

by "balancing" conflicting interests that exist whether or not the right is established, they in effect ignore the right.

To the charge that they fail to take rights seriously, utilitarians may reply as follows. Experience shows that people are much better off in the long run if a right such as free speech is established and protected by the government. Once it is established, officials have an obligation to protect it. It is useful, from the standpoint of the general welfare, to establish and enforce some rights.

There is force to this reply, since institutions that are justifiable from a utilitarian perspective would most likely establish and enforce some rights. But the utilitarian reply is nevertheless unsatisfactory, for two distinct reasons.

In the first place, while it is plausible to maintain that a public official is under an obligation to discharge the public trust she has accepted, which includes respecting established rights, no such obligation automatically flows from a utilitarian approach to decision-making. A utilitarian official is bound by her theory to permit interference with the exercise of a right whenever the general welfare would be served by such a course of action. She would no doubt often respect rights that ought to be respected, but she would also accept arguments for infringing rights that ought not to be accepted. An implication of the right of free speech, for example, is that speech should be protected *even when* the net cost of doing so (such as the cost of providing police protection for unpopular speakers) is greater than the net cost of denying it. But a utilitarian cannot accept this.

In the second place, while it may be true that people are better off in the long run if such a right is established and protected, this way of looking at the issue ignores other possible reasons for having and respecting legal rights. It ignores the idea that the individual has an *independent* moral right to speak his mind on political matters — a right that may or may not be acknowledged by the law — and that a government *wrongs* those whose speech it limits in order to promote welfare. In a similar way, it ignores the idea that

certain institutions, such as slavery, may be unjustifiable because they violate the rights that people have independently of the law.

Principles of justice

The criticisms of utilitarianism that we have sketched involve two important notions: equality and rights. When assumed to be independent of utilitarianism, these are usually treated as considerations of justice.

Justice may be conceived in a wide or a narrow sense. In its wide sense, it represents an overall judgment of moral appraisal. Utilitarianism can be understood as a theory of justice in this sense, one that makes all moral appraisal subordinate to the service of welfare. But we also use the idea of justice to refer to a specific virtue of actions, individuals, and institutions. In this narrow sense, justice is distinguished, for example, from mercy and benevolence.

Utilitarianism has no clear theory of justice in the narrow sense, and utilitarians have generally neglected this aspect of morality. Some utilitarians have suggested that the specific virtue of justice amounts to decisions made uniformly or according to rule. This is plausible when justice concerns the application of rules to particular cases, but it does not seem an adequate conception of the justice of rules themselves or of social institutions more generally.

A traditional approach to justice in the distribution of goods, derived from the Greek philosopher Aristotle (384–322 BC),⁴⁸ maintains that goods should be distributed to individuals on the basis of their relative claims. This idea provides no single theory but rather a framework for comparing different conceptions of social justice. Thus one might hold that A and B should receive goods proportioned to their relative degrees of moral virtue, their contribution to the social pool of goods, their respective needs, and so on. Egalitarianism (as we have understood it so far) can then be seen as a theory of distributive justice which maintains that each person has an equal basis for claiming a share of goods. This approach leaves

fundamental questions unanswered, such as what goods are properly subject to distribution and how to decide the proper basis for distribution.

A plausible account of justice was suggested by the English philosopher John Stuart Mill (1806–79), who held that moral conduct consists in respecting moral obligations. Since some but not all moral obligations correlate with moral rights, matters of justice represent a special class of moral problems; justice consists in respecting other individuals' moral rights.⁴⁹

Unlike his utilitarian predecessor Bentham, Mill accepted the idea that people have rights that are independent of social recognition and enforcement. Law does not merely create rights, but is expected to respect rights and is unjust when it fails to do so. Bentham scorned this idea, expressed in terms of "natural rights."⁵⁰ As a utilitarian, he held that law should serve the general welfare, while the doctrine of natural rights implies that law can be evaluated in nonutilitarian terms.

Skepticism about "natural rights" has often turned on the claim (made, for example, of a right to life, liberty, and the pursuit of happiness) that they are "self-evident." Claims of "self-evidence" in moral matters seem to presuppose some special faculty that delivers moral knowledge and this, as we have noted, has never received adequate defense or explanation. The claim that we have natural rights in its traditional form is thus quite easily discredited.

