for an individual (and so calls for a more substantial justification) if the state does not provide welfare assistance for the prisoner's needy dependents than if it does. This suggests that the laws should at least be considered as a system, even though a particular agent has the authority to tamper only with a small part of it. A law reformer may be prepared to consider only one small aspect of the law, but if she has to choose between reform X and reform Y, she should perhaps choose that reform which, when taken together with the aspects of the system she cannot change, will yield an overall system which is better or more just.[22]

Against that view, however, the realistic law reformer (whether judge or legislator) may worry that she cannot always rely on the current system. For example, a judge concerned about poverty facing an incoming administration devoted to abolishing critical elements of the welfare state may want to build redundant "safety nets" into individual legal rules to guard against catastrophe for the litigants who come before her in the event that the protections currently in place are removed. A legislator worried about a possible erosion of protection for criminal defendants through judicial decisions may want to write redundant protections into specific pieces of legislation. Generally, the realistic assessment that the whole system of laws and policies in force in a divided government lies beyond the control of any particular political actor may lead the dedicated contractarian to make important decisions taking each rule, each policy, each decision on its own without considering the set of backdrop institutions and rules that would otherwise come into play in the individual case. Of course *some* backdrop considerations have to come into play in each decision, but assessing which ones and how much impact they should have is something that a contractarian legislator or judge may want to consider anew with each decision.

In addition, there is the consideration that, in many cases, people do not swallow their social system whole, so to speak. People are often concerned that justice be done in a particular case or that a particular rule should be just when considered on its own, irrespective of the impact of other rules or institutions. If rule X considered in itself is more just than

22. It is interesting that Rawls suggested that the contractarian case for utilitarian principles might be stronger if the social system were considered piecemeal. *Id.* at 170-171.

rule Y, people with this sort of concern may prefer X even though the whole system would be more just with Y than with X. This might be the case where X offered redundant protections and there were some loss of efficiency from having *both* X and Y as live options when there was no difference in the level of protection offered. But the fact that, for example, people can fall back on the welfare system if their tort claims aren't recognized, can hardly comfort those who believe that tort judgments do more than compensate people for injuries but in some sense also vindicate the injured party.[23] Similarly, if people believe that it is worth their while to press tort claims for the precedents they may establish that would reduce the incidence of further accidents for others, then simply compensating a person for her injuries would not accomplish this either. Some of the redundancy built into piecemeal contractarianism may be due to the fact that the various solutions to particular problems are not completely fungible. If they were, then the piecemeal contractarian, like her holistic counterpart, would find no difficulty with adopting in a particular case a solution already in place for another problem.

Sometimes the press toward piecemeal evaluation happens because certain rules—for example, those that impose stigma—can be catastrophic for individuals in a way that no other benefit can mitigate.[24] Mainly, though, it is because of the way in which we individuate laws in our moral thinking. We may be concerned that each particular rule seem fair and that it have a justification of its own, over and above the claim that it fits into a system whose justice is considered as a whole. In the comparison of piecemeal and holistic contractarianisms, both sides are committed to doing justice to each individual, but holists are prepared to put up with particular rules that seem unjust in themselves if that is necessary for a system that treats each individual most justly in terms of her overall prospects.[25]

Perhaps the most convincing case for piecemeal over holistic contractarianism starts from the observation that, in real life, political reform always involves a stage of transition. Holistic theories do not take

23. For example, we may think that a defendant required to pay damages for negligence suffers not only the financial loss (for which welfare support may partially compensate) but also the "moral harm" of being presented as someone who has failed to live up to her obligations to take care in social life. *See* R. DWORKIN, *supra* note 10, at 3.

24. But, if so, a holistic approach would recognize this fact also.

25. But how far should we take this? It may be that the tendency of piecemeal contractarianism is to move toward a purely equitable system where each case is taken on its own merits without concern for rules at all. But why would anyone consent to live in a regime where each case was decided individually, without the sort of predictability that rules provide? It would be difficult for someone living in a society like this to avoid running afoul of the law because one would not know whether particular actions might be illegal. And if one could tell what was forbidden (by reference to bad consequences or violation of particular principles), then one would have some rules for determining this, and one would not have a purely case by case system. This does not rule out *some* reference to equity in cases where the rules do not fit comfortably. But it does say that those cases should be exceptions to well-understood rules and should only be decided on the basis of principles that are themselves part of the larger framework to which people have agreed.

this sufficiently into account. Rawls's theory, for example, provides no way to get "from here to there" without dislocation of a sort that might be condemned by the very principles he espouses.[26] A piecemeal contractarianism, where the system of institutions and rules is left in place as each component of this system is in turn revised, promises a much less disruptive transition phase than a wholesale recasting of political and social institutions. Moreover, since each individual reform must pass contractarian muster, the problem of intermediate violations of consent-based morality does not arise. Piecemeal contractarianism may provide a better way of achieving real contractarian reform than the holistic version. And if piecemeal reform is pursued patiently and thoroughly, there is no reason why it should not be as comprehensive and as radical as a holistic approach.

B. The Contracting Parties

The second question to ask in order to proceed with the elaboration of a contractarian approach is "who are these people whose deliberations we are asked to imagine?" If the question is simply, "which people?", the answer might seem to be the parties to the disagreement. This certainly includes those whose interests clash directly in the dispute, as well as others who stand to be affected by the externalities of a settlement one way or another. But there is also the question of how we should think about the relationship between a particular dispute and those disputes sufficiently like it to be influenced by its effect as a *precedent*. In many cases, the contractarian mode of approaching a dispute will take this into account: since the parties are required to contemplate the possibility that they occupy the other's role, they are already thinking in terms sufficiently abstract to guarantee the universalizability of the conclusions they reach.[27]

A further question is whether the universalizability that contractarianism provides is sufficient to capture the sense felt by many of us that in some disputes the public or the community has an "interest" quite apart from the individual interests of any of its particular members. For example, most of us think that the rules about homicide should have a public dimension that is not exhausted by even the fairest bargains that would be struck between potential killers and potential victims. It matters to us *as a community* under what conditions people's lives are taken away from them; this reveals itself in the uneasiness we feel about consensual homicides such as suicide pacts, euthanasia, blood sports (like boxing), and the like. In these cases, we think a *public* debate is called for. But how should we think about this debate? If the debate is couched in con-

26. *See* J. RAWLS, *supra* note 1, at 8-9 (on "perfect compliance" theory).

