

4-1973

Justice as Fairness: A Commentary on Rawls's New Theory of Justice

Gilbert Merritt

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Gilbert Merritt, Justice as Fairness: A Commentary on Rawls's New Theory of Justice, 26 *Vanderbilt Law Review* 665 (1973)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol26/iss3/13>

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Justice as Fairness: A Commentary on Rawls's New Theory of Justice

Gilbert Merritt*

I. INTRODUCTION

A Theory of Justice,¹ John Rawls's new book on social and legal philosophy, appears likely to become a monument of systematic thought comparable to Locke's *Second Treatise of Government* and Mill's *Utilitarianism*. It provides answers systematically to the most difficult questions of our time and promises to shape the thought and action of men for many years. Daniel Bell, a noted social scientist, has said that in Rawls "we can observe the development of a political philosophy which will go far to shape the last part of the 20th Century, as the doctrines of Locke and Smith molded the 19th."² Charles Fried, the noted legal philosopher, recently wrote:

This book in my view is the most important work in moral and social philosophy published since World War II. It is magisterial in its purpose: to propound a complete and fully elaborated theory of justice and to locate it within the context of a well developed general theory of the right and the good as well as of ethical epistemology and method. . . . [I]t is a completely original work. It is an original work because it takes into account modern developments in all branches of philosophy, and in relevant areas of logic, mathematics, psychology and economics.³

This Review, intended to introduce Rawls's thought to the broad legal community, will describe the structure of *A Theory of Justice*, emphasize its fundamental concepts, and indicate the impact that its application to our legal system may have.

II. GENERAL ORDER OF DISCUSSION OF RAWLSIAN SYSTEM

Many moral philosophers and social scientists follow a two-step line of argument in formulating theories of how society should assign

* Partner, Gullett, Steele, Sanford, Robinson & Merritt, Nashville, Tennessee; B.A., Yale, 1957; LL.B., Vanderbilt, 1960; LL.M., Harvard, 1962; U.S. District Attorney for Middle Tennessee, 1965-69; City Attorney, Nashville Metropolitan Government, 1963-65; Delegate, Tennessee Constitutional Convention, 1965; Lecturer in Law, Vanderbilt University, since 1960.

1. Cambridge, Mass.: Belknap Press of Harvard University Press, 1971 [Hereinafter cited as RAWLS]. The motivation to consider Rawls and write this paper came from discussions of Harvard law professor Charles Fried on the subject of law and morals in the summer of 1972.

2. *Meritocracy and Equality*, No. 29, THE PUBLIC INTEREST 29, 57 (Fall, 1972).

3. Book Review, 85 HARV. L. REV. 1691 (1972). See also Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004 (1972).

fundamental rights and duties and distribute the benefits of work and cooperation. They identify a single end or goal, such as pleasure, happiness, or the greater glory of God, toward which individual morality is directed. Then, arguing that justice is the maximization of this end for society generally, they construct a theory of justice by working out the rights, duties, principles, and rules that are necessary to extend the individual good to society. Utilitarianism, which has dominated the thinking of intellectuals and guided the action of officials for almost a century, is such a teleological philosophy. Happiness or satisfaction is its dominant individual good and, as Rawls says, its "main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."⁴

Under utilitarian principles, maximizing satisfaction permits inequalities in theory that individuals intuitively find unacceptable in practice and may be used to justify "the violation of the liberty of a few . . . by the greater good shared by many."⁵ Most arguments justifying arbitrary inequalities and violations of liberties follow the utilitarian forms of maximizing satisfaction to provide the greatest net balance. According to Rawls, however, this is a fundamental flaw resulting from "extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. Utilitarianism does not take seriously the distinction between persons."⁶

Rawls's system avoids this problem in two ways. The good does not have a single or dominant end, but rather he defines it as multiple or plural with a complex structure capable of rational analysis. Moreover, he asserts that a theory of justice is not dependent on a definition of individual good and that in constructing a system of justice a theory of the good does not have to precede a theory of the right.⁷

4. RAWLS, *supra* note 1, § 5, at 22.

5. *Id.* at 26.

6. *Id.* at 27. Suppose a case where a white child is raped by a black youth in a community where racial tension is high and prosecution of the guilty youth would create a very substantial risk of a race riot. If the police chief and district attorney are the only ones who know of the black youth's guilt and can keep it secret, they might conclude that community welfare requires pinning the crime on an old white derelict who needs institutional care anyway. Utilitarianism would be compatible with and willing to consider this course of conduct, which as a matter of moral judgment we find unacceptable.

7. "[T]he structure of teleological doctrines is radically misconceived: from the start they relate the right and the good in the wrong way. We should not attempt to give form to our life by first looking to the good independently defined. It is not our aims that primarily reveal our nature but rather the principles that we acknowledge to govern the background conditions under which

In describing the general direction of this philosophy, I will follow Rawls's "reverse" order, outlining first the main principles of justice under his system and then the relationship between these and the individual good.⁸

III. MAIN PRINCIPLES OF RAWLSIAN JUSTICE

Rawls's system is particularly appealing to the legal mind. Striving to be fully deductive, geometrically deriving subsidiary principles from main principles and assumptions, it nevertheless follows patterns of common-law reasoning by looking for the rational structure underlying our intuitions—the unexpressed consistencies and distinctions in moral situations. It is a reflective process, checking the results of deductive reasoning against judgments arising from concrete situations and seeking to define acceptable points of equilibrium.