But the idea is then too quickly dismissed. The idea that people have natural rights can be understood apart from dubious ideas about "self-evidence." At the minimum, the idea seems to be that *every single person* has some moral rights which are independent of special circumstances, agreements, and relationships. The sense of such a claim depends primarily, then, on that of a moral right. And this seems to be the idea of a right that does not depend for its existence (as legal rights seem to do) on some sort of social recognition or enforcement. This idea seems to make as much (or as little) sense as that of a moral principle which is independent of social recognition or enforcement – in other words, a moral standard that may be

discovered and is not merely imagined or made. In this respect, the idea of a moral right makes as much (or as little) sense as the notion that law should serve the general welfare. It claims that there are grounds independent of law for evaluating legal institutions, policies, and decisions. The idea of a moral right simply does not assume (as utilitarianism does) that those grounds are exhausted by welfare-maximizing considerations.

Mill tried to reconcile the idea of moral rights with utilitarianism by claiming that the principles of justice (understood by him as principles about moral rights) can be defended on utilitarian grounds. But, for reasons we have noted, his efforts seemed bound for failure. It is unclear that utilitarians are prepared to respect rights when their infringement would better serve the general welfare. If so, it is unclear how seriously they can take the idea of rights. In order to respect and thus to accept rights, they would have to limit or qualify their utilitarianism.

Thus, those who reject a purely utilitarian approach to the evaluation of law, and of social institutions generally, typically embrace some notion of justice expressed in terms of moral rights or principles of distribution. Views of these types differ widely; many different fundamental rights have been endorsed, as well as many different bases for distribution. As Mill perceived, we need some way to make systematic sense of these assorted moral notions. Most important, we need a way of defending principles of justice.

Some progress has been made along these lines in recent years. In *A Theory of Justice*, John Rawls developed a comprehensive alternative to the influential utilitarian tradition, including a theory about how principles of justice could be compared and a specific conception of justice defended.⁵¹ We shall devote the remainder of this chapter to Rawls's theories. First, we shall examine the principles that Rawls defends and see how they diverge from utilitarianism. We then discuss Rawls's strategy for defending basic principles.

Rawls's theory concerns justice in the narrow sense, which

he regards as the most important moral test for social institutions: social arrangements are not morally defensible unless they are just. The basic idea of justice, according to Rawls, is the absence of arbitrary inequalities. A set of social institutions is unlikely to treat all individuals alike. It creates distinct social roles and occupations, to which are attached differing opportunities, resources, and burdens. The question for a theory of justice is, what differences may be tolerated from a moral point of view? Rawls's principles concern the "basic structure" of a society⁵² – those political, economic, and social arrangements, such as its systems of property and exchange, its form of governance, and its class structure, which determine the fundamental conditions under which people live and their long-term prospects.

Rawls defends two principles of justice, one concerning basic civil rights, the other social and economic inequalities. According to the Equal Maximum Liberty Principle, each person has "an equal right to the most extensive basic liberty compatible with a similar liberty for others." This is understood to cover freedom of speech and assembly, the right to vote and to be eligible for public office, liberty of conscience and freedom of thought, freedom of the person and the right to hold personal property, freedom from arbitrary arrest and seizure. The second principle asserts that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage [also called the "difference principle"], and (b) attached to positions and offices open to all [the "fair equality of opportunity principle"]."⁵³ Rawls thus defends a qualified or limited egalitarianism.

The main features that distinguish Rawls's theory from utilitarianism correspond to respects in which utilitarianism is often thought to be deficient as a comprehensive political philosophy. Consider the matter of social and economic equality. Many utilitarians have argued for equalizing the distribution of goods, because shifting goods from those better off to those who are worse off can usually help the latter more

than it hurts the former and can therefore be expected to yield net benefits. But utilitarians have no fundamental objections to inequalities. They are committed to approving social arrangements in which some benefit at others' expense, provided the benefits exceed the costs and the outcome is the highest aggregate welfare level that can be achieved. This is thought by many to be unjust and is condemned by Rawls's difference principle.

Utilitarians have also defended social liberty and political rights, but their allegiance to those values has an uncertain relation to their basic principle. At bottom, utilitarianism has no objection to limiting liberty, distributing it unequally, or restricting political rights, provided that such policies would secure greater welfare. Rawls's first principle implies that we have some rights which any system of social organization must respect. Rights of citizenship and political participation may not be sacrificed in order to increase the aggregate welfare level.