27. Problems will only arise in those special cases in which the sheer *number* of particular cases settled one way or the other is an independently relevant moral factor.

tractarian terms, then the public serves the role of guarantor of the argument's integrity, rather than as an imagined party to the thought experiment. Contractarianism, then, just *is* the form of the public debate. However, the underlying contractarian idea is more seriously threatened if we think of the public as a party with interests in the dispute which are not captured either by considerations of externalities, considerations of universalizability, or by general considerations of fairness. To the extent that this view is adopted, the contractarian approach would in effect be abandoned in favor of a more communitarian approach to political morality.

There are other issues here too. Should people's sensitivities count as externalities if their only interest in an issue is *via* an external or moralistic preference? Should offense to a person's views about how moral decisions ought to come out count equally with harms to persons themselves as a basis for determining what an externality is? Our basic hunch is that, since contractarianism is a way of settling moral disputes, it seems sensible *not* to regard a person as a party if her only involvement is some moral conviction (contractarian or not) about how it ought to be settled.[28] These sorts of convictions shortcircuit the very process of moral reasoning that contractarianism attempts to provide.

Another important issue in determining who should be party to the thought experiment involves geographical limitations. Are some issues purely local? And should the constituency for even the widest questions be limited by national boundaries in the way that contractarian arguments usually are? The link between contractarianism and political self-determination suggests an affirmative answer to this last question, while its postulation as a method for resolving conflicts of interest generally casts doubt upon the limitation. Those concerned with freedom and legitimacy may take as their constituency those against whom the rule will be enforced. Those concerned primarily with impartiality may be interested in the somewhat wider community of all those whose interests are affected in some way.

i. Motivation and Rationality

Once we have determined the constituency of the contractarian approach, so to speak, further questions present themselves regarding how we are to imagine these people conducting themselves, and how we are to infer the conclusions that they might reach. All contractarianism involves some distancing and some abstraction from people's actual behavior, if only because it is a response to a situation in which actual behavior has led to deadlocked conflict or to conflict likely to be resolved

28. There is a vast literature on external preferences. Recent contributions include Waldron, *Mill and the Value of Moral Distress*, POL. STUD. (1987); Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (J. Waldron ed. 1984); C.L. TEN, MILL ON LIBERTY 10-41 (1980).

by (what we regard as) undesirable means. But what sort of distancing should we imagine?

The parties are to be imagined apart from the particular dispute in which they are engaged. They are to be imagined contemplating the possibility of such a dispute and deliberating about it, but to be doing so in a way that is not the same as plunging them immediately into it. We have chosen that particular formulation in order to leave open as many questions as possible. Rawls is well known for the suggestion that people in his "original position" will be bargaining behind a "veil of ignorance" covering almost every particular aspect of their lives and situation.[29] There may be a case for saying that nothing less than this can secure even the minimum distance required for a contractarian approach to the vast questions that Rawls is asking, and that a somewhat scantier veil would be appropriate for a piecemeal approach. But at this stage we want to leave open the question of whether the requisite distancing requires any veil of ignorance at all.

In asking how the parties are to be imagined deliberating, we have to raise complex and interwoven issues of motivation, reasoning, and knowledge. So far as motivation is concerned, three broad alternatives suggest themselves. The first is realistic: we might imagine that the parties are ordinary people with their ordinary motivations (whatever they happen to be). The second and third are more ideal-typic: perhaps the parties are to be thought of in a strictly game-theoretic way, as individuals concerned with the satisfaction of their own desires and the advancement of their own interests, which they know are not necessarily shared by others; or perhaps the parties are to be thought of as ideal moral beings, sensitive to the desires and interests of others in the ways the best moral theory requires them to be.

It is easy to see why the third of these approaches, the one that sees individuals as ideal moral beings, should be rejected. We adopt the contractarian approach, if we do, in order to find out what is the right thing to do about the disagreements with which we are concerned. It is not much help to be told that to do this we should imagine what would be decided by people who knew what was the right thing to do (though of course trivially, this would yield the right answer!). Such an approach confuses contractarians with the parties whose deliberations they are imagining. It may be a good thing in actual political debate if disputants behave like contractarians,[30] but it will soon turn into a futile regress if the people whose deliberations the contractarians are imagining are themselves imagined to behave like contractarians.

The first approach to motivation—that the people who populate con-

29. J. RAWLS, *supra* note 1, at 136-142.

30. That perhaps is what Rousseau required for the emergence of his general will.

tractarian models simply are the ordinary everyday people we encounter in daily life—is not as theoretically supine as it might appear. A considerable literature has emerged in recent years suggesting as a *sine qua non* for justice that we keep faith with the social meanings embedded in people's senses of themselves and of their relations with one another.[31] This undoubtedly would make the contractarian method yield different results for different societies, but perhaps that relativism is desirable. Certainly, it need not lead to a conservative acceptance of whatever institutional arrangements happen to be in force in the society to which it were applied. People's senses of themselves *may* be a product of the social arrangements around them (and one who takes this approach must be sensitive to that possibility), but they may often be at odds with these arrangements. And, depending on what other constraints (on knowledge, reasoning, etc.) we impose, we may still have the parties coming up with conclusions that are surprising to those upon whom they are modelled.[32]

This first approach has two variants. One indicates that we should take people as they are in daily life and model our contracting parties on the way people in the particular culture actually think and act. This would yield moral results different from the arrangements currently in force primarily when current arrangements were enforced or imposed by one group against the wishes of others—a result that would have great significance in evaluating systems of political oppression. The other variant of the realistic approach is to take actual people not as they currently are, but as they *aspire* to be. This second method might yield social criticism which calls for social and political arrangements different from the ones currently in force even if the current arrangements were consensual (though falling short of people's ultimate aspirations). In one sense, the American constitutional convention accomplished this sort of thing by creating a republic based on aspiration rather than on the then-existing practice.[33]

Rawls adopted the second of our three approaches to moral motivation, stating that the theory of justice was a part—perhaps the most significant part—of the theory of rational choice, and adopting a view that the contracting parties should be seen as players in game-theoretically constructed endeavors, motivated by their own self-interest[34] rather than by any given sense of fellow-feeling or community.