Rawls's theory begins in the social contract tradition. He holds that we are most likely to arrive at just, obligatory, and stable principles for ordering the basic structure of society if the process is viewed as an effort to reach agreement by the persons affected. In this way each person is given an equal share in formulating principles, and by accepting the benefits of the agreement, each assumes a duty to accept its obligations. This notion of social contract—the consent of the governed—appears explicitly in the Declaration of Independence⁹ and the Preamble to the Constitution.¹⁰

these aims are to be formed and the manner in which they are to be pursued. For the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities. . . . We should therefore *reverse* the relation between the right and the good proposed by teleological doctrines and view the right as prior. The moral theory is then developed by working in the opposite direction." *Id.* § 84, at 560 (emphasis added).

8. Rawls's work is divided into 3 parts: in the first, he explains the main principles of his system; in the second, he describes the institutions that satisfy the main principles and are necessary in order for the basic structure of society to be just; and in the third, he relates the main principles and institutions to this theory of the individual good. In turn each of these 3 parts is divided into 3 chapters:

PART ONE. THEORY	PART TWO. INSTITUTIONS
I. Justice As Fairness	I. Equal Liberty
II. The Principles of Justice	II. Distributive Shares
III. The Original Position	III. Duty and Obligation
PART THREE. ENDS	
I. Goodness as Rationality	
II. The Sense of Justice	
III. The Good of Justice	

9. "That to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed. . . ."

10. "We the *People* of the United States, in Order to form a more perfect Union" (emphasis added).

A. *The Original Position*

Rawls next formulates the hypothetical set of conditions and procedures that govern the way agreement should be reached. These conditions define the "original position" from which the participants bargain. In the original position, each person retains his common sense, self-interest, and knowledge of each of the general facts about human nature and society. But certain evidence is not admissible and may not be considered by the participants. No one knows or may consider whether he is rich or poor, black or white, male or female, strong or weak, sick or well, or the other particular facts and characteristics of his own circumstances.

Thus, Rawls imposes the principle of equality on the hypothetical deliberations of the original position on the ground that in formulating principles of a just society, inherited or acquired characteristics such as wealth, intelligence, race and health are morally irrelevant and therefore not admissible in evidence. We should emphasize that the original position is a figurative or metaphorical situation, and these rules of evidence are artificial. Yet they seek to reflect common sense. They are principles of neutrality and impartiality that we would try to employ in making up the rules of a game or a trial that we wanted to be fair. They also accord with deeply held moral beliefs in mutual respect and dignity, the rationality of man, his capacity to choose and adhere to moral principles, and the unique potentialities of individuals. They are derived from traditional Christian ethics and enlightenment philosophy and express the same sense of fundamental moral worth expressed by Locke and Kant and adopted by Jefferson in the Declaration of Independence in the phrase, "all men are created equal."¹¹ It is from this fair set of procedures imposed on the deliberations of the original position that Rawls draws the title he gives his entire theory—"justice as fairness."

B. *The Principles*

From the conditions of fairness that define the original position, Rawlsian justice draws its two main principles of order for the basic structure of society and a third set of principles describing individual duties and obligations. Rawls calls the two fundamental rules the principle of equal liberty and the principle of distributive justice:

11. The relationship between Rawls's original position and Jefferson's view is even more clear from the first draft of this part of the Declaration of Independence: "We hold these truths to be sacred and undeniable; that all men are created equal and independent, that from that equal creation, they derive rights inherent and inalienable."

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices opened to all.¹²

1. *Equal Liberty*.—The first principle, which encompasses both personal and political liberty, defines a workable political conception generally followed in our constitutional and legal system. From this principle Rawls formulates by a process of rational analysis a variety of moral principles of more specific application: freedom of conscience, thought, speech, assembly, and association; toleration; liberty of the person; political rights, including those associated with equal participation in the political process and fair opportunity for their exercise; principles of priority that control conflicts among liberties; and the rule of law, including a discussion of due process, penal sanctions, and the relation of liberty to the *public* nature of rules and their clarity.¹³

In Rawls's moral framework, this first principle of equal liberty has priority over the second principle of distributive justice. Accordingly, equal liberty may not be decreased, departed from, or traded-off in order to gain greater social and economic advantages.¹⁴ Neither, for example, may freedom of speech or due process be exchanged for the advantages of economic growth or efficiency that a more regimented society might provide; nor may equal liberty be sacrificed to attain greater economic equality.¹⁵

2. *Distributive Justice*.—Although not well established in our society, the principle that social and economic inequalities are justified only when advantageous to everyone, particularly to the least favored

12. RAWLS, *supra* note 1, § 11, at 60-61.

13. Rawls's discussion of enhancing the worth of political liberty in relation to election financing demonstrates a specific application of the first principle of his moral system.

Compensating steps must, then, be taken to preserve the fair value for all of the equal political liberties. A variety of devices can be used. . . . In addition political parties are to be made independent from private economic interests by allotting them sufficient tax revenues to play their part in the constitutional scheme. . . . What is necessary is that political parties be autonomous with respect to private demands, that is, demands not expressed in the public forum and argued for openly by reference to a conception of the public good. If society does not bear the costs of organization, and party funds need to be solicited from the more advantaged social and economic interests, the pleadings of these groups are bound to receive excessive attention. And this is all the more likely when the less favored members of society, having been effectively prevented by their lack of means from exercising their fair degree of influence, withdraw into apathy and resentment.

Id. § 36, at 225-26.

14. This is true at least in a relatively affluent society; in a poor country there may be some trading in order to provide conditions which make the enjoyment of liberty meaningful.