Rawls's definition of benefits also differs from utilitarianism. Utilitarianism is concerned with welfare, understood in terms of pleasure and pain or the satisfaction and frustration of desires or preferences. Rawls defines benefits in terms of "primary goods"⁵⁴ – socially distributable goods, such as income and wealth, liberty and opportunity, which need not be considered desirable in themselves, but enable a person to serve her own interests and aims as she chooses. This is meant to provide a publicly ascertainable measure of benefit and to avoid problems concerning interpersonal comparisons of welfare. Furthermore, by measuring benefits in such terms, Rawls commits his theory to some measure of respect for individual autonomy, because the theory does not say how primary goods should be used by individuals. It assumes, in effect, that individuals have a basic right to use such resources as they see fit, so long as they do not undermine just institutions. This fits nicely with Rawls's concentration on the basic structure of society. The principles of justice are meant to regulate the effects of basic institutions and do not apply to

private arrangements and transactions. This leaves people free to develop their own associations and additional institutions, provided that they do not undermine the basic structure in a just society. Rawls's principles do not require a specific pattern of distribution for all distributable goods. They are designed to provide a just framework in which individuals can work out further problems and pursue their private or public interests as they choose.

Other political theories, such as utilitarianism, could be developed in terms of primary goods instead of welfare. This would be useful for egalitarian theories in particular, which otherwise face serious difficulties. Individuals differ, for example, with respect to how prudently or wastefully they utilize the resources they secure. If egalitarianism mandates that the actual welfare level of individuals be the same, then it will prescribe periodic transfers from the prudent to the wasteful in order to preserve equality of welfare, which may strike one as unfair. That difficulty would be avoided if egalitarianism were understood as requiring not equal welfare but an equal periodic distribution of some, but not all, primary goods. The result would not conflict with the traditional concerns of egalitarianism.

To understand further the Rawlsian theory of justice and its differences from utilitarianism, we must take as our reference point a particular society with an egalitarian basic structure, measured, of course, by primary goods. If its basic institutions provide for different social roles, the benefits attaching to each must be the same, in the sense that the average person in each social role can reasonably be expected to receive the same net share of primary goods over the course of her life as the average person in any position.

We can also imagine basic institutions for the same society which distribute benefits unequally. In one type of *inegalitarian* system, the average individuals in some social roles benefit *more* than they would under egalitarian institutions, while others benefit *less*. This type of *inegalitarian* system involves social trade-offs. In another type of *inegalitarian* system, the

average person in *each* social role is better off than she would be under an egalitarian system for the same society. This type of *inegalitarian* system involves *no* social trade-offs: no one gains at others' expense. Rawls's difference principle prohibits social trade-offs that flow from the basic structure of society. It condemns the first type of *inegalitarian* system but approves the second. Inequalities must improve everyone's prospects.

Suppose, for example, that society A has a rigid class structure with limited social mobility. A child assumes the social role and occupation of her parents. Let us suppose that this system involves social trade-offs: some classes benefit more and some benefit less than they would under an egalitarian set of institutions that might be established in the same society. Rawls regards such a system as unjust because those who are worse off do not benefit from the basic inequalities. But such a system might be acceptable to utilitarianism. Under some conditions, systems involving social trade-offs are "efficient" from a utilitarian standpoint: the net benefits (relative to egalitarian arrangements) enjoyed by those entrenched in the upper classes can exceed the net losses for those in the lower classes, so that the aggregated benefits are greater than they would be under an egalitarian regime.

Contrast this case with society B, which includes a social division of labor that makes everyone better off than they would be under an egalitarian regime, though the benefits attaching to different social roles and occupations are unequal. This might happen, for example, if there are unattractive but important tasks, such as coal-mining or garbage collection, which people are not inclined to perform without special incentives, such as higher wages. The result of attaching premium wages to these jobs might be that everyone is better off because the jobs are filled and the important tasks performed, which would not happen otherwise. Though everyone is better off, those who fill those jobs benefit to a greater degree because they receive a larger share of primary goods. Though such a system is not egalitarian, Rawls regards

it as just because everyone is better off than they would be under egalitarian institutions for that society. Such inequalities are not arbitrary because they purchase benefits *for all*.

Such a system might be "efficient" from a utilitarian point of view, because it might promote average or aggregate welfare to the maximum degree possible. But a utilitarian might also reject such a system, if there were some alternative system that promoted welfare to a greater degree.

