

Contractarianism as a Political Morality¹

Benjamin Sachs

Contractarianism initially made its mark as a sort of philosophical analogue of what scientists call the *theory of everything*. For Hobbes, the first well known contractarian, contractarianism was supposed to settle every important question in moral and political philosophy. It provided a theory of how individuals should treat each other, of how extensive the state's power over the individual should be and toward what end it should use that power, and of the individual's duty to obey the state and his/her right to overthrow the government. This kind of contractarianism was well suited to its historical context: 17th-century Europe. In that time and place, everything seemed up for grabs. The old feudal systems and the Catholic hegemony were collapsing and two diametric opposites—democracy and monarchical absolutism—were vying to become the next dominant political model. Furthermore, revolutions were rampant and it seemed there was nothing to hold back humankind's underlying propensity for settling differences through violence and brutality. So there was a place for something of the form of contractarianism—some theory of everything to explain how peace and order could be achieved in the face of disagreement and clashes of interests.

But then contractarianism fell out of favor, and it's not hard to see why. Eventually, compelling non-contractarian answers to theretofore-open questions became established both *de facto* and *de jure*, thus robbing contractarianism of its motivation. The spread of ideas of human rights and the moral equality of persons had much to do with this, as did the movement in philosophy toward the idea that a

¹ I would like to thank the audience at the meeting of the Aristotelian Society at which I presented a previous draft of this paper, as well as Lisa Jones, Sarah Broadie, and especially Theron Pummer for their helpful comments.

moral theory could be built on purely rationalistic grounds, combined with the suspicion that contractarianism is necessarily quite speculative.

Contractarianism, in the form of a theory of justice, was revived by Rawls. But even this more modest aim for contractarianism has been called into question, most notably by G.A. Cohen, who contends that we have other tools at our disposal, aside from contractarianism, for identifying the true conception of justice.

Fortunately for those of us who are attracted to contractarianism but find the standard objections to it compelling, there is an often overlooked strand of contractarianism—one that has its roots in James Buchanan² and, I would argue, Kant³--that isn't vulnerable to the standard objections: contractarianism as a political morality. (A political morality is basically a morality constraining the state, though I will make that definition more precise in §5.) My goal here is to clear the space for contractarianism so understood by showing how it avoids the standard objections and provides answers to questions that cannot obviously be answered better some other way.

I arrive at this answer by beginning with contractarianism as a theory of everything and paring away the unappealing layers of contractarianism so understood. I begin, in §1, by describing what contractarianism is. Then, in §2, I dispense with contractarianism as a theory of legitimacy—a theory of the individual's obligation to obey the state. In §3, I discard contractarianism as a theory of interpersonal morality. Next, in §4, I concede Cohen's point that contractarianism is not plausible as a theory of justice. §5 is the heart of the essay; there I identify what philosophical questions in the general area of moral/political theory remain, having removed so much from

² Specifically, Buchanan 1975.

³ Specifically, the Kant of *On the Common Saying: That may be Correct in Theory, but it is of No Use in Practice* (in Kant 1996: 273-310). This interpretation of Kant is shared by Michael Lessnoff (1986: 91) and, I think, by Gerald Gaus (2012: 111-13)

contractarianism's