15. RAWLS, *supra* note 1, § 46.

class, is gaining recognition. It is not a socialist or Marxist view, for Rawls's system recognizes private ownership of the means of production, property, and wealth, although it remains specifically neutral on whether such ownership should or should not be in private hands. Although the principle has economic consequences, it is not a part of economic theory but rather a moral principle derived from the principle of equality and the conditions of fairness which define the original position.

Rawls's view of distributive justice is based on two underlying principles: the "difference principle"—the concept that an equal distribution of social goods is preferable unless an unequal distribution will benefit both persons—and equality of opportunity—the principle that everyone similarly motivated and endowed should have roughly equal prospects of culture and achievement. Equal opportunity is necessary as a corrective measure from one generation to the next, for the difference principle, which permits the use of social incentives in the form of income, inheritance, and authority differences, otherwise might give some members of each generation too great an advantage from the beginning. The principle of equality of opportunity includes rules that prevent excessive accumulations of wealth and provide equal opportunities of education for all.

Rawls's conception of justice rejects the idea that wealth and life's other tangible benefits should be distributed on the basis of who "deserves" them. In a moral sense, no one deserves the arbitrary advantages of inherited wealth or talents that result from the natural lottery of intelligence, energy, and health. The ordinary criterion of deserving—the willingness to make an effort—itself depends upon happy family and social circumstances.¹⁶ Furthermore, income and wealth based on one's "contribution" are determined primarily by laws of supply and demand, not moral worth.¹⁷ Although some theorists have proposed the elimination of distinctions of wealth and power based on merit or greater natural capacity, Rawls argues that

. . . the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.¹⁸

From these principles of distributive justice, Rawls formulates a

16. *Id.* § 12, at 74.

17. *Id.* § 48, at 311-12.

18. *Id.* § 17, at 101.

variety of moral principles of more specific application: the proper savings rate over time; the level at which a social income minimum should be set; and the proportion of total social resources that should be devoted to public goods.¹⁹ In order to establish the background institutions for a just basic structure, Rawls suggests that the government should be divided into four branches charged with preserving certain social and economic conditions: (1) the "allocation" branch, whose objectives are to effect a competitive price system relatively free of unreasonable accumulations of market power and to administer a system of incentive taxes and subsidies designed to correct the occasional but inevitable failures of the market to allocate certain resources properly; (2) the "stabilization" branch, whose purpose is to maintain full employment; (3) the "transfer" branch, which must make the adjustments necessary to maintain the social income minimum, the level necessary to support the needs and standard of life of the disadvantaged; and (4) the "distribution" branch, responsible for raising necessary revenues and encouraging the wide disbursal of property, correcting deviations in the distribution of wealth, and preventing concentrations of power detrimental to the fair value of political liberty and equality of opportunity.²⁰ This latter task would be accomplished through the system of taxation and through adjustments in property rights.

3. *Individual Duties and Obligations.*—The principles of equal liberty and distributive justice governing the basic structure of society and subordinate principles to be derived from them give rise to a multitude of moral requirements for individuals. Although a comprehensive discussion of these requirements would relate the Rawlsian system to the whole catalogue of legal standards, rules, rights, and duties that constitute the body of our law, Rawls demonstrates this relationship with a few fundamental distinctions.

He first distinguishes between natural moral *duties* and moral *obligations*. Natural duties apply unconditionally to individuals regardless of their voluntary acts or relationship to a particular institution or group. Examples include the duty of mutual respect, the duty to avoid causing unnecessary suffering, and the duty to support and further just institutions. An obligation, on the other hand, arises from what Rawls calls the "principle of fairness," which provides that when a group of people join in a cooperative venture according to established rules, those who restrict their liberty in order to benefit all, may rightfully expect

19. Public goods include such items as defense, health services, and social insurance.

20. RAWLS, *supra* note 1, § 43.

others who benefit from the venture similarly to restrict their freedom.²¹ While natural duties and obligations overlap, obligations are based on the notion that an individual should not gain from the cooperative effort of others without contributing his fair share. This is a principle of reciprocity or mutual benefit. This principle of reciprocity influences a large part of the structure of cooperation and trust in society. "It is now equally evident that, having trust and confidence in one another, men can use their public acceptance of these principles enormously to extend the scope and value of mutually advantageous schemes of cooperation."²² Many doctrines and standards of contracts, torts, and restitution, for example, derive from this principle.²³

Rawls does not discuss at length the principle of mutual benefit or reciprocity of *obligation*, or deduce and elaborate from it either concrete applications or principles and rules of more intermediate levels of abstraction. He does, however, go through this process for one of the natural *duties*: the connection between the duty to support just institutions and civil disobedience. Rawls discusses the definition and role of civil disobedience and conscientious refusal, the duty to comply with unjust laws, and the status of majority rule. He demonstrates that properly limited civil disobedience is occasionally justified in a relatively just society, but only to protest violations of the principles of equal liberty and equality of opportunity—and not to protest unjust tax laws or other violations of the difference principle. He shows how the concepts of civil disobedience and conscientious refusal, when properly understood and acted upon, are a force for stability in society. Rawls articulates the philosophical bases present in many of the writings of Jefferson and Paine on civil disobedience and underlying many early state constitutional provisions on civil disobedience and non-resistance.²⁴

4. *Summary of Rawls's Main Principles of Justice.*—Concluding his discussion of the foundations of his theory of justice, Rawls summarizes and puts his two main principles in final form. The first states that each person is to have an equal right to the most extensive system of basic liberties compatible with a similar system of liberty for all. The second asserts that social and economic inequalities are to be arranged

21. *Id.* § 18, at 111-12.

22. *Id.* § 52, at 347-48.