Neither utilitarianism nor Rawls's theory automatically condones existing social arrangements. We live in societies with great social, economic, and political inequalities. Some may argue that current arrangements promote welfare to the maximum degree possible, and thus that they can be defended on utilitarian grounds. But that is doubtful. The system of social transfers sometimes referred to as "the welfare state" suggests how equalization can raise the average welfare level. It is likely that welfare could be more effectively promoted by more radical social surgery than contemporary political leaders are prepared to contemplate. If so, our system could not be justified on utilitarian grounds.

Some may argue that the inequalities within our system can be justified under Rawlsian principles because everyone is better off than they would be under egalitarian arrangements. But that is even more doubtful. The occupants of some social positions receive enormous shares of primary goods without performing any useful social functions at all. And, while some of the special benefits enjoyed by those in the highly paid professions, such as law and medicine, may be needed to attract competent individuals to those jobs, it is arguable that the benefits actually received exceed the level required to insure that those tasks are performed well. Such inequalities as these that flow from basic institutions could not be justified under the difference principle. Our system also seems to require that there be a permanent pool of unemployed as well as low-paid laborers, and individuals within these groups may well be worse off than they would be under egalitarian arrangements. That too would violate the difference principle.

One of the most important primary goods recognized by Rawls is something we would not ordinarily think of as a socially distributed good, namely self-respect – a sense of one's own worth and the worth of one's aims, goals, and plans. To experience a minimally decent and acceptable existence, one must think oneself and one's own concerns to be worth something. It is argued that economic and social advantages, such as income and wealth, cannot compensate for the lack of self-respect. Self-respect becomes an issue for social justice in the following way. Our attitudes toward ourselves are affected by others' attitudes toward us. The development of self-respect by and large requires a generally shared belief that each person has the same basic rights, that each should be free to chart her own course in life, and that each is qualified to participate in the governance of the community. Self-respect, and thus the basic good of the individual, can only be served if institutions reinforce such attitudes. Rawls argues, therefore, that justice requires that certain basic rights and liberties be maximized and distributed equally and that the various roles in society should be open to all.

Establishing a formal system of equal basic rights and liberties when people are starving might amount, of course, to an empty gesture. In that case, social resources should be marshaled to establish more favorable conditions, in which ordinary citizens can effectively exercise the rights and liberties of citizenship. Under conditions such as we live in today, when no one should have to struggle for subsistence, benefits should be distributed so as to permit the effective exercise of equal basic rights and liberties.

The two principles of justice developed by Rawls thus represent a "special conception" of justice, which applies to those societies that are capable of generating sufficient goods to make political participation a real alternative for individuals and civil rights practically meaningful. In other conditions, covered by the "general conception" of justice, liberty may be limited, but only as part of a general program of promoting conditions that are favorable to the effective exercise of basic

rights and liberties. Once those conditions are realized, the special conception of justice comes into effect.⁵⁵

Rawls's theory of justice may be summarized as follows. Social justice requires first and foremost that the basic structure of society not incorporate any arbitrary inequalities, as measured by the goods that people by and large require to serve their own interests and secure their own ends. Inequalities are arbitrary unless they can be expected to make the average individual in each social role better off than she would be under an egalitarian regime. This represents a compromise – a kind of reciprocity – between those who might secure greater benefits under a utilitarian regime and those who would then do worse and might therefore insist upon complete equality instead. When social resources are sufficient to provide conditions that favor the effective exercise of political rights and liberties, then equal rights and liberties should be established for all.

Justice as fairness

Rawls defends these principles in two closely related ways. He maintains that they conform to and account for our most considered judgments about social justice, and he develops a “social contract” argument for them. We will concentrate on the latter argument, because it represents an important political tradition which we have not previously acknowledged.

Rawls claims that his principles are those that “free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the terms of their association.”⁵⁶ Rawls's argument relies on considerations of prudence regulated by minimal assumptions about the character of moral reasoning.