---

31. *See, e.g.*, A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); M. WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987); M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) [hereinafter SPHERES OF JUSTICE].

32. See J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1971) for development of the ideal speech situation as a way of removing parochial interests from discourse.

33. But this sort of exercise often rules certain areas out of bounds in the reform, as the constitutional convention did with slavery.

34. J. RAWLS, *supra* note 1, at 142-150.

But rational choice motivations need not be egoistic or self-centered. People's own projects and desires may include altruistic concerns for others: their families, neighbors, or famine victims in Ethiopia, for example. Most individual altruism does not presuppose or amount to a theory of justice or to a proposal for a solution to any of the problems a contractarian might want to address; and, as long as it does not, there is no paradox or circularity in attributing altruism to rational agents in a model that is being used normatively to resolve conflicts of interest. The point is simply that altruisms can clash as easily as (probably *more* easily than) egoisms; and, as long as they do clash, there is still room for game playing, bargaining, and agreement, understood in rational choice terms. The only restrictive assumption of the rational choice approach (and it *may* be artificial) is that once we have specified people's desires and projects, altruistic or egoistic as they may be, each person is assumed to take no *further* interest in the satisfaction or frustration of any of the others' desires and projects. There may be reasons, however, for taking a more restrictive approach than this. In *Morals by Agreement*, David Gauthier maintains that sociability

> becomes a source of exploitation if it induces persons to acquiesce in institutions and practices that but for their fellow-feelings would be costly to them. Feminist thought has surely made this, perhaps the core form of human exploitation, clear to us. Thus the contractarian insists that a society could not command the willing allegiance of a rational person if, without appealing to her feelings for others, it afforded her no expectation of net benefit.[35]

This is an independent theorem of justice which constrains the contractarian model. Gauthier, understandably enough, does not attempt to make a contractarian argument for the theorem.[36]

In Rawls's theory, the egoism of the imagined parties (if that is what it is) is mitigated by their lack of knowledge; they know nothing of their own desires except that they do possess some desires which are not necessarily shared by others. There are two ways of looking at this specification of ignorance. First, as we have already suggested, it may simply be one way of achieving the abstraction necessary to get contractarian arguments underway. Without some such assumption, the parties who are imagined to be consenting find themselves just where they were when the fight broke out. Secondly, such ignorance may be intended as an independent moral constraint, though one designed to cover procedure rather than outcome. On this reading, the lack of knowledge prevents rational contracting parties from taking into account things which mor-

35. D. GAUTHIER, *supra* note 1, at 11.

36. Presumably a convincing argument would have to be double-pronged, showing the convergence of restricted and non-restricted motivation on this theorem at a meta-level.

ally ought to be excluded from consideration. We shall return to this interpretation shortly.

Whether the contractarian chooses to adopt the moral motivations of people as these motivations currently exist, or as they exist in people's aspirations, or as they would exist if held by some abstracted set of rational actors, depends on the purpose and uses of the contractarian evaluation. If the point were to ask what an ideal society would look like, then taking the moral motivation of idealized rational actors as the basis may be sensible. This would make particular sense if one were engaged in a holistic contractarian construction. If the point were to achieve concrete political change in a particular context, however, then one of the more grounded methods might be preferable. Piecemeal contractarianism may fit more comfortably with considerations of the actual or aspirational motivations of the particular members of a particular social context if only because it would likely produce results more coherent in the current structure. The important point for our purposes here is to indicate that contractarianism as a method does not necessarily *require* some very abstract and stylized sense of who the contracting parties are and what their motivations might be, as Rawls's conception suggests. The approach may be used more modestly with more sociological fidelity and still be fully contractarian.

ii. Deliberation

The processes of reasoning attributed to the parties in a contractarian framework must be familiar and intelligible to those whose actions are ultimately to be guided or interests affected by the outcome of the contractarian argument. Otherwise, persons to whom the arguments will be addressed might see no match at all between their actual selves and the way it is suggested *they* might have deliberated under the hypothetical conditions. The reasoning must also be intelligible from a theoretical point of view, for the model of deliberation is invoked in a process of argument. This implies a degree of idealization, and again contractarians have usually looked to the perfect, instrumental rationality of rational choice theory as a model for the parties' reasoning. The parties are understood to be rational maximizers, seeking to enhance their net satisfactions under their knowledge, complete or incomplete, of the condition to which that maximization is subject. It is assumed that they reason consistently, that their preferences are coherent, that they can grasp complex decision problems, and so on. Though these assumptions are almost certainly idealized when compared to the processes of deliberation that most people actually use, there is no great worry from a liberal point of view about attributing them hypothetically to ordinary men and women, provided it can be shown that the idealized conditions represent, in a rigorous and articulate form, standards for reasoning that most peo-

ple strive, however implicitly, to attain.[37]

One obvious alternative—attempting to model exactly the actual processes of deliberation of ordinary people—would be theoretically very difficult. Conclusions would have to be inferred from evidence of something like small group experiments where analogous questions were posed to people deliberately under something like the requisite conditions. Some such experiments have been performed. For example, experiments conducted by Norman Frolich, Joe Oppenheimer, and Cheryl Eavey appear to show that real individuals, confronted with a choice of regimes under circumstances that approximate Rawls's original position, choose neither the maximin strategy of raising the floor as high as possible nor the expected value strategy of maximizing the average. Instead, groups of individuals overwhelmingly agree to maximize the average with a floor constraint, a strategy that favors utilitarianism only after the system provides contractarian guarantees against losing badly. Real individuals, it seems, are willing to trade off some of their average benefits in order to get a guarantee that they will not fall below a certain level. But they are not so risk averse that they would sacrifice any possibility of gain to be guaranteed the maximum possible floor.[38]

But does this tell us how people would actually decide in a situation of the sort that Rawls, for example, wants us to imagine? Certainly, there would be ethical problems with any experimentation that dealt with serious questions of justice. The theory of justice deals with the conditions under which people's lives are to be lived, life chances developed, and long-term well-being facilitated or frustrated. It is simply not open to a social science experimenter (unless she is a Mengele) to offer issues of this kind to real people under circumstances in which the issues will be taken seriously. There are obvious difficulties in extrapolating from a laboratory experiment where the participants know they will be paid and can return to their comfortable homes at night, to conclusions about how people would determine the fundamental basis of the distribution of wealth for the society in which they are to live.[39] Still, other indirect empirical evidence may be available.