23. For a discussion of the implications of the principle of reciprocity see notes 42-55 *infra* and accompanying text.

24. See, e.g., TENN. CONST. Art. I, § 2 (adopted in 1796): "That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind."

so that they are both to the greatest benefit of the least advantaged, which is consistent with the just savings principle, and attached to offices and positions open to all under conditions of equality of opportunity. Rawls then restates the two priority rules derived from the principles. The first, the Priority of Liberty, requires that the principles of justice be ranked in lexical order and that, accordingly, liberty may be restricted only for liberty's sake. Under this ordering, a less extensive liberty must strengthen the total system of liberty shared by all, and a less than equal liberty must be acceptable to those possessing the lesser liberty. The second rule, the Priority of Justice over Efficiency and Welfare, dictates that the second principle of justice stands lexically prior to both the principle of efficiency and that of maximizing the sum of advantages. Additionally, fair opportunity takes priority over the difference principle. Under this rule, an inequality of opportunity must enhance the opportunities of those given less opportunity, and an excessive rate of savings must on balance mitigate the burden of those bearing this hardship. Finally, Rawls submits that "[a]ll primary social goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of these goods is advantageous to the least favored."²⁵

IV. RELATION OF MAIN PRINCIPLES OF JUSTICE TO INDIVIDUAL GOOD

Having presented the main principles of justice, the institutions they require, and the duties and obligations they impose on individuals, Rawls turns, finally, to the question whether justice as fairness is a feasible conception. Is it consistent with the great variety of wants and aims that men have? Is our nature such that these principles can be carried through? Do these principles lead to a stable society, and are they congruent with the way men see their own good? Rawls's principles of justice are provisional: they are put forward with the knowledge that they are valid only if an account of the individual good shows that the life goals and wants of individuals will flourish under these principles.

A. Nature of the Individual Good

Rawls views the individual good as a multiple and complex set of activities and ends. This complexity results both from the great variety of wants and potentialities that each person possesses and from a basic principle of human motivation that Rawls calls the "Aristotelian principle:"

25. RAWLS, *supra* note 1 § 46, at 303.

[O]ther things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity. The intuitive idea here is that human beings take more pleasure in doing something as they become more proficient at it, and of two activities they do equally well, they prefer the one calling on a larger repertoire of more intricate and subtle discriminations. For example, chess is a more complicated and subtle game than checkers, and algebra is more intricate than elementary arithmetic. Thus the principle says that someone who can do both generally prefers playing chess to playing checkers, and that he would rather study algebra than arithmetic. . . . Presumably complex activities are more enjoyable because they satisfy the desire for variety and novelty of experience, and leave room for feats of ingenuity and invention. They also evoke the pleasures of anticipation and surprise, and often the overall form of the activity, its structural development, is fascinating and beautiful. Moreover, simpler activities exclude the possibility of individual style and personal expression which complex activities permit and even require, for how could everyone do them in the same way?²⁶

Not only is the individual good complex, but it can be analyzed and planned rationally. It is "determined by the plan of life that we would adopt with full deliberative rationality if the future were accurately foreseen and adequately realized in the imagination."²⁷ Happiness results from the "successful execution (more or less) of a rational plan of life drawn up under (more or less) favorable conditions Someone is happy when his plans are going well, his more important aspirations being fulfilled, and he feels sure that his good fortune will endure."²⁸

Although the good differs among individuals, a rational life plan will contain certain primary goods that are uniformly sought as rational. Reasonable income and wealth, extensive liberty and opportunity, and self-respect are primary goods that fit into any rational plan: self-respect includes the individual's conviction that his goals in life are worth pursuing and that he will be able to effect his purposes and intentions.²⁹

B. *The Stability of Justice as Fairness*

Before discussing the relationship between moral right, individual good, and the question of stability, it is important to note that Rawls's system, and the contract theory generally, emphasize the *public* nature both of the principles of justice and the rules that flow therefrom and also of the activity of officials. When a system publicly expresses men's respect for each other, and society is known to operate justly, the persons "subject to these arrangements tend to develop a desire to act in accordance with these principles and to do their part in institutions

26. *Id.* § 65, at 426-27.

27. *Id.* § 64, at 421.

28. *Id.* § 63, at 409.

29. *Id.* § 67, at 440.

which exemplify them. A conception of justice is stable when the public recognition of its realization by the social system tends to bring about the corresponding sense of justice."³⁰ Whether Rawls's principles will provide a stable system depends on whether the principles can reinforce themselves in practice by generating a public sense of justice that will regulate the life plans of individuals in a well-ordered society. Rawls argues that justice as fairness is a stable concept because it is consistent with sound psychological theory. It is in accord with the way people come to hold and act upon moral principles, and is, therefore, a feasible theory that can be put into practice.

Rawls believes that human nature is such that individual moral development and the process of learning to act in a moral way comes in three stages. As small children in the family we begin gradually to acquire a sense of justice because our nature is such that we accept the *authority* of our parents who impose certain precepts and conduct upon us. Next, in the second stage our sense of justice is further developed by approval and disapproval arising from *association* with others in various groups in school, neighborhood, games and work where we develop an awareness of other persons, their intentions, feelings and point of view. We develop a set of emotional constraints, inhibitions and reactions which are aroused by the success or failure to fulfill one's duties and obligations in the association. The third stage completes our moral development. We go beyond the approval and disapproval of others as we analyze and understand the principles that operate in our association with others. We develop moral *principles*, understand the values they secure and the way they operate to everyone's advantage. As we understand that we and those we care for are the beneficiaries of just principles and institutions, we develop a desire to act upon ideals and principles of justice, to work for just institutions, and to reform existing ones when justice requires it. Rawls titles these three stages in the maturing of the individual's sense of justice "the morality of authority," "the morality of association," and "the morality of principles,"³¹ and his treatment of them reflects his understanding of recent developments in psychology and social behavior.³²

30. *Id.* § 29, at 177.

