

Phil 115, May 25, 2007
Justice as fairness as reconstruction of the social contract

Rawls's description of his project:

I wanted to work out a conception of justice that provides a reasonably systematic alternative to utilitarianism, which in one form or another has long dominated the Anglo-Saxon tradition of political thought. The primary reason for wanting to find such an alternative is the weakness, so I think, of utilitarian doctrine as a basis for the institutions of constitutional democracy. In particular, I do not believe that utilitarianism can provide a satisfactory account of the basic rights and liberties of citizens as free and equal persons, a requirement of absolutely first importance for an account of democratic institutions. I used a more general and abstract rendering of the idea of the social contract by means of the idea of the original position as a way to do that (xi–xii, preface to the revised edition).

Questions:

- How does the original position “generalize and carry to a higher level of abstraction the traditional conception of the social contract” (3)?
- How by doing so, does it provide the basis for an alternative to utilitarianism?

The “traditional conception of the social contract”:

An example: John Locke’s *Two Treatises of Government*.

Ch. I: Locke begins by summarizing the *First Treatise*, an argument against Sir Robert Filmer.

- Filmer was a proponent of divine right, the view that legitimate political authority is bestowed by God. According to Filmer, God originally granted to Adam the right to rule over his children and the world, which then passed to Adam’s heirs.
- Locke’s conclusions are
 - (i) that Adam himself had no such right to rule,
 - (ii) that even if he had, his heirs had no such right,
 - (iii) that even if his heirs had such a right, there is no way to determine an heir in certain cases, which must have often have arisen in the past, and
 - (iv) that even if all of these problems are waived, there is no way to determine who among those presently alive is heir: the eldest in eldest line of Adam’s descendents.

Ch. II: “To understand political power right,” Locke writes, “we must consider what State all Men are naturally in.” Roughly, “natural”=“prior to consent.”

By nature, men are “free” and “equal.”

- *Not* that there are *no* rules that legitimately constrain what they do. Even in the state of nature, men are bound by *divine* law, the “law of nature.”
- Men are not bound by *man-made* laws. They can do as they think best, within the bounds of the law of nature, without having to ask for any human being’s permission.

Locke’s argument for the law of nature and the right to punish:

- Because God created us, we are his property.
- Because we are God's property, he has the sole right to decide what can be done with us.
- There is no evidence that God delegated this right to others.
 - First, God made men roughly equal in their natural abilities.
 - Second, God never announced that some were to rule over others.
- Therefore:

The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure. And being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of Creatures are for ours. Everyone as he is *bound to preserve himself*, and not to quit his Station willfully; so by like reason when his own Preservation come not into competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, of what tends to the Preservation of the Life, the Liberty, Health, Limb, or Goods of another (271).
- Since these requirements would be impotent if there were no means to enforce them, we conclude that God intended someone to have the right to enforce them.
- Since we are all equal, however, God could not have intended someone to have natural rights that the rest of us lacked.
- So God must have intended for each of us to have this same right. Which is to say that the Law of Nature gives every individual the right to punish those who violate it.

If men are *naturally* free and equal, then how can political authority ever be legitimate? If men *consent* to it.

There are certain “inconveniences” of the state of nature from which only political authority promises relief. Briefly put, the inconveniences are due to the fact that each of us has the right to punish violators of the law of nature. Vigilantism threatens to spiral out of control.

Locke imagines a two-stage process for remedying these inconveniences of the state of nature. *The first stage* is a social compact: a unanimous agreement to join in one commonwealth for the purpose of establishing a political order that will remedy the inconveniences of the state of nature. We all agree to accept whatever political order is chosen by a majority of us. This involves giving up our individual rights to punish and undertaking to assist the political order in its execution of the law of nature.

The second stage is an agreement between the people—the commonwealth constituted in the first stage—and its government. The people *lend* the government certain powers, on the condition that they be exercised exclusively to remedy the inconveniences of the state of nature.

The people reserve the right to change the government, should it improperly exercise its power.

This process gives Locke a criterion of *legitimate* government. A political regime is legitimate if and only if

- (i) it *could* have been consented to from
- (ii) a position of natural freedom and equality
- (iii) in a way which does not violate the law of nature.

Let us call this kind of imaginary consent “*legitimizing consent*.”

Legitimate government, for Locke, is a necessary, but not sufficient condition of political obligation. There are many legitimate governments to which we do not have political obligation.

For political obligation we also need “*obligating consent*.”

- There are two kinds of obligating consent, for Locke: “express consent” and “tacit consent.”
- Express consent is the more demanding of the two, in two senses. First, it takes more to give express consent. It requires some explicit, public announcement. Tacit consent, by contrast, is given by continuing to reside in the territory of a political regime.
- Second, express consent commits one to more. In giving express consent, one joins a community, making oneself subject to its regime in perpetuity. In giving tacit consent, one makes oneself subject to the regime for only so long as one resides in its territory.
- The important point, however, is that in both cases some kind of voluntary act is necessary for political obligation.

How is Rawls’s original position related to Locke’s “traditional social contract”?

Similarity: In both cases, an answer to a political philosophical question is justified by presenting it as the choice of free and equal persons.

Differences:

1. The objects of Rawls’s choice are *principles of justice*, which tell us when social institutions are just. The objects of Locke’s choice are *particular forms of government*, in the case of legitimating consent, and *particular governments*, in the case of obligating consent.
2. Rawls’s choice is *hypothetical*, not *actual*. What matters is what the parties would choose, not what anyone has actually chosen. Legitimizing consent is also hypothetical. But obligating consent is actual.
3. Rawls’s choice is *nonhistorical*. It could not take place, and even if it could, it would not matter. Both legitimating consent and obligating consent, by contrast, are historical. Although legitimating consent is hypothetical, it is still historical. Although it does not matter whether it actually did happen, it is important that it could have happened. It could have taken place, in real time, with real people, with all of their preexisting

interests and advantages, and with all of the bargaining power that attends those advantages.