But whether the empirical evidence is direct or indirect, it would be difficult to use it as a complete *substitute* for an intelligible model of reasoning in the original position, though it may provide helpful information about how such reasoning might proceed within a more general model. Without some such general model, we would have no basis for extrapolating material for our agreement except a purely inductive one:

37. For a more complete discussion of this point, see Waldron, *supra* note 10, at 127-150.

38. Frolich, Oppenheimer & Eavey, *Laboratory Results on Rawls's Distributive Justice*, 17 BRIT. J. POL. SCI. 1 (1987); Frolich, Oppenheimer & Eavey, *Choice of Principles of Distributive Justice in Experimental Groups*, 31 AM. J. POL. SCI. 606 (1987).

39. Clearly, these difficulties are most acute for holistic contractarianism—perhaps less of a problem for some piecemeal approaches.

this is how decision-makers have been observed to behave in the past. That may appear inadequate if the aim of the contractarian approach is to represent decision-making as a process of deliberation that is sensible to imagine as one's own and not just as a black box with input and output. We should remember, however, that although the most commonly used model to fill in this knowledge is a rational choice one, there is nothing in the contractarian logic which excludes other intelligible and coherent models of reasoning.

iii. Knowledge and the Conditions of Justice

What about various special constraints on the parties' knowledge and considerations in the original position? What about risk aversion, ignorance, neutrality, and the like? It has often been observed that contractarianism is an utterly Protean approach: any slight variation in the way in which deliberation is conceived to be conducted will yield substantial differences in the outputs obtained.[40] For example, Rawls is widely supposed to have assumed that the parties in his original position were risk-averse; vary that assumption, it is said, and his case against utilitarianism is significantly less substantial.[41] There are two things to be said about this alleged malleability.

First, whether one should incorporate assumptions about risk aversion, future discounting, etc., will depend partly on one's empirical sense of the persons whom one is modelling. In some societies, the people to be modelled may be very conservative; in others, they may be reckless; in others, there may be some mix of the two. In addition, there is the question, briefly discussed above, of how to make a model both intelligible and realistic. The golden rule for a contractarian is that the further her model is from people's own sense of who they are and how they feel they ought actually to make their decisions (not, be it noted, how they *do* actually make their decisions), the less appealing the contractarian argument as a whole will be to them in their political thinking. There is a trade-off then, as we have seen, between theoretical elegance and political conviction. Different people will make the trade-off differently, and the conclusion to draw from this is that one argument is more or less elegant,

40. For example, B. ACKERMAN writes in SOCIAL JUSTICE IN THE LIBERAL STATE 237 (1980), "It is just too easy to manipulate the definitions of chooser and choice set to generate a conclusion that suits one's fancy."

41. *See, e.g.*, R.M. Hare, *Rawls's Theory of Justice*, in READING RAWLS (N. Daniels ed. 1975). But this is a misreading of Rawls. As a matter of fact, there is no assumption in his argument that the parties are risk-averse. The argument against average utilitarianism centers around the idea that the risks it would involve are risks the parties *may* not take (for reasons connected with the strains of commitment), as opposed to risks they *would* not take. Insofar as there is an argument about risk aversion at all, it is to the effect that a rational strategy for a one-off bet on which all one's life prospects are riding is by no means easily discernible. *See* J. RAWLS, *supra* note 1, at 170-171; Waldron, *John Rawls and the Social Minimum*, 3 J. APPL. PHIL. 25 (1986).

or more or less appealing, than another—not that the whole approach is discredited by the differences.

And, here again, the *point* of contractarian evaluation should make a difference to our worries about the flexibility of the method. If the point of contractarian evaluation is to use the results as resources in political or legal debate, then the model will be more convincing the more it matches the circumstances in which the debate actually takes place. But, if the point is to determine ideal practices or to determine the abstract basis for reflective judgments about justice, then the conclusions will be more sensitive to small tinkerings with the assumptions and less compelling across different visions of political life. It does not follow that the conclusions are always meaningless or that they have no bearing on political debate. If there are good arguments in favor of adopting one set of assumptions over another, then the sensitivity of the conclusions to those assumptions is a matter on which the contractarian should pride herself. It shows the importance of having good arguments for the starting point of contractarian reasoning.

Second, those who criticize contractarianism for its adaptability, criticize it as though it pretended to be a single theory. But no such pretense is made except by those who want to use the label critically. Contractarianism is a type of approach and there are many different strategies of this type. These strategies have, as we saw earlier, a certain spirit in common and a certain framework. Those who think that bottom-line conclusions are all that matter in political philosophy and who are uninterested in the way such conclusions were reached will no doubt find these similarities irrelevant. Those who think otherwise may be more interested.

