

COMMENT

RIGHTS, MARKETS, AND COMMUNITY

JULES L. COLEMAN*

I.

Professor Jeremy Waldron's *When Justice Replaces Affection: The Need for Rights*, raises the question: What role, if any, remains for institutional rights within the communitarian framework? The question is interesting only if the contrast between liberalism and communitarianism is characterized as a difference between a political ideology that is rights-based (liberalism) and one that is anti-rights-based (communitarianism). Indeed, Professor Waldron characterizes the difference in precisely that way. The communitarian rejects liberalism, which he sees as an ideology whose core concepts are property, markets, and rights, whose guiding regulative norm is impartial justice, and whose meta-ethic is subjective, relative, and contractarian. As communitarians characterize liberalism, all important socio-political, economic and legal institutions are contractual, or market based; and justice itself can be treated as the outcome of a rational contract among idealized, individually rational autonomous agents.

The recent turn in contractarian moral and political theory to a preoccupation with the economist's ideal of perfect competition¹ gives further expression to the communitarian characterization of the liberal ideology. Under conditions of perfect competition, individuals are able to maximize the satisfaction of their preferences. When the conditions of perfect competition are not realized, however, rational individuals must cooperate with one another to secure gains otherwise unavailable. Cooperation is *rational* only if it is to each person's advantage. Rational cooperative schemes consist in sets of normative constraints. These constraints restrict the domain within which individuals can pursue their rational self-interest. They provide

* Professor of Law, Political Science and Philosophy of the Social Sciences, Yale Law School. B.A., Brooklyn College, 1968; Ph.D., The Rockefeller University, 1972; M.S.L., Yale Law School, 1976.

1. For an analysis of the role of perfect competition in political philosophy, see Coleman, *Competition and Cooperation*, *ETHICS*, Oct. 1987, at 76-90. Many of the arguments raised in this comment draw on this article.

alternative reasons or motivations for action, namely moral reasons. Thus, norms specifying the terms of cooperation, like justice, emerge among individuals as instruments for securing gains that would otherwise be unattainable. Justice is a rational response to market failure and is therefore part of a realm of mutually advantageous social interaction.

Because in order to be rational these norms of cooperation must be to each person's advantage, it is possible to characterize them as the outcome of a rational bargain or "hypothetical social contract." In this characterization of liberalism, social life is reduced to markets and contracting. When markets succeed, contracts are enforceable by the existence of alternatives. Defection incentives are weak or nonexistent. When markets fail, self-interested defection is more attractive. In that case, moral or legal norms are necessary to encourage rational cooperation. Because they are to the advantage of all parties, these norms can themselves be treated as the outcome of a contract. Thus, the basic institutions of society, markets, and the norms governing response to market failure, are fundamentally contractual. We are encouraged to contemplate the role of political justice in our social life in precisely the same way we think of market contracting: That is, as a regulative constraint for mutual advantage among a "society of strangers." So it seems that "the market," "contract," and the consequent conception of justice as contract and as a dimension of the domain of mutual advantage are at the core of liberal individualism. Indeed, the communitarian might argue, they are constitutive of it.

The new communitarianism denies that social relations are best thought of as contractual or quasi-contractual. In doing so, it denies two things. First, it denies that communities can be analyzed or "rationally reconstructed" as contracts—real, quasi, or hypothetical. The bonds of community are not limited to, nor are they fundamentally, matters of rational, voluntary agreement. Second, because community is not simply a form of multi-party contract, it is a mistake to understand the relationships among its members as being governed primarily by contractual norms, in particular, by claims of right and by appeals to justice.

There are, of course, all manner of social institutions that are not best understood in market or contract terms. The family is a useful example. The concept of family includes the notion

that each member takes an interest in the well-being of the others, and, therefore, takes full account of the others' interests in family matters. At its best, the family is an institution regulated by "affective emotions," not by self-interest. Thus, families are not best construed as regulated by justice, nor are the claims its members bring to bear on one another those of justice or of right.

Friendship also resists a contractual analysis. Friendships are not bargains struck for mutual advantage. To be someone's friend is, among other things, to care about what happens to that person for his sake, not for one's own sake. Families and friendships are mutually enriching, but their point is not to promote self-interest.

In denying that the basic and important institutions of society are contractual, the communitarian critique makes both critical and positive claims. The critical claim is perhaps best understood as a reminder: Namely, that our appreciation of social life and political organization need not be constrained by the liberal vision of it. This is the vision they have identified with rational, autonomous agency, the market paradigm, the priority of justice, and of the right over the good, as well as with contractarian meta-ethics.

