

6. THE CASE FOR EQUALITY / JOHN RAWLS

Most of us Americans never signed a social contract. In fact, the only people in the United States who have actually agreed to abide by the Constitution (public officials aside) are naturalized citizens—immigrants who have taken an oath of allegiance as a condition of their citizenship. The rest of us are never required, or even asked, to give our consent. So why are we obligated to obey the law? And how can we say that our government rests on the consent of the governed?

John Locke says we've given tacit consent. Anyone who enjoys the benefits of a government, even by traveling on the highway, implicitly consents to the law, and is bound by it.¹ But tacit consent is a pale form of the real thing. It is hard to see how just passing through town is morally akin to ratifying the Constitution.

Immanuel Kant appeals to hypothetical consent. A law is just if it could have been agreed to by the public as a whole. But this, too, is a puzzling alternative to an actual social contract. How can a hypothetical agreement do the moral work of a real one?

John Rawls (1921–2002), an American political philosopher, offers an illuminating answer to this question. In *A Theory of Justice* (1971), he argues that the way to think about justice is to ask what principles we would agree to in an initial situation of equality.²

Rawls reasons as follows: Suppose we choose the principles to govern our collective contract. What principles would we choose? It's difficult to agree. Different people would be reflecting their various interests, moral and political positions. Some people are rich and some are poor and well connected; others, less so. Some are members of racial or religious minorities; others, not. We might reach a compromise. But even the compromise would likely reflect the greater power of some over others. There is no social contract arrived at in this way would be a just one.

Now consider a thought experiment: Suppose we are to choose the principles, we don't know our position in society. Imagine that we choose behind a "veil of ignorance" that temporarily prevents us from knowing anything about our position we are. We don't know our class or gender, our political opinions or religious convictions. Nor do we know our advantages and disadvantages—whether we are a well-educated or a high-school dropout, born to a successful family or one. If no one knew any of these things, we would be in an original position of equality. Since no one would be in a gaining position, the principles we would agree to would be fair.

This is Rawls's idea of the social contract: we choose principles in an original position of equality. Rawls asks what principles we—as rational, self-interested persons—would choose if we found ourselves in that position. He does not assume we are motivated by self-interest in real life; only by self-interest and religious convictions for purposes of the thought experiment. What principles would we choose?

First of all, he reasons, we would not choose principles that would put the veil of ignorance, each of us would think of ourselves as if we wind up being a member of an oppressed minority.

Rawls reasons as follows: Suppose we gathered, just as we are, to choose the principles to govern our collective life—to write a social contract. What principles would we choose? We would probably find it difficult to agree. Different people would favor different principles, reflecting their various interests, moral and religious beliefs, and social positions. Some people are rich and some are poor; some are powerful and well connected; others, less so. Some are members of racial, ethnic, or religious minorities; others, not. We might settle on a compromise. But even the compromise would likely reflect the superior bargaining power of some over others. There is no reason to assume that a social contract arrived at in this way would be a just arrangement.

Now consider a thought experiment: Suppose that when we gather to choose the principles, we don't know where we will wind up in society. Imagine that we choose behind a "veil of ignorance" that temporarily prevents us from knowing anything about who in particular we are. We don't know our class or gender, our race or ethnicity, our political opinions or religious convictions. Nor do we know our advantages and disadvantages—whether we are healthy or frail, highly educated or a high-school dropout, born to a supportive family or a broken one. If no one knew any of these things, we would choose, in effect, from an original position of equality. Since no one would have a superior bargaining position, the principles we would agree to would be just.

This is Rawls's idea of the social contract—a hypothetical agreement in an original position of equality. Rawls invites us to ask what principles we—as rational, self-interested persons—would choose if we found ourselves in that position. He doesn't assume that we are all motivated by self-interest in real life; only that we set aside our moral and religious convictions for purposes of the thought experiment. What principles would we choose?

First of all, he reasons, we would not choose utilitarianism. Behind the veil of ignorance, each of us would think, "For all I know, I might wind up being a member of an oppressed minority." And no one would

want to risk being the Christian thrown to the lions for the pleasure of the crowd. Nor would we choose a purely laissez-faire, libertarian principle that would give people a right to keep all the money they made in a market economy. "I might wind up being Bill Gates," each person would reason, "but then again, I might turn out to be a homeless person. So I'd better avoid a system that could leave me destitute and without help."

Rawls believes that two principles of justice would emerge from the hypothetical contract. The first provides equal basic liberties for all citizens, such as freedom of speech and religion. This principle takes priority over considerations of social utility and the general welfare. The second principle concerns social and economic equality. Although it does not require an equal distribution of income and wealth, it permits only those social and economic inequalities that work to the advantage of the least well off members of society.

Philosophers argue about whether or not the parties to Rawls's hypothetical social contract would choose the principles he says they would. In a moment, we'll see why Rawls thinks these two principles would be chosen. But before turning to the principles, let's take up a prior question: Is Rawls's thought experiment the right way to think about justice? How can principles of justice possibly be derived from an agreement that never actually took place?

The Moral Limits of Contracts

To appreciate the moral force of Rawls's hypothetical contract, it helps to notice the moral limits of actual contracts. We sometimes assume that, when two people make a deal, the terms of their agreement must be fair. We assume, in other words, that contracts justify the terms that they produce. But they don't—at least not on their own. Actual contracts are not self-sufficient moral instruments. The mere fact that you and I make a deal is not enough to make it fair. Of any actual contract,

it can always be asked, "Is it fair, what they question, we can't simply point to the agreed independent standard of fairness.

Where could such a standard come from? I think, from a bigger, prior contract—a contract that all constitutions are open to the same challenge. The fact that a constitution is ratified by the people does not mean its provisions are just. Consider the U.S. Constitution. In all its many virtues, it was marred by its acceptance of slavery that persisted until after the Civil War. The Constitution was agreed to—by the delegates in Philadelphia—was not enough to make it just.

It might be argued that this defect can be corrected by consent. African American slaves were not consulted at the Constitutional Convention, nor were women, who did not vote until more than a century later. It is certainly true that a representative convention would have produced a different constitution. But that is a matter of speculation. No actual constitutional convention, however representative, can guarantee fair terms of social cooperation.

To those who believe that morality begins with consent, this may seem a jarring claim. But it is not. People often question the fairness of the deals people make, especially in light of the contingencies that can lead to better deals. You may be a better negotiator, or have a stronger bargaining position. You may know more about the value of the things being negotiated. The words of Don Corleone in *The Godfather*, "I'm not a doctor, but I can't refuse," suggest (in extreme form) that, to some degree, over most negotiations.

To recognize that contracts do not automatically produce justice doesn't mean we should violate them whenever we please. We may be obligated to fulfill