That conclusions are sensitive to assumptions tells us that we should pay some critical attention to the assumptions of contractarian models. One set of considerations, referred to by Rawls and others as "the circumstances of justice," may be sensible to take into account and model in the original position, if possible. These are the conditions of human life that define and sharpen the problems addressed by normative theory. They concern the sort of beings we are and the sort of environment we live in. They include not only the old standards of scarcity, mutual vulnerability, and limited altruism, but also the facts that each society has a history, that its inhabitants adhere to different ideals, that time and patience are not infinite, that there are limits to what people can bear, and so on. There is no point insisting that only *a priori* truths be included under this heading; these are empirical facts of human life, which may vary (and of which our knowledge and understanding may vary) from time to time and place to place.[42] We see no merit in the

42. For the circumstances of justice, see J. RAWLS, *supra* note 1, at 126-130; H.L.A. HART, THE CONCEPT OF LAW 189-195 (1961); D. HUME, A TREATISE OF HUMAN NATURE 484-501 (A. S. Bigge ed. 1888).

suggestion made popular by writers like Macpherson and Sandel that the contingency (and perhaps the unpleasantness) of these truths derogates from the interest of the theories that take them into account.[43] Nor—if we are convinced that they are true, and likely to remain true, for any society we may concoct—is there any point in relegating them (as Ackerman, for example, relegates mutual vulnerability and the strains of commitment)[44] to the realm of second best theory, and constructing a contractarian "core," so to speak, predicated on the hypothesis that they can be overcome. If the contractarian approach is to address real human problems, then the circumstances which define those problems must be modelled in the core. Again, the general point is that the less abstraction from the circumstances of political and social life, the more convincing the contractarian models will be. Assumptions that represent deviations from the world as we find it demand special justification in contractarian models.

One such assumption is the Rawlsian "veil of ignorance," which has attracted considerable critical attention. Rawls stipulated that the parties in his imagined "original position" were to deliberate as though they were ignorant of their abilities and preferences (they merely knew that they had *some* abilities and preferences) and of the particular features of their society.[45] From a strictly rational choice point of view, these restrictions must be modelled as a sort of amnesia, to avoid the patent irrationality of decision-makers failing to take into account some of the beliefs which they have.

Now this is obviously a significant abstraction from everyday political life, but there may be a good reason for it. Perhaps this restriction on knowledge captures our sense of the reasons that are relevant and irrelevant in moral argument: a view about relevant reasons may be represented for the purposes of moral theory as a constraint on deliberation.[46] The irrelevance of information about one's own role in a dispute may, as we have seen, be bound up with the distancing that the contractarian approach to dispute resolution necessarily involves. Or it may be bound up with one's sense of the problem being addressed: it is difficult to see why information about society's present structure should be considered relevant to a discussion of the structure that a society—any society, in Rawls's original formulation—*ought* to have. Of course, one will want to include whatever general information we have, including information

43. *See* C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 19 (1973); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 33 (1982).

44. B. ACKERMAN, *supra* note 40, at 21-24.

45. J. RAWLS, *supra* note 1, at 136-142. This restriction is often read to imply that all persons in the original position are the same. But this is not so: they know that others do not necessarily share their ideals.

46. This is roughly the way in which Ackerman treats the requirement of neutrality, which we will consider in a moment. B. ACKERMAN, *supra* note 40, at 8-11.

induced from our particular situation: if we have discovered, for example, that Keynesian intervention in an economy is self-defeating, that will no doubt be relevant. But the exclusion of strictly particular information—that we live within this system rather than some other—is a helpful way of getting us to focus on the radical nature of the question being posed. If the question posed is less holistic, however, the case for excluding particular information diminishes. If the question is of the piecemeal type and, for example, asks what would be a just abortion law for us, then information about the other background institutions we have (permissibility of contraception, availability of contraception and child care, history of gender oppression, and so on) is obviously relevant.

Eventually, though, the justification of restrictions on information or constraints on deliberation is a moral one. Even if such restrictions are simply ways of getting us to see the problem that is being posed, they are *eo ipso* ways of asking us to think morally and to cast our imaginations beyond a preoccupation with our own peculiar concerns. This indicates that the principles in question are likely to be quite deep and to lie near the root of the very impulse to do liberal political philosophy. To consider the interests and situations of others on a par with one's own, to refuse to accept as a justification of a regime the mere fact that one does very well under that regime while others suffer—these are principled attitudes. But they are not, so to speak, principles which are *optional* or *dispensable* in our tradition of political philosophy. They are intimately bound up with the attitudes that define that whole enterprise. Thus, although there may be controversy about whether a Rawlsian "veil of ignorance" gives best expression to this idea, there can be little dispute that *some* such idea must be represented *somehow* in a contractarian theory.

In *Social Justice and the Liberal State*, Bruce Ackerman imposes a further constraint: that the deliberating parties may not advance reasons which require them to assert that any one conception of the good is superior to any other.[47] This may be justified in similar ways. If a clash of ideals is the dispute the contractarian is addressing, then neutrality is bound up with the distancing that the approach necessarily involves. But if, in the end, it comes down to the morality of relevant reasons, neutrality may be more difficult to sustain as a matter of principle. It is certainly the case that liberal political philosophy requires one to be sensitive not only to the existence of a plurality of conceptions of the good, but also to conceptions that are rejected by the most populous or powerful group. But it is difficult to infer from this requirement a further

47. *Id.* at 8-11. Ackerman denies that his theory is contractarian. *Id.* at 6, 336 *et seq.* But his thought-experiment about colonists on a spaceship engaging in constrained dialogue to determine the distribution of advantages in a new world is sufficiently close to the spirit of the approach we outlined at the beginning to be worth considering here.

requirement not to use one's conception in constrained deliberation; such an absolute requirement would raise the question of whether there is a point to having a deeply held view about the good life at all, if it is not to be deployed on occasions like this.[48]

C. *Unanimity*

The nature of the contractarian exercise imposes certain constraints on decision-making. The parties are to look for a solution, since the problems addressed by this approach are practical and urgent. And the solution is to be unanimous, for one cannot be voted into a contract. If we are imagining an agreement by which a person will be bound or an agreement which makes it permissible to do certain things to that person, then it *must* be thought of as an agreement that commands that person's *own* consent, otherwise the link between individual consent on the one hand and obligation or legitimacy on the other hand is broken.

There are two points which are important about this requirement of unanimous agreement. First, there may be good arguments for leaving certain issues to be resolved by majority vote (either by the imagined contracting parties or by us in real life); but, if so, they must be arguments which can themselves be presented as securing unanimous support in the original position for that particular case. In other words, there must be unanimous agreement that a majority vote should settle an issue for a majority vote to count as legitimate in a contractarian framework. This will work more persuasively for some issues than for others.[49] Secondly, the contractarian is committed by her assumptions to drawing quite drastic conclusions from irreconcilable disagreements. If there is no solution which can secure unanimous acceptance on some issue, then there is no solution that can legitimately be enforced across the board. This may mean that there are some political problems for which there may be no morally acceptable answers in a particular population and that the only strategy to adopt consistent with contractarian evaluation is some form of pluralism or some form of federalism or secession.