31. *Id.* §§ 70-72.

32. The influence of the social sciences on Rawls's thought is apparent in this statement of the 3 stages of development:

First law: given that family institutions are just, and that the parents love the child and manifestly express their love by caring for his good, then the child, recognizing their evident love of him, comes to love them.

Second law: given that a person's capacity for fellow feeling has been realized by acquiring

Just as natural selection and the evolutionary process have shaped man's physical and mental characteristics, these psychological tendencies have forced man to develop a sense of justice that permits him to operate within fair cooperative arrangements and stable social groups. Rawls's theory of justice as fairness is consonant with these psychological laws and the tendency of evolution because both are rooted in the principle of reciprocity, mutuality, or partnership—the tendency to answer in kind and return what is given.³³

Reflecting the idea of reciprocity or mutual benefit, Rawls's contract theory, his principles of equal liberty and equal opportunity, and his difference principle combine the desires for protection and security with altruism. This balance between altruism and self-interest guarantees the development of the kind of sense of justice which the psychological laws require for individuals to live in stable social groups. Rawls's view that the benefits of social cooperation—liberty, opportunity, income and wealth—should be distributed so as to be to everyone's advantage gives effect to and heightens the operation of the reciprocity or mutuality principle and is, therefore, a stable conception of justice.

Moreover, Rawls's two principles of justice and their subordinate rules have greater clarity and a more definite structure than other conceptions of justice. By contrast, utilitarianism vaguely and imprecisely seeks to maximize the aggregate satisfaction. The clarity and order of Rawls's principles "[offer his principles] with greater sharpness to the intellect and thereby [secure] their hold on the mind,"³⁴ thus increasing the over-all stability of his system.

C. *The Congruence of Justice as Fairness and Individual Good*

Rawls also demonstrates that justice as fairness is congruent with

attachments in accordance with the first law, and given that a social arrangement is just and publicly known by all to be just, then this person develops ties of friendly feeling and trust toward others in the association as they with evident intention comply with their duties and obligations, and live up to the ideals of their station.

Third law: given that a person's capacity for fellow feeling has been realized by his forming attachments in accordance with the first two laws, and given that a society's institutions are just and are publicly known by all to be just, then this person acquires the corresponding sense of justice as he recognizes that he and those for whom he cares are the beneficiaries of these arrangements.

Id. § 75, at 490-91.

33. "Beings with a different psychology either have never existed or must soon have disappeared in the course of evolution. A capacity for a sense of justice built up by responses in kind would appear to be a condition of human sociability. The most stable conceptions of justice are presumably those for which the corresponding sense of justice is most firmly based on these tendencies." *Id.* at 495.

34. *Id.* § 76, at 501.

the conception of individual good as a rational life plan. The principles of justice contribute to the individual good of the members of society who, when they appraise their plans of life, "will decide to maintain their sense of justice as regulative of their conduct toward one another."³⁵

In order to show the congruence of Rawlsian justice and individual good, it is necessary to accept his idea of "social union" and understand why individuals participate in groups. Rawls rejects the view that the individual participates in families and other associations according to the standard of reciprocity only as a means of obtaining a larger share for himself and realizing his own private aims. Rawls contends that people also participate because each person's individual "potentialities . . . are greater than those he can hope to realize,"³⁶ and, as dictated by the Aristotelian Principle, the individual takes pleasure in the realization of the potentialities of others and their efforts to develop and exercise their abilities.³⁷

Social union in this sense of human sociability is desirable in itself. Society is made up of many social unions, and Rawls conceives of a society ordered according to the principles of justice as fairness as a "social union of social unions" in which the members cooperate to realize their own and other individuals' natures. Applying the idea of social union to the basic structure of society as a whole, we find that just institutions are good in themselves, and collective activity under these principles must be experienced as a good in itself. The desire to develop a sense of justice and act justly in the social union "derives in part from the desire to express most fully what we are or can be, namely free and equal rational beings with a liberty to choose."³⁸ We most fully realize our individual natures and our good when we act not only within the various social unions to which we belong, but also act with a sense of justice within the larger social union whose institutions are created in accordance with the principles of justice as fairness.

Rawls's ordering of the first principle of justice over the second—the priority he gives the principle of equal liberty over the princi-

35. *Id.* § 78, at 514.

36. *Id.* § 79, at 523.

37. "[I]t is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others. We are led to the notion of the community of humankind the members of which enjoy one another's excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all." *Id.*

38. *Id.* § 40, at 256.

ple concerning the distribution of wealth and authority—proceeds from the need of individuals to realize their own and other individuals' potentialities through social union. This priority applies in relatively well-ordered societies in which the level of abundance—food, clothing, and material needs—is sufficient so that “only the less urgent wants remain to be met by further advances. . . .”³⁹ When basic material needs are met, the individual commonly pursues spiritual and cultural interests, participates in public affairs, and exercises some control over the laws regulating association. The desire of individuals to express themselves in free social union with others increases, and the importance of securing the freedom of association in social unions through the principle of equal liberty grows accordingly. Moreover, unless we emphasize the prior importance of the self-respect arising from equal citizenship over the status and self-esteem derived from an individual's place on the scale of income and wealth, we elevate the importance of wealth and fix the means of status in such a way that “each man's gain is another's loss.”⁴⁰

The nature of the relationship between principles of moral right and the individual good, then, establishes justice as fairness as a more feasible conception than utilitarianism or other single-end philosophies. Where utilitarianism pursues satisfaction or happiness as its dominant end and maximizes this individual good for society at large to achieve its principle of justice, justice as fairness reverses the order and recognizes that the principles of right are realized prior to the good and provide the parameters within which each person defines his own good. Under this view the good is multiple and complex, and Rawls's theory therefore does not aim at the “complete specification of conduct,” as do single- or dominant-end conceptions of justice.⁴¹ A person's conduct is morally correct as long as he acts according to a rational life plan regulated by the principles of justice as fairness.