Social contract arguments are commonplace within political theory, but Rawls's contract argument is different from those with which we are most familiar. Contract arguments usually seem to claim that we or our ancestors have been parties to an agreement that establishes a political structure or commits us

to obedience. They seek to show why one is under an obligation to abide by the laws of one's society. Such arguments are exceedingly dubious. Many who are supposed to be bound by the alleged agreement have no recollection of making one, and it remains a mystery how an agreement entered into by others could bind those who are not parties to it. Attempts to assuage such doubts may suggest, first, that the agreement is merely “hypothetical” – something it would be reasonable for one to make – but then it is unclear how one could be bound by an agreement that one has never made. Other defenses of the usual social contract arguments transform them completely, into arguments based, say, on the idea that it is *unfair* not to obey the laws of one's community when one has received benefits resulting from others' obedience and one remains within the community. The notion of a contract is replaced by distinctly different moral reasons for obeying the law.

Rawls's version of the contract argument neither assumes that individuals have made a pact nor concerns the formation of society or obedience to its laws or current rulers. The argument is intended to show that certain moral principles are binding on us, because they would be accepted by prudent individuals under special conditions which bear a significant relation to our own circumstances.

In ordinary social life we find that our interests clash with those of others, but that we are capable of making ourselves better off through cooperative arrangements. We need to determine a mutually acceptable basis for restraint and cooperation. We will not discover this through the use of pure reason or natural science. It does not follow, however, that principles are entirely arbitrary – that nothing soundly can be said either for or against any principles. Rawls's contract argument is intended to show how principles can be evaluated.

We can identify mutually acceptable principles by applying minimal ideas about morality to our situation. We seek *general* principles, which apply to all relevant cases and are not tailored to benefit special interests. We also need a *fair procedure* for selecting them – one that regards each person as

fundamentally free and deserving of consideration equally with others. Fairness helps determine a procedure that enables us to compare alternative conceptions of justice.

We sometimes have occasion to design procedures that are intended to serve a predetermined end or to achieve a predetermined result. Assuming that the criminal code is just, for example, we wish a criminal trial to insure that those who are guilty will be convicted but that the innocent will be acquitted. Viewed in this light, a procedure that insures such results may be considered just. Criminal procedures are imperfect, however, so the best we can hope for is "imperfect" procedural justice. In other cases, we may be able to design procedures that guarantee a predetermined result; then we can achieve "perfect" procedural justice. Suppose, for example, that a pie must be divided equally among several people. If we assume that each person wishes as big a slice as possible for himself, then we can have it distributed as it should be if the person who divides it knows in advance that he will take the last slice left after others have chosen theirs. He can make sure that he will get as big a slice as possible only by dividing the pie equally.

The sort of procedure we require is an instance of neither perfect nor imperfect procedural justice but rather of "pure" procedural justice. We do not begin with a fixed idea of the correct outcome. Rather, the fairness of the procedure makes the outcome fair, as in the case of a well-designed lottery. The outcome will be just *only because* it flows from a fair procedure. Suppose, for example, that our city faces an epidemic of a dangerous infectious disease against which people can be protected by a serum that is available in limited quantities. There is not enough to go around. Let us assume that each person has as much of a claim as any other to receive the protective inoculation. We know that some can be protected, but we have no basis for deciding who they should be – none, save for recourse to a fair procedure, such as a lottery, which gives each person an equal chance to secure the needed dosage.

If principles of justice are not to be found in pure reason or nature, we must begin our inquiry without any independently certifiable basis for deciding how goods should be distributed or conflicting claims adjudicated. The procedure that we are seeking can therefore be a matter for neither perfect nor imperfect procedural justice. It must be a matter for pure procedural justice. If we can design a fair procedure for arriving at universal agreement, the outcome of the procedure – a set of principles – will be just, and decisions following them will be just too. The application of the principles to problems of social distribution will be just insofar as it yields decisions that depend entirely on a fair procedure. This is the idea of "justice as fairness."⁵⁷

A fair procedure for this purpose is, then, an attempt by free and rational individuals, who cannot exercise any coercive power over the others, to determine mutually acceptable ground rules for their basic institutions by deliberating in an unbiased way, undeflected by considerations of special interest. This is an ideal that we can at best approximate. But the ideal makes sense, as we are capable of recognizing cases in which the ideal is not satisfied. For the purpose of determining what the ideal implies, Rawls develops his contract argument. He describes a situation in which the ideal is satisfied. He imagines, for example, that a group of individuals are subject to a "veil of ignorance" which prevents them from remembering specific facts about themselves and their conditions, so that they are incapable of skewing principles to serve their own or other special interests. This corresponds to the idea that, in our deliberations concerning principles, we must reason impartially and must not be deflected from mutually agreeable principles by considerations of special interest. Rawls also imagines that the parties to the contract have a full understanding of psychology and social dynamics, so that they can appreciate how competing principles would work out in practice. This corresponds to the idea that such decisions should be informed by facts about the human condition and can be corrected on the basis of increased understanding.