We saw earlier that rational choice models may problematically underrepresent the concern for others' interests required by a liberal theory. The unanimity criterion bound up with the contractarian idea itself—the fact that one cannot be voted into a social contract—overcomes this difficulty. As we saw earlier, the idea of the social contract addresses individualized problems of obligation and legitimacy: what reason can be given to this person for why *she* should obey or for why force used against *her* is legitimate? Now, a rich and powerful person's satisfaction with the regime under which she benefits may be sufficient to generate

48. For further discussion, see R. DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 191-204 (1985) and J. RAZ, THE MORALITY OF FREEDOM (1986).

49. *See* J. RAWLS, *supra* note 1, at 195-201.

her own consent to it, but it cannot explain why others, who are less advantaged, should give their approval and submit to the same framework of rules. Preoccupation with one's own interests, therefore, is unlikely to be a way of legitimating a regime in which one proposes to benefit from the submission and deprivation of others.

Thus, suppose we consider Rawls's question of whether a regime organized around principles of average utility could command the consent of those who were to be subject to it in circumstances where there was reason to believe that a minority might have to be exploited for the greater average happiness. A veil of ignorance of the type Rawls proposed perhaps ensures that *nobody* would agree to such a regime for fear that she might turn out to be among the oppressed minority. So the regime is illegitimate. However, remove the veil of ignorance and the same conclusion—illegitimacy—can be obtained. Those who knew the circumstances that put them among the fortunate majority might be willing to consent to the regime, but those who had reason to fear that they would be in a minority would not. Since it is the essence of the contractarian approach that a regime is legitimated only by the consent of everyone subject to it—that is, everyone with respect to whom its rules are to apply and be enforced—the consent of the majority will not do. The regime we are imagining will not work if a minority is exploited, so if consent of the minority is not obtained in such a regime, the regime cannot be legitimated. Strictly speaking, then, the Rawlsian veil of ignorance is redundant: the very idea of a contractarian theory already models in its unanimity the reciprocal concern for others' interests that liberal political theory presupposes.

D. Positive and Negative Contractarianism

The final question about the internal mechanics of contractarian arguments concerns the conclusions the contracting parties are to be imagined reaching. We have already seen that the contracting parties may be imagined to be addressing questions of a wider or a narrower compass. But their answers may also vary in another way. They may be imagined to agree on a particular positive solution to a problem posed to them. Or they may only get as far as agreeing to rule certain possible solutions out. We shall call these alternatives *positive* and *negative* contractarianism respectively.

In positive contractarianism, some actual or proposed social rule is justified by reference to claims about what *would* have been agreed to in an "original position." The contract model lends it positive support. In negative contractarianism, the model is used primarily in a negative or critical way. It is used to show that a certain actual or proposed rule would *not* have been consented to in an "original position," thereby rul-

ing out certain things without necessarily ruling anything in.[50]

This distinction between positive and negative contractarianism cuts across the distinction between holistic and piecemeal contractarianism, and it is separable too from the issue of the completeness of the social conception that emerges from a contractarian argument. Rawls, in our classification, counts as a positive contractarian even though a complete social blueprint does not emerge from *A Theory of Justice* and even though his work leaves many issues quite unresolved (including, as we said earlier, the issue of property).[51] The fact is that Rawls poses a very abstract question—what are to be the basic principles of social evaluation?—and purports to give a complete and positive answer to that question. Any further questions are simply questions of which institutional arrangements in fact satisfy his principles given the circumstances of the society involved.[52] Thus, for example, Rawls concludes from his discussion that all social and economic inequalities are to be adjusted so that they work to the benefit of the least advantaged group; whereas a negative contractarian might be content to say that the least advantaged must never be allowed to sink below a certain level, leaving it open how and on what terms inequalities above that level were to be evaluated.[53]

As befits its modesty, negative contractarianism has a number of advantages. We saw earlier that a hypothetical contract can establish nothing about the obligations that people actually have but can only establish at most that a regime is legitimate.[54] A hypothetical contract *can*, however, be used to establish that people do not and cannot have an obligation of a certain sort. For if it is the case that no one would (or, better still, could) agree to a certain arrangement, then that arrangement is shown to be in principle incapable of commanding the sort of actual consent that might oblige somebody to submit to it in fact. The point can be put another way. Establishing in a hypothetical argument that an arrangement would or would not be agreed to is a way of establishing terms in which the reality of what purports, in actual life, to be consent to that arrangement can be impugned. To do so is not to insult the person whose consent is being impugned, for the question will usually only arise in circumstances where she wants to repudiate the alleged obligation anyway. Negative hypothetical contractarianism is therefore a very

50. Actually, the distinction is just a little more complicated than this, for the conclusions of a negative contractarian argument may be represented in an actual rule (for example, a constitutional rule about lower order rules that are not to be made, or political acts that are not to be undertaken). A better way to put the matter would be that positive contractarians use their method to solve social problems; negative contractarians use it only to constrain their solutions.

51. *See supra* note 6 and accompanying text.

52. His conception is supposed to do all the evaluative work that utilitarianism has been used to do by others.

53. *See* Waldron, *supra* note 41.

54. *See supra* notes 10-14 and accompanying text.

powerful tool of political criticism.[55]

Hypothetical consent, then, can take either the positive form of showing how regimes with particular content may be legitimated or the negative form of showing how particular obligations could not possibly arise. Either way, hypothetical consent can play a major role in political evaluation.

III. The Uses of Contractarianism

It is not our intention in this paper to consider what specific conclusions might be reached by parties who are imagined to be deliberating on some issue in any of the original positions we have discussed. But the contractarian method will be used to generate *some* propositions about the right or the best or the just way to run a society or some aspect of it. In this final section we want to say something about the ways in which these conclusions should be used.