Why this matters:

- Agreements are fair only if they are arrived at in fair conditions.
- So in order to know whether a historical social contract itself was fair, we would need to know whether the conditions in which it was reached—the basic structure prevailing at the time—were fair.
- So we need a way to apply the idea of the social contract to the basic structure itself. This is what the original position is supposed to give us, and this is why it is nonhistorical.

How Rawls's account of political obligation differs from Locke's

First, as you read in §§18–19, 51–52, Rawls does not think that all political requirements are voluntarily undertaken. There are two kinds of political requirements, for Rawls.

- There are political obligations, strictly speaking, which stem from the “*principle of fairness*,” and which are *voluntarily undertaken*. The principle of fairness “holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair)... and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests” (96). This principle may explain the political obligations that people have in virtue of adopting particular offices, such as accepting a judgeship.
- There is the *natural duty* “to support and comply with just institutions that exist and apply to us,” which we have *whether or not we have performed any voluntary act*. Since most citizens do not give any relevant kind of consent, most citizens have only the natural duty to support and comply with just institutions that exist and apply to them.

Second, between Rawls's and Locke's accounts of political requirement is that Rawls believes that the principles that govern both our voluntary obligations and nonvoluntary, natural duties are *chosen in the OP*.

- For Locke, our express or tacit consent satisfies a condition of an independently justified principle of political obligation.
- The choice in the OP, by contrast, is not meant to satisfy a condition of an independently justified principle of political obligation. Instead, the choice in the OP is, in part, a choice of certain *principles of political requirement*—the principle of fairness and the duty of justice—and it is meant to show, among other things, that those principles of political requirement are the *correct* principles.
- Whether the conditions of those principles of political requirement are satisfied in any particular case is a *different question*. It turns on whether we have voluntarily accepted the benefits of just institutions, in which case we have a duty of fairness to do our part within those institutions, or whether the institutions that apply to us are just, in which case we have a natural duty to support them.

What role does the OP play in Rawls's theory? How is the role of the OP in Rawls's theory related to the role of the social contract in the tradition?

Dworkin asks: What role does the OP play in Rawls's theory?

Dworkin's proposal: the OP is meant to show that it is fair to hold people to the terms of the agreement, that one is entitled to demand that they comply with the principles of justice.

- If we understand Rawls's use of the OP in this way, Dworkin reasons, then we understand him to be assuming that "because a man would have consented to certain principles if asked in advance, it is fair to apply those principle to him later, under different circumstances, when he does not consent."
- "But that is a bad argument," Dworkin continues. "Suppose I did not know the value of my painting on Monday; if you had offered me \$100 for it then I would have accepted. On Tuesday I discovered it was valuable. You cannot argue that it would be fair for the courts to make me sell it to you for \$100 on Wednesday."
- Moral: Merely hypothetical contracts do not bind.
- The reply to Dworkin is that, for Rawls, the role of the choice in the OP is *not* to show that some condition for having political obligations is satisfied.

But then what role does the OP play, if *not* this role?

The OP is, Rawls says, "a device of representation."

- The original position is meant to represent certain fundamental conceptions of persons and society. We conceive of persons of free and equal. We conceive of society as a fair system of cooperation between persons who are free and equal.
- The question is, then, what follows from these conceptions? What, exactly, do they imply about justice?
- If we view society as a fair system of cooperation between persons who are free and equal, then a natural answer is that principles of justice will be fair terms of cooperation between free and equal persons. How do we determine what these fair terms of cooperation between free and equal persons are?
- Consider what terms of cooperation free and equal persons would choose. This is what the OP is supposed to represent.

If we view the OP as a device of representation along these lines, then we can see a deep affinity with the traditional social contract.

- Both the OP and the traditional social contract are meant to provide answers to questions that arise once we view *persons as free and equal*.
- Locke's social contract is meant to explain how political authority can arise when persons are naturally free and equal.
- The OP is meant to show what conception of justice follows from viewing persons as free and equal.
- This is part of what Rawls has in mind when he says that the OP "generalizes and carries to a higher level of abstraction the traditional conception of the social contract."

Recall that Rawls's aim is to provide a systematic alternative to utilitarianism.

- On Rawls's diagnosis, the source of the problem with utilitarianism is its fundamental conceptions of persons and society. Utilitarianism fails to take seriously the distinction between persons, and it views society as a single system of desire.
- To find an alternative to utilitarianism, then, we need different ways of understanding persons and society.

- Rawls proposes that we replace the utilitarian conception of society as a single system of desire, which fails to respect the distinction between persons, with a conception of society as a fair system of cooperation.
- Do these alternative conceptions of society and persons actually provide a systematic alternative to utilitarianism?
- We need to know *what* these alternative conceptions—which at first glance seem abstract and indeterminate—imply.
- The role of the OP is to *determine* what these alternative conceptions imply. We determine what principles of justice are implied by the conception of society as a fair system of cooperation among free and equal persons by considering what principles of justice would be chosen by persons in a situation that is fair to them as free and equal.

That is, Rawls hopes that the OP will be, as it were, the capstone of a bridge between our particular judgments about justice and our fundamental conceptions of persons and society:

Our particular judgments about justice (e.g., slavery is unjust)
are accounted for by the

two principles,
which would be chosen in the

original position,
which is a device of representing (i.e., a way of showing what follows from)

our fundamental conceptions of persons—as free and equal—and of society—as a fair system of
cooperation.