The parties to the imaginary contract do not use moral reasoning. They do not seek a compromise between differing moral positions. Rather, moral notions enter into the contract argument by suggesting constraints on prudential reasoning (it must not be skewed to serve special interests, for example) and on the results (which must be general principles, applying to all societies).

So the contract argument is designed to show what any group of individuals would agree to, on prudential grounds, when their reasoning is limited by minimal moral constraints, such as the idea of impartiality, and is informed by an understanding of the interests at stake. We are not perfectly prudent, and we accept the idea that prudential judgments are corrigible. In a similar way, we are not perfectly impartial but, if we make the most minimal moral assumptions, then we are committed, Rawls believes, to accepting such constraints as impartiality. For these reasons, the contract argument is supposed to certify principles that we are deeply committed to accepting. In this sense, those principles – *whatever* they may be – are to be regarded as binding on us and on *anyone* who meets those same conditions.

Who could that leave out? It is difficult to imagine anyone to whom prudence is inapplicable. But what about the moral constraints, which are essential to the argument? If these amount to the most minimal assumptions of a morality, then they apply to anyone who wishes to press any claim on others in moral terms. Anyone who adopts a moral point of view is committed to submitting his claims to adjudication under general principles that would be generated by a fair procedure, a procedure capable by its very nature of generating a just result. The argument therefore is inapplicable to an ethical nihilist, who refuses to take any moral values for granted, even the thinnest notion of procedural fairness; but only to a fully consistent nihilist, who rejects morality completely and refuses to consider any issues in moral terms. Such a person cannot believe, for example, that he has any rights or that anyone can wrong him. He is a very special case indeed.

The idea behind the contract argument is theoretically attractive because it purports to show the moral position that one can justifiably take. The argument succeeds, however, only if it can be made to work – only if its moral assumptions can be kept to a bare minimum and it is capable of ranking one set of principles, one conception of social justice, above all others.

Rawls's argument for his own principles can be understood as an application of this general strategy. Rawls claims, for example, that individuals so ideally situated would first of all decide to use the index of primary goods as a public basis for determining benefits. They would then decide to use as their basis for comparison what could be achieved under egalitarian institutions. But they would be prepared to accept inequalities if it were prudent to do so. This leads to one of the more controversial aspects of Rawls's defense of his principles.

If prudent individuals were to adopt the familiar strategy of seeking to "maximize expectable utility," they would then be bound to select a form of utilitarianism for evaluating the basic structure of society. Rawls argues that, given the special conditions of the decision to be made, a "maximin" strategy is preferable. This would insure that those who wind up at the bottom of any social structure fare at least as well as they could fare under egalitarian institutions. (Indeed, Rawls claims that his ideal contractors would wish to make conditions as good as possible for those worst off.) They would be prepared to tolerate only those inequalities flowing from the basic structure of society that benefit all. This reasoning generates Rawls's difference principle. For reasons already suggested, Rawls then argues that such contractors would also require a system of basic rights and liberties which could not be compromised with considerations of welfare, at least under conditions favoring the effective exercise of such rights and liberties.

Three sorts of questions may be raised about this line of reasoning. First, and most fundamentally, does the contract argument provide a general *justification* of moral principles? Second, does Rawls apply the contract strategy *soundly*? That is, does he succeed in showing that his principles would be

chosen in such circumstances and therefore that, if the basic idea of the contract argument is sound, those principles are binding on us here and now and should regulate our judgments of social justice? Third, are Rawlsian principles acceptable within a broader *coherence* argument? That is, are we prepared to give up conflicting reflective moral judgments in favor of his principles? We have said something relevant to the first question. To answer the second we would have to engage further in the complex continuing controversy over Rawls's argument, which would not serve our main purpose here. But we can add some comments on the third question.