Communitarianism is not just a negative thesis, however. It has a positive side as well, though it is quite hard to figure out precisely what its central claims are. When one rejects the contract-property model of social organization, with what does one replace it? Instead of the bonds that tie being those of a commitment to cooperate on fair terms, that is, the terms of justice and rights, what becomes the common ground of community?

Characterizing communitarianism's core thesis is one of the central challenges Professor Waldron faces. He appears to take the core of communitarianism to consist in the transformative possibility of replacing the idea of society as brought together to cooperate on fair terms with an ideal of society as based primarily on the "affective emotions." Professor Waldron then asks whether such a vision is essentially incomplete—whether, in particular, the communitarian will still find appeals to rights central.²

2. Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 631-32 (1988).

II.

In order to assess communitarianism, then, we need to evaluate both its critical and positive claims. It is not at all obvious that the communitarian critique of liberalism is compelling. First, to the extent it identifies liberalism with particular meta-ethical claims (for example, foundationalism, contractarianism, the subjectivity of value, and the like), it simply is confused. Not all liberals are contractarians or foundationalists. Buchanan, Gauthier, Hobbes, Kant, Locke, Nozick, Rawls, and Rousseau, for example, are contractarians; Bentham, Dworkin, Mill, and Feinberg are not. Gauthier is a foundationalist; Rawls is not. Gauthier, Nozick, and Dworkin are market enthusiasts; it is not obvious, however, that either Rawls or Scanlon is.³

It is also fashionable for communitarians to criticize liberalism for being committed to a metaphysically thin conception of the person, abstracted from social relations. This criticism is often made of Rawls.⁴ But it simply is confused to think that Rawls is committed to an atomistic, impoverished conception of the person. Rawls believes that all persons have a capacity for meaningful social relations, and that it is important for each to possess primary goods necessary to secure enduring personal and social ties, and for society's basic structure to permit and foster such ties. For Rawls, individuals are social entities in just the sense communitarians claim they are, and in just the sense they claim Rawls denies they are. How can this confusion be explained?

In Rawls's view, the person is conceived of in two distinct ways, and for two distinct methodological reasons. We are all individuals capable of social ordering. Yet in asking ourselves whether our distinct forms of social ordering or cooperation are just, we are to engage in a thought experiment. In that experiment, each of us is to imagine whether the principles governing our relations would have been chosen by individuals in the so-called original position. In the original position, individuals are more thinly characterized. No attention is given to

3. Among the contractarians, see J. BUCHANAN, *THE CALCULUS OF CONSENT* (1962); D. GAUTHIER, *MORALS BY AGREEMENT* (1986); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971); Scanlon, *Contractarianism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103 (A. Sen & B. Williams eds. 1982). For noncontractarian liberals, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984).

4. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

their socially constituted selves, other than the fact that each person knows that he and others have a capacity for important social relations.

The charge that Rawls is committed to a metaphysically useless conception of the self, one that is too thin because it fails to take account of each individual's socially constitutive dimensions, is simply confused. Rawls is committed to the social self as a fact about each of us, but it is not a fact that gets replicated *in the original position*. The importance of social relations is recognized by Rawls within the domain of his discussion of primary goods, not in the original position. There are, of course, other facts about us that are similarly denied status in the original position. It is a mistake to claim that Rawls's overall conception of the person merely is his characterization of individuals in the original position.

One has to remember that Rawls's commitment to the thin self is methodological only. For it plays a role only in the argument for the principles of justice. There, his claim is that the principles chosen by rational, disinterested, thinly conceived individuals behind a thick veil of ignorance constitute justice.

One can disagree with this characterization of the original position. For example, why are Rawlsian individuals risk averse, rather than risk neutral? Why must the veil be so thick? Some might even argue that the Rawlsian individual is too thick because it includes a sense of justice and a conception of the good. Thinner conceptions of the person might require us to view the individual as no more than a bundle of first-order preferences. Of course, the communitarian can charge that while Rawls's individuals are thicker than the economist's bundle of preferences, they are still too thin.

Notice the argument now takes a different form. The communitarian can no longer claim that Rawls, the liberal, is committed to a metaphysically thin conception of the self. Rather, the communitarian critique is that by failing to replicate the socially constitutive self in the original position, Rawls begs certain questions. For the kinds of institutions that are likely to be just on Rawls's account will necessarily depend on his characterization of the original position. In short, the original position is not normatively neutral.

By the same token, a communitarian conception of the person may render defensible forms of association that might be

unjust on the Rawlsian account. For example, the Rawlsian contractarian picture may favor voluntary forms of association for mutual advantage, whereas a communitarian characterization of the initial position might permit certain nonvoluntary associative forms. But then the communitarian conception is not normatively neutral either.