V. IMPLICATIONS FOR JUDICIAL PROCESS

In our legal process, when private cooperative arrangements break down or official action is questioned, the disputants generally seek “not a change in the law but a declaration that existing law is in accordance with their position,”⁴² and characteristically turn to the courts as the place of first resort. As a result, the body of decisional law developed by the courts with inputs from an infinite variety of sources constitutes

39. *Id.* § 82, at 542.

40. *Id.* at 545.

41. *Id.* § 86, at 566.

42. H. HART & A. SACKS, *THE LEGAL PROCESS* 186 (1958).

most of the enormous underlying body of law that governs society. Legislatures usually make law "by way not of original solution of social problems but by alteration of the solutions first laid down by courts."⁴³ Thus, the assumptions, forms of analysis, and constraints upon legal development that lawyers and judges employ are very important in the implementation of any social philosophy or policy.

Rawls's theory has many implications for the judicial process. In the field of constitutional law, for example, much serious work is needed to clarify and define the basis of various civil liberties. Rawls's theory will be very helpful in determining the reach and limitations of principles of constitutional adjudication. In *An Anatomy of Values*,⁴⁴ Professor Charles Fried has undertaken the process of clarifying various liberties in relation to moral principles. His discussion of the relationship between justice as fairness and privacy, self-incrimination, and electronic surveillance is a specific example of how analysis can reveal the relationship between law and moral principles. Professor Fried defines the scope of the right of privacy and the privileges against self-incrimination and surveillance by demonstrating that privacy is the "rational context" in which mutual respect, trust, friendship, and intimacy exist.⁴⁵ Rawls provides the rational structure to support similar analysis of other constitutional principles.

Rawls's theory is also helpful in developing more rational principles and rules in the traditional areas of law like tort and restitution and in modern fields which apply tort and restitutionary principles like securities and antitrust regulation. Moreover, Rawls's theory provides a new perspective on the instrumentalist view of law as a set of means rather than ends, a perspective which alters the traditional view of the nature of legal rights and duties. I want to explore briefly in this section the implications of Rawls's theory in this more traditional area of concern to the practitioner.

The dominant legal philosophy espoused by lawyers, judges, legal scholars, and social scientists is an admixture of the utilitarian or positivist view of law expressed by John Austin⁴⁶ and the legal realism of Justice Holmes. Rejecting the contract tradition of legal theory, this philosophy suggests that law consists of both the commands and sanctions imposed by officials and the principles and rules that can be de-

43. *Id.*

44. C. FRIED, *AN ANATOMY OF VALUES: PROBLEM OF PERSONAL AND SOCIAL CHOICE* (1970).

45. *Id.* at 137-52.

46. J. AUSTIN, *LECTURES ON JURISPRUDENCE* (R. Campbell ed. 1874).

duced from their behavior. This view insists on separating law and morals and on maintaining a sharp line between ethics or moral philosophy and law. Developed in the nineteenth century in response to the needs of an industrializing society, this philosophy offers a modern theory of law with its roots in economic theory.

This is essentially an instrumentalist conception of law. Principles, rules and procedures are simply tools to be manipulated so as to bring about a rational order for society. They have no intrinsic value. This conception of the legal system, which emphasizes the coercive element of law and the need for predictable and regular administration of rules and sanctions as a means of achieving a rational order, leaves out the purposive and expressive nature of law and is therefore compatible with injustice. Such an instrumentalist perspective fails to emphasize law as a cooperative social activity consisting of ends of intrinsic value necessarily giving expression to moral principles and judgments.

These principles of the instrumentalist philosophy are most apparent in Justice Holmes's image of the "bad man:"

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

.
If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

.
[I]f we take the view of our friend the bad man we shall find that he did not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁴⁷

This Darwinian or economic view is still at the basis of most thinking about law. Two respected legal scholars, Calabresi and Melamed, have recently reiterated it as follows:

Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of "might makes right"—whoever is stronger or shrewder will win. Hence the funda-

47. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897).

mental thing that law does is to decide which of the conflicting parties will be entitled to prevail.⁴⁸

They explain their meaning in terms of Holmes's "bad man": "If Taney owns a cabbage patch and Marshall, who is bigger, wants a cabbage, he will get it unless the state intervenes."⁴⁹ Accordingly, law is related to morality but only, we might say, as the sickle and the pitchfork are related to hay: "The use by the state of feelings of obligation and rules of morality as means of enforcing most entitlements is not only crucial but terribly efficient."⁵⁰ They are separate but related tools used to cut down and stack up in a more efficient way disorderly and arbitrary natural forces.

In its emphasis on coercion, predictability, regularity, efficiency, and order, the instrumentalist view focuses on one important aspect of justice but not the most important one. It does not recognize that the fundamental thing which law does is make concrete and real the mutual ties and common purposes binding a society and express according to the reciprocity principle the obligation of each individual to do his part in advantageous cooperative ventures the benefits of which he accepts. Rawls's theory intertwines—or, to use Holmes's word, "confuses"—law and morals and emphasizes the expressive character, intrinsic value and partnership or contractual quality of law. Under this conception we should measure law not from the vantage point of the "bad man" but from the less cynical perspective of the man in Rawls's original position who retains his common sense and self-interest but does not give weight to his own peculiar circumstances of wealth, social status, or race.