The contractarian method is likely to be used against the background of some political dispute—some discussion in a community about what should be done. It will not be the only method of argument being deployed in that discussion, but it is always tempting for the contractarian to use her method in a rather authoritarian way—coming down from the mountain, Moses-like, with the results of her thought experiment and announcing to the assembled masses that there is no need for any further argument. Since the assembled masses are likely to resent this attitude, it may be worth considering some of the ways in which they might find it offensive. Two sources of resentment are particularly important. People may claim that the abstraction of the contractarian's thought experiment fails to capture the local sense of "the way things are done around here." And they may complain that the contractarian's announcement wrongly preempts their discussion—as though hypothetical deliberations in an imaginary forum could somehow be a substitute for democratic decision making in a real one. We will take each of these worries in turn.

A. Local Morality and Contractarian Solutions

Contractarian moral theory may appear to substitute abstract universal judgments for local ones, and those who believe that asking what is right in general misses the essentially local nature of answers to that question may be skeptical of this method. Rawls's theory has been criticized for winding up, after all of its abstraction and argument, with a structure of institutions that looks very much like the contemporary

55. It was, in fact, the main form of the contractarian method used by John Locke. *See, e.g.*, J. Locke, *supra* note 13, at 398-409. *See generally* R. Tuck, Natural Rights Theories: Their Origin and Development 143-155 (1979).

United States, and this has been thought to pose special dangers for the application of the method elsewhere.[56] Some moral relativists may see contractarian theory as threatening moral imperialism in cultures where American values do not apply. And they worry about the nonrelativist character of contractarianism as a result.[57]

The opposition between relativist and nonrelativist moral theories has often been misunderstood. Nonrelativist moral theories do not necessarily maintain that all societies in all times and places are governed by the same substantive moral rules. It would be possible for a nonrelativist to argue in favor of the general rule: "when in X, do as the X-ians do," generalizing from the case of Rome. This can be adopted as a *general* moral framework, but there need be nothing universal in its implication across societies. The theory is an indexical one, not a relativist one, because it asserts that this rule for determining permissible content should be followed no matter what the setting. Some nonrelativist moral theories, then, may leave room for quite a lot of the local morality without losing their generality or universalizability. Contractarianism is one such theory. How much local content appears in the outcome depends crucially on how the model is specified. But, as we have seen, there are several ways in which the model can be left open to local input.

One way to make room for local content is to adopt the negative rather than the positive variety of the theory. While it is true that a contractarian theory of a detailed and positive kind may propose a blueprint for the organization of a society—one which might have the potential to (but would not necessarily) overwhelm local understandings—negative contractarianism merely sets the outer boundaries of political debate and leaves a great deal of room for local decision-making within those limits. Unless there were tremendous hostility to individual consent as a legitimating force, the negative contractarian view would not *necessarily* undermine local understandings. But it would be precisely in situations where the local understandings excluded such empowerment of the individual that the contractarian would want to say more than that each culture should operate on its own terms. Negative contractarianism does not pose much of a constraint on the organization of social and political life, but it does impose some, and the point where that bit of constraint kicks in is precisely where liberals have actually wanted to draw nonrelativist conclusions about the organization of different societies.

Another way to allow for local understandings is to adjust the image one has of the contracting parties, the amount of knowledge they have, and the way in which they reason. If the parties are to be modelled after those we find in abstract game-theoretic encounters, the contractarian

56. *See, e.g.*, Nielson, *Justice and Class* in JUSTICE AND ECONOMIC DISTRIBUTION (1978).
57. *See generally* M. WALZER, SPHERES OF JUSTICE, *supra* note 31, Chs. 1, 2, 13.

thought experiment will incorporate less local understanding than if the parties are conceived of as more like the real people found in a particular social setting. Similarly, if the parties are imagined not to know things that most people in a particular political culture do know or are thought to reason in a way that is unusual or undesirable in the local setting, the model will have less local connection and probably less political appeal. In this article, we have tried to show that there is a series of choices to be made on these questions. Contractarianism as a general approach can include a variety of portrayals of people, the knowledge they have, and the sort of reasoning that they use—portrayals which may be closer to or more distant from the local norms. Just how the parties are to be imagined depends on the purposes of the theorist and the uses to which the conclusions will be put.

Any contractarian theory will also presuppose a view of how one interprets the *facts* of situations to which contractarian solutions would be relevant. Perception itself is not universal; some cultures see as central features of situations thought to be peripheral or irrelevant by others. Moreover, perceptions may vary within a culture in systematic ways. The perceptual frame the contractarian chooses (whether, for example, she chooses the perceptual frame of those who are disadvantaged or of those who represent a long-standing set of traditions) will influence the degree of local content in the thought experiment as well.[58]

All of these are choices about how the thought experiment is done. But we should also consider what happens with the results after the thought experiment is completed. Contractarian results can be used as a *resource* in political debate—one among many such resources that may be present in a particular context. Its use may be trumped by considerations of tradition or utility, by exercises of power or by a majority vote of current participants with their unretouched preferences. The existence of a contractarian argument does not guarantee its success. Those who would live under such a set of institutions or rules or policies need to be convinced that their actual consent should follow their hypothetical consent. And, in particular local contexts, other factors may sway actual consent.

Contractarianism does not lead to single right answers that are true for all times and places. It may have more or less local variation, depending on the specification of the model and the uses to which it is put. As a moral stance, contractarianism is in its general structure tolerant of a wide variety of internal variations. Contractarians with different choices for the questions outlined in Part II of this article may well produce different answers to moral problems.

58. For an exploration of this problem of point of view, see Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987); Scheppele, *Telling Stories*, 87 U. MICH. L. REV. 2073 (1989).