One might wonder whether, as Rawls implies, it is always just to allow extra benefits for some in order to secure benefits for others. The idea seems reasonable in the abstract, but we can imagine situations in which some members of society threaten to withhold their needed services unless they are given extra benefits. Imagine, for example, that doctors band together and refuse to practice unless they are paid exorbitant fees – fees much greater than are required to attract competent physicians (but the doctors rigidly control access to medical practice). It may be prudent to accede to such demands, but it does not seem as if such a compromise is required by justice. Rather, the demands themselves appear unjust. Rawls might respond to this sort of objection, however, by pointing out that such examples concern specific arrangements that might be made within a given society, whose basic structure is not at issue, rather than the design of the basic structure itself.

One might also wonder whether a system is properly regarded as unjust simply because Rawlsian principles are not satisfied, even though all members of the society truly accept and consent to different ground rules for their institutions. Consent is often not enough to justify actual arrangements, for consent can result from unfair pressures brought to bear on individuals. But, if consent is fully free and adequately informed and it is periodically confirmed as new generations take their place within society, it would seem capable of justifying many arrangements that would be rejected by Rawls,

without violating any rights of individuals. For example, a population may decide not to accept egalitarian arrangements which would benefit all, because they prefer that all receive equal shares of primary goods. If this is possible, then one can also imagine a population that decides it is worth gambling for greater benefits, which can be secured through institutions that a utilitarian would prefer, even though those at the bottom would be worse off than they would be under an egalitarian regime. If all, including those who wind up at the bottom, truly accept these arrangements, it is difficult to see how they could be faulted on moral grounds. The trouble, perhaps, is that it is so very difficult to be sure that agreement in such cases is genuine – that those at the bottom are neither brainwashed nor subtly coerced into accepting conditions that they would reject if given a fair opportunity to do so.

These few comments suggest a complicating feature of Rawls's actual defense of his principles. The contract argument is developed within the framework of a broader coherence argument designed to reconcile the outcome of the contract argument with the judgments about justice we are otherwise prepared to make. Rawls seems to believe this is required, and not optional, because the basic idea of the contract argument is not powerful enough, all by itself, to generate a unique set of principles. The basic idea of the contract argument can be applied in a variety of subtly different ways to generate different principles of social justice. The effect is to compromise the contract argument, to weaken its claim to establish a conception of justice on the basis of minimal assumptions about morality combined with prudential reasoning. It remains to be seen how serious a compromise this is.

As these last remarks suggest, we have been considering issues in moral theory that are unresolved. What this means, I believe, is not that moral theory simply deals with chronically insoluble problems, but rather that understanding in this realm, as in all others, works at and pushes back the frontiers. Utilitarian notions, for example, have been with us, in more or less coherent form, for centuries; but the development of

utilitarian theory and systematic appraisal of those notions have accelerated greatly in the relatively recent past. Progress in our understanding of ideas about justice seems no less noteworthy.

Utilitarianism and contrasting principles of justice have been the focus of our discussion in this chapter, because these represent not only long traditions but also contemporary controversies. We have tried not so much to reach a firm position on these matters as to clarify the issues, to explain some central concepts that have occasioned puzzlement, and – most importantly, perhaps – to demonstrate by example that we can reason extensively about fundamental principles.

In the process, we have acquired a basis for discussing more specific moral problems that arise within the context of law, to which we shall now proceed. It should be emphasized, however, as a point about method in moral theory, that our discussions of these problems will not proceed as if we had already established general principles, but can be expected to contribute to our understanding of the leading principles themselves.

5

Legal coercion and moral principle

Even if law is not by its nature coercive, legal systems typically use threats and force to insure compliance with their norms. Our question is how such practices can be justified.

Two general assumptions provide a framework for this discussion: law is morally fallible, and moral judgments are capable of being sound. If law is morally fallible, we cannot assume that legal uses of coercion are justifiable. It is generally agreed that the use of force and coercion normally needs justification. If that is true, it is appropriate to ask for a defense of legal coercion. It may be noted that the idea that coercion requires justification itself assumes that moral judgments are capable of being sound. Otherwise, there could be no sound moral objection to coercion.

Coercion deprives us of the freedom to choose by our own best lights. Its legal use deprives people of other goods as well, such as possessions and even life. No wonder it seems to require justification. But how can such practices be defended?

This question is usually conceived of as the problem of justifying legal punishment. But it is somewhat broader than that may suggest. For the legal use of coercion is not limited to punishments imposed under the criminal law, since it stands behind all legal arrangements that are enforced, including “civil remedies” in other branches of law, such as the law of