In some instances, analysis according to the reciprocity principle will suggest new forms of legal argument and lead to conclusions different from the instrumentalist position. In the absence of reciprocity, the concept of a legal "duty" is quite weak. From the point of view of Holmes's "bad man" it is weak, as it is in Professor Hohfeld's traditional cataloguing of legal relations in terms of rights, duties, powers, and immunities.⁵¹ But the conception of a legal "obligation" arising from the mutuality expressed in the reciprocity principle gives strength and clarity to the concept of legal rights and duties.

The difference in the forms of analysis and outcome becomes clearer when a specific example from tort law is considered. If a police

48. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

49. *Id.* at 1091.

50. *Id.* at 1090 n.4.

51. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 23-64 (W. Cook ed. 1923). Professor Hohfeld is responsible for much of the classification of law employed today.

officer shoots at a fleeing bank robber and mistakenly injures an innocent bystander, analysis based on principles of utilitarianism and legal realism could easily lead to a conclusion denying the liability of the officer and the government.⁵² Under utilitarian analysis, the issue involved concerns the "reasonableness" of the police officer's risk-taking conduct and questions whether the need to suppress crime by permitting law enforcement officers to act without restraint in dangerous situations justifies the risk that a stray bullet may injure a bystander. Using this utilitarian calculus, which evaluates the maximum social utility by weighing the social costs and benefits of capturing the felon by force, some courts have found that the social benefits of suppressing crime do justify injuring bystanders and that a reasonably prudent man would undertake this risk in the name of law enforcement to promote the general welfare, even though a few innocent individuals must suffer.⁵³ Even those courts holding otherwise often utilize the same pseudoscientific cost-benefit reasoning. These courts add an insurance principle to the cost analysis and conclude that since the general welfare requires that society bear the cost of these injuries the state should be liable because it is in the best position to spread the cost to society at large.⁵⁴

Under justice as fairness and the reciprocity principle, however, this utilitarian analysis is unacceptable because it fails to focus on the legitimate expectations of the victim and on whether the existing cir-

52. In analyzing the case of the police officer who shoots a bystander, I follow the general line of argument of Professor Gordon P. Fletcher in his *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). With unusual insight and mastery he traces the history of tort in the 19th century showing the departure of tort law from the principle of reciprocity to utilitarian theory and instrumentalism.

53. See *Morris v. Platt*, 32 Conn. 75 (1864); *Shaw v. Lord*, 41 Okla. 347, 137 P. 885 (1914).

54. See *Terry, Negligence*, 29 HARV. L. REV. 40 (1915), and cases cited therein. Using this cost-benefit analysis, some courts, unfortunately, have continued to limit government liability, even after the enactment in 1946 of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1970), a measure designed to abolish absolute governmental immunity for the torts of its employees and to broaden the government's liability for negligence. The Supreme Court, however, has construed the Act to mean that policy decisions at high levels of government, as distinguished from decisions made at the field or operational level, are immune from liability because the maximization of social satisfaction requires that the injured individuals, rather than society, bear the cost of the government's conduct. *Dalehite v. United States*, 346 U.S. 15 (1953). See W. PROSSER, TORTS § 131 (4th ed. 1971). The justification of governmental immunity is almost always stated in positivist terms following Justice Holmes's explanation in *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907): "A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Accordingly, innocent individuals must remain uncompensated for injuries, even those caused by gross negligence, simply because the negligent decision was made at the "policy" level. When FBI agents, for example, negligently cause injury to passengers by shooting at a hijacked airplane, the question of liability in the cost-benefit analysis will depend upon the level at which the decision to intervene was made.

cumstances surrounding the activity require that the party creating the risk assume an obligation to restrict his activity in accordance with these expectations. The reciprocity principle permits the creator of the risk to expect the injured party to accept only the mutual or reciprocal risks of a voluntary, cooperative endeavor, and not abnormal or nonreciprocal risks. Thus the crucial question is whether the defendant created an unequal risk—a risk that “was of an order different from the risks that the plaintiff imposed on the defendant.”⁵⁵ If the risks are nonreciprocal, the defendant is liable unless his conduct is excused, perhaps by compulsion, emergency, or unavoidable ignorance.

The reciprocity principle is concerned with doing justice between the parties rather than maximizing community welfare through judicial social engineering. For this reason, the reciprocity principle is more congruent with traditional tort concepts of fault, negligence, contributory negligence, assumption of the risk, proximate cause and foreseeability, and strict liability than is the cost-benefit analysis. The inquiry in tort cases like the hypothetical situation is not how to aggregate community satisfaction by cost-benefit analysis, but how to determine the bounds of reciprocity and legitimate expectations. In the example, the officer's conduct toward the victim is reckless because he knowingly fires in the victim's direction, thus creating an abnormal or nonreciprocal risk of harm that cannot be anticipated or guarded against. Since there is no basis for excusing the dangerous conduct on grounds of unavoidable ignorance, compulsion, or the foreseeability of the consequences, justice as fairness would permit the victim to recover.

A Theory of Justice provides the main principles of a legal philosophy that emphasizes fairness and cooperation and, when applied, is likely to result in a more just approach by judges in their function as the place of first resort for the resolution of disputes. Rawls has constructed a philosophy that takes the individual seriously and, unlike the dominant utilitarian philosophy, does not attempt to conflate all persons into one unit through the concept of maximizing community satisfaction. Accordingly, Rawlsian philosophy makes it more difficult to excuse arbitrary inequalities and violations of liberty.