In his more recent writings, John Rawls has offered a much more relativist interpretation than we have, not only of the particular choices a contractarian may make, but of the contractarian enterprise itself:

> We are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances. We want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions. We look to ourselves and to our future, and reflect upon our disputes since, let's say, the Declaration of Independence. How far the conclusions we reach are of interest in a wider context is a separate question.[59]

If this is accepted, it is a mistake to apply the spirit of the contractarian enterprise to societies that do not share our history or our concerns, even given the ample room that the approach leaves for local variation and local understandings. We have our doubts about whether contractarians should be so modest, though we cannot fully consider the issue here. Two points should be made, however. First, it may not be in fact open to us to restrict the range of our moral thinking in this way. Societies are no longer hermetically sealed off from one another in either their thought or the impact of their social arrangements. And the modern democratic societies that Rawls wants to concentrate on are nowadays in effect *microcosms* of world society: they include hundreds of cultures and subcultures, representing more or less all the social forms that there are, and the task of finding common principles for them all cannot be avoided.[60] Secondly, this relativism does less than justice to the nature of our own moral thinking. We cannot have the thoughts we do in our culture about the relation between, say, autonomy, obligation, and coercion while restricting their application to one particular society. To the extent, for example, that those thoughts are grounded in Kantian concerns, their application is necessarily universal. To say, therefore, that the contractarianism which embodies these thoughts is to apply only to our local arrangements and may have no application to what *we* think beyond them, is to distort *our* meanings and misrepresent *our* moral thoughts.[61]

B. Contractarianism and Democracy

Contractarianism models a form of decision-making. It asks us to imagine both a particular sort of context in which decisions are made and

---

59. *Kantian Constructivism*, *supra* note 3, at 518. *See also Justice as Fairness*, *supra* note 3, at 224-225.

60. This is particularly true of America and increasingly of Britain.

61. *See* J. WALDRON, NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 151-209 (1987); Waldron, *Particular Values and Critical Morality*, 77 CALIF L. REV. 561 (1989).

a particular set of procedures for making those decisions. The idea is that everyone participates, everyone's interests are consulted, and everyone strives to get a sense of what it is like to be each of the others. No elite imposes an ideal solution: the right is what emerges from a discussion among equals. Because of the way these things are specified, democracy emerges as a privileged form of governance on the contractarian account. The conditions for contractarian decision-making and the conditions for democracy are so close as to make their convergence seem deliberate. Contractarianism may reproduce what an ideal democracy operating in ideal circumstances would do.

But not all forms of democracy will satisfy these conditions of contractarianism. The contingencies of democratic politics leave issues of principle at the mercy of the play of political forces; and in its majoritarianism, democracy seems at odds with the contractarian idea that the consent of *each person* is needed before *she* can be said to have assumed an obligation or before power can legitimately be exercised over *her*. Clearly, a democracy that resolved issues by majority vote (or worse still, by a majority vote among representatives) would be less like a contractarian original position than one that resolved issues after a discussion of various arguments ending in unanimous agreement. Majority votes allow minorities to go unsatisfied in a way that would block contractarian solutions. Discussion and unanimous agreement are less typical of actual democracies, but more like some democratic ideal. Indeed, the model of democracy that best fits contractarianism may well be more like the Tanzanian theory of a one-party state (based on consensus rather than factions) than the Madisonian theory of head-counting.[62] The point here is that democracy can be seen sometimes as a trial of strength where the outcomes depend on which faction has the most adherents and sometimes as a process of deliberation where the outcomes depend on which view is most convincing. Only conceptions of the latter kind answer to contractarian concerns.

Still, even on the most attractive model of democracy, there is tension between contractarianism as a mode of thought and democracy as an actual practice. The last question we want to raise is how much room is left for actual democratic decision making once the contractarian has delivered her conclusions? Once again, this depends on the sort of contractarian analysis one is using. A positive contractarian may leave very little to be resolved through democratic processes; after all, if the right answer can be found in reasoning through hypothetical cases, there is not much for actual decision-makers to do. This posed an embarrassing problem for Rawls—never resolved in his theory. One of the positive

62. For the contrast, see the discussion in Nursey-Bray, *Consensus and Community: The Theory of African One-party Democracy*, in DEMOCRATIC THEORY AND PRACTICE (G. Duncan ed. 1983).

conclusions of his contractarian theory was that people should have the greatest rights of political participation consistent with an equal right for all. This principle was among those ranked lexically prior to the Difference Principle which was to govern and constrain social and economic inequality. So, if people actually vote to use principles other than the Difference Principle to deal with social and economic inequality, surely that vote should prevail over the Difference Principle (which was also reached by contractarian reasoning). But, then, what is the point of contractarian reasoning once political rights, and their priority, have been established? Rawls's answer was to express a hope that political procedures could be adjusted so that outcomes consonant with the Difference Principle would be more likely.[63] But this seems to lose faith with the priority of the principle of equal liberty also, particularly if these adjustments take the form of constraints on participation.

It seems to us that there are two connected ways in which a contractarian may avoid such difficulties. She cannot avoid them by denying rights of political participation: such rights, as we have seen, are so congruent with the contractarian approach, that it is incredible to suppose they would not emerge as conclusions. But clearly a move from positive to negative contractarianism makes things easier. Negative contractarianism allows any solution as long as it fits within certain boundaries; it finds only what may *not* be done and is indifferent among solutions which have been ruled in, thereby providing an obviously greater opportunity for democratic decision-making.[64] Its aim would be to mirror, in other words, democratic citizens' own sense of the alternatives available that are clearly unacceptable.

But the second and connected point goes more deeply. It may well be that one of the uses of contractarian argument is not to preempt the exercise of democracy, but rather to give people an account of how their democratic decision process might go. Contractarian accounts may be used as *resources* in actual political debate, attempting to get real citizens in a democratic society to adopt the attitudes of contracting parties, to learn to think impartially about the conflicts which confront them, to find solutions to political deadlocks that do not just represent the balance of competing interest groups. Contractarianism asks us to take a special attitude toward democratic decision-making—to see it not as an opportunity for voting our interests and trying to get ahead, but rather as a way of respecting the plans and hopes of others while respecting our own and of realizing that others have legitimate claims to make even if their inter-

63. J. RAWLS, *supra* note 1, at 195-201, 221-234.

64. One might argue that constitutionalism can be a form of contractarianism on this account, since constitutions specify the moral boundaries within which democratic processes may operate. If the specific constitutional constraints are those for which plausible contractarian arguments can be given, then a constitutional democracy may embody a negative contractarian approach.

ests are different from ours. It asks us to be compassionate and understanding, not petty and narrow-minded. It establishes impartiality as a way of respecting other persons. If we are asking why people should take any notice of a contractarian, something like this may ultimately provide our answer.