None of this is surprising, of course. Harsanyi is right. Persons who are *ex ante* risk neutral rather than risk averse choose the principle of average utility, not the difference principle.⁵ Altruists might well choose principles of cooperation very different from those favored by disinterested maximizers. It thus cannot be surprising that a communitarian or very thick conception of the individual in the original position could lead us to differing visions of the terms of social cooperation. But this is *very* different from saying that liberalism is committed to an impoverished conception of the person generally. If communitarianism's criticism of Rawls is just the claim that different conceptions of the person in the original position may legitimate different forms of association, it is not false; it is simply not very interesting. It has not told us why Rawls is wrong to account for the importance of our social relations in terms of primary goods rather than in the original position.

What of the communitarian's positive claim? Here I want to follow Professor Waldron's characterization of its central claim: the vision of social ordering in which reliance on rights is replaced by the affective emotions. Within this framework, political discourse "will be informal and engaged rather than impersonal and abstract. Political thought will be a matter of the discovery and recognition of the particular social selves we are, rather than the deliberate choice and articulation of abstract principles of right."⁶

The gist of Professor Waldron's argument is that social and political arrangements based primarily on affective emotions are too uncertain and confining. Rights are then necessary to reduce uncertainty and to provide frameworks for expanding possibilities. The argument essentially is this. In one sense, a system of individual rights provides a fallback position when

5. See Harsanyi, *Advances in Understanding Rational Behavior*, in *ESSAYS ON ETHICS, SOCIAL BEHAVIOR AND SCIENTIFIC EXPLANATION* (Dordrecht ed. 1976).

6. Waldron, *supra* note 2, at 631.

the bonds of affection erode or fail. Speaking of marriage Professor Waldron writes:

[T]here is a need for an array of formal and legalistic rights and duties, not to constitute the affective bond, but to provide each person with secure knowledge of what she can count on in the unhappy event that there turns out to be no other basis for her dealings with her erstwhile partner in the relationship.⁷

In the context of care for the aged, Professor Waldron makes similar remarks:

To insist, then, in a communitarian spirit, that care for the aged should remain the responsibility of the family, we would have to accept either or maybe both of two costs. We would have to place limits on the *other* demands that adult children would be permitted to respond to, the risks they could run, and the mobility they could seek. (I suspect, by the way, that in the present state of things, this would involve limiting once again the capacity of *women* to move and flourish outside the home. A great many of the concerns about communitarianism articulated in this paper are above all *feminist* concerns.) Or, if we were not prepared to do that (and maybe even if we were) we would have to accept the cost of exposing the elderly to a certain amount of insecurity and uncertainty in addition to the other burdens of their age. Neither in this country nor in Europe have people been willing to accept those costs. Instead, we have opted for less personal, less affective modes of care. People are encouraged to purchase an income for their old age in the marketplace, so they can rely on a pension check from a finance house even if they cannot rely on the warm support of their children. And, as a fall-back position, the impersonal agencies of the state guarantee an income, either to all the elderly, or to those who have not made or have not been able to make impersonal provision for themselves. Thus, although we may not care for them on a face-to-face basis, we both provide impersonal structures to enable them to care for themselves, and we respond collectively and impersonally as a society to the rights that they have to our support.⁸

Professor Waldron's characterization of the system of rights as constituting a fall-back position is somewhat misleading. Because they provide security, rights free individuals to explore possibilities they might otherwise be disinclined to explore. For

7. *Id.* at 629.

8. *Id.* at 636 (emphasis in original).

by guarding against the worst eventualities, these rights reduce the costs of pursuing more imaginative, riskier possibilities. There is a sense in which knowing that one can fall only so far enables one to extend one's reach. Perhaps in this sense the impersonal scheme of rights is necessary for, or at least strongly facilitates, social relations based primarily on affection.

It is perhaps better to think of rights not as constitutive of social relations but, rather, as defining the framework or basic structure within which social relations take shape and flourish. Rights and legal structures provide recipes for the creation of social relations. This, of course, closely resembles Professor Hart's view of the secondary rules of a legal system.⁹ Whereas the primary rules specify rights and duties, secondary rules are meta-rules.¹⁰ They are about primary rules in the sense that they specify recipes for constructing, amending, eliminating, and adjudicating primary rules.

We might now understand the communitarian critique as follows. What we should want to eliminate is the reliance on primary rules that impose rights and duties to specify our social relations. What the communitarian cannot convince anyone of is the justification for eliminating reliance on secondary rules.

Professor Waldron picks up this line of argument in his account of *Romeo and Juliet*. As Professor Waldron correctly notes, the tragedy of *Romeo and Juliet* is not the result of Friar Lawrence's letter failing to get through. Rather, it is that "[t]here is nothing outside the structures of their warring clans that these two can rely on—no points of salience, no common framework of expectations, and no public knowledge—just their own meagre resources and those of their understandably pusillanimous allies."¹¹

The lesson of *Romeo and Juliet* is the need for a "structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments."¹² These are "what Hart called secondary rules of

9. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

10. *Id.* at 78-79.

11. Waldron, *supra* note 2, at 633.

12. *Id.* at 634.

change”¹³

III.

I want to take one step further the argument for impersonal institutions and formal structures even within a society whose social bonds are primarily based on the affective emotions. In doing so, I want to present an argument for the market that I have elsewhere attributed to Professor Frank Knight.¹⁴ It is an argument for a market economy, like the arguments Professor Waldron advances for legalism, that, even in his transformative vision, the communitarian must acknowledge.

The standard argument for laissez-faire market economies is that they are both Pareto-efficient and libertarian. In virtue of each agent’s fully voluntary actions, the economy secures a Pareto-optimal outcome. That is, purely voluntary interaction yields a result in which no one can be made any better off without making others worse off.

There is no reason to believe that communitarians would be much impressed by this defense of the market. First, there is nothing in efficiency *per se* that is attractive to a communitarian. Although there is something attractive about consensus or agreement, the communitarian rejects the idea that society’s basic institutions are simply rational contracts. Indeed, one could say that it is the liberal preoccupation with markets that so enrages the communitarian. What makes me think, then, that a communitarian would be driven to accept the form of institution—namely, the market—that, it appears, he most deplors?

In outline, the argument is this: At bottom all social institutions are schemes of cooperation, in that they are expressions of the ways in which we organize our relationships with one another over various domains of activity. In order to endure, these institutions must rely on an underlying genuine consensus that, in a large heterogeneous society like our own, is obviously difficult to secure and fragile once achieved. If they are to endure, the institutions that emerge to govern social interaction cannot generally call into question the nature and scope of the underlying consensus. In markets, individuals act on their

13. *Id.*

14. *See* Coleman, *supra* note 1.

own conception of the good within a framework of normative constraints—the absence of force, fraud, and nonpecuniary externalities. We need not approve of each other's preferences, or the ways in which we order them, in order for us to relate to one another for mutual advantage over a very large domain. That is the fundamental virtue of markets and, in my view, the source of their attraction to us. They maximize beneficial interaction while minimizing the stress on the underlying consensus.

The supreme and inestimable merit of the exchange mechanism is that it enables a vast number of people to cooperate in the use of means to achieve ends as far as their interests are mutual, without arguing or in any way agreeing about either the ends or the methods of achieving them. It is the "obvious and simple system of natural liberty." The principle of freedom, where it is applicable, takes other values out of the field of social action. In contrast, agreement on terms of co-operation through discussion is hard and always threatens to become impossible, even to degenerate into a fight, not merely the failure of co-operation and loss of its advantages. The only agreement called for in market relations is acceptance of the one essentially negative ethical principle, that the units are not to prey upon one another through coercion or fraud.¹⁵

On one reading, the communitarian takes issue with the so-called legal liberal because of the latter's endorsement of the primacy of justice and of the right over the good. In this view, justice and the law that embody it are best characterized as norms regulating the affairs of "strangers." A richer appreciation of the primacy of social roles and relations would, in this view, give rise to a very different sort of social, political, and legal structure, one that deemphasized adjudication based on rights and competing claims. Instead of endorsing an adversarial scheme in which disputes are resolved by adjudicating the legitimacy of claims representing disparate interests pressed against one another, we would build institutions that emphasized open and full conversation, conciliation, and convergence. These institutions, recognizing our inherent reliance on one another for our own identities, would encourage us to

15. Knight, *The Role of Principles in Economics and Politics*, reprinted in *ON THE HISTORY AND METHOD OF ECONOMICS* 267 (1956).

seek common ground, not to compromise by giving in but to do so by seeing the underlying commonality of our condition.

If Professor Knight is correct about the relation of markets to stability, this communitarian vision may be just so much romantic fantasy. Were we to take seriously the need for enduring social relations, we would very likely set up institutions that did not at every turn press us to explore the depth of our commitment. No relationship, however strong, can withstand continuous strain on its foundation. Thus, we would as good communitarians very likely create all those liberal institutions—for example, law seen as norms governing relations among strangers and impersonal free markets—that, in theory at least, we decry. If what we really want to do is cooperate broadly over persons and time, we will do better by setting up institutions that are, broadly speaking, competitive. And if we are non-ideal or nonromantic communitarians at heart, we had best act at least over a large domain of interactions as if we were legal liberals.

Like a system of rights that makes possible a domain of social ties based primarily on the affective emotions, impersonal markets allow us to interact over a wide range of activities in ways that do not place undue stress on the strength and depth of those ties. Even within the communitarian framework, it is impossible to displace the centrality of informal and impersonal institutions and structures.