VI. IMPLICATIONS FOR POLITICAL PROCESS

Combining ideas from various fields of learning and experience, Rawls argues vigorously for a systematic social philosophy that articulates the structure and unifies the direction of democratic liberalism.

55. Fletcher, *supra* note 52, at 546.

Rawls provides a compelling and unifying social ethic, at least for those who identify themselves with the forces of liberalism, but who have heretofore only half-articulated the basis of their ideals. Rawls constructs the principles of a philosophy, but not the rules and standards of legislation, judicial decision, or the idiom for a political campaign. Like a work of art, this philosophy has a shape and beauty of its own, but is not self-executing. Principles must be implemented to have usefulness and impact, for few people read philosophy; and even if they did, principles alone "tell too little about what to do either to be effective in getting it done or to make a penalty seem fair for not doing it."⁵⁶

The political implications of justice as fairness traverse the whole spectrum of the political process and include the judgments required in appointing federal judges, the consideration of legislation such as no-fault insurance, the establishment of a realistic social minimum income through welfare reform, the redistribution of benefits from work and cooperation through major tax reform, the establishment of the liberty of equal participation in the political process through public financing of political campaigns, the modification of the antitrust laws to avoid concentrations of economic power and to encourage the wider disbursement of wealth, the alteration of wage and price controls—if they are to continue—to limit corporate profit and capital gain as well as the working man's wage increases, the decision to enact a new public information law opening official conduct to public disclosure, and the determination to stop government wiretapping and other invasions of privacy. The purpose of this Review, however, is not to deduce specific legislative reform from Rawls's system, but to draw more general conclusions about the political direction in which he leads. Perhaps this may best be done by anticipating the likely nature of his opposition.

It will come on one hand from various conservative viewpoints that defend and encourage widespread inequalities based upon inherited wealth, position, and unequal natural abilities. On the other hand, opposition will come from Marxists, who argue that through class hatred and revolution by the masses a classless society must be established in which the means of production are owned by the state.⁵⁷ Rawls constructs a balance between these points of view, a balance which requires that people redress arbitrary and widespread inequalities in society while maintaining the principle of equal liberty and a framework of order in which people can pursue their life plans as they choose.

56. H. HART & A. SACKS, *supra* note 42, at 160.

57. For an interesting criticism of Rawls from the perspective of the Marxist tradition see McBride, *Social Theory Sub Specie Aeternitatis: A New Perspective*, 81 YALE L.J. 980 (1972).

Conservatives will disagree with the egalitarian direction of justice as fairness because they believe that the favored classes *deserve* in a moral sense their wealth or inheritance, intelligence, energy and initiative, and the resulting rewards of social position and authority. They will focus on the question of *deserving*. Although some conservatives will concede that major adjustments are necessary to eliminate invidious discrimination and to allow the distribution of wealth and authority to parallel more closely individual ability and merit, they will argue that some individuals have greater moral worth than others, and that society should recognize that inequalities based on individual merit are therefore valid and just.

The principle of equal liberty and the difference principles give justice as fairness a more egalitarian political direction than the view that men justly deserve the rewards of their natural ability. Rawls argues that rewards based on natural ability are undeserved and should remain unaltered only when their elimination would reduce the total benefit to everyone, including the least favored. These "undeserved inequalities," he says, "call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for."⁵⁸ His difference principle provides a method of redress:

It transforms the aims of the basic structure so that the total scheme of institutions no longer emphasizes social efficiency and technocratic values . . . [and] represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.⁵⁹

Rawls allows greater incentives for those who use their abilities to enlarge the stock of good for the mutual advantage of all. But while Rawls and enlightened conservatives may agree on some social issues, they will approach these issues in a very different manner. The conservative viewpoint, for instance, is hard to reconcile with the present federal tax system that insists at least in theory that people pay progressively higher proportions as their income rises and reflects, presumably, their greater work and ability. Similarly, conservatism is difficult to square with current social legislation that requires redress in the employment of women or blacks even though their performance may not be so "deserving." Justifying such social legislation under justice as fairness is easily accomplished, but the conservative who sees these differences

58. RAWLS, *supra* note 1, § 17, at 100.

59. *Id.* at 101.

as morally-deserved can do so only with difficulty. For Rawls, equality of opportunity means that people must reach for equality of results rather than for opportunity for those who are naturally endowed.

From still another perspective, Marxists will argue that equality requires the elimination of incentives and differences in reward—a classless society—and that this end can be effected only through political revolution and class hatred. Rawls's answer is simply that a course of revolution and hatred destroys the incentives and the framework of cooperation which are to everyone's advantage, especially to the least favored class.

Ultimately, Rawls's moral philosophy will have important meaning for the political process because its particular emphasis on liberty, equality, cooperation, and the claims of the least favored class seems more consistent with basic Christian ethics than the principles of either conservatism or Marxism. Justice as fairness balances in a more acceptable way for post-industrial society the idea of rewarding work and natural ability with the claims of the disadvantaged to individual moral worth and dignity, and material assistance and opportunity. *A Theory of Justice* will prove significant, finally, because it reflects an ancient tradition whose roots are found in teachings millenia old:

When the Son of man shall come in his glory . . . [a]nd before him shall be gathered all nations . . . [t]hen shall the King say unto them . . . [f]or I was hungry and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. Then shall the righteous answer him, saying, Lord, when saw we thee hungry and fed thee? or thirsty, and gave thee drink? . . . And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.⁶⁰

60. *Matthew* 25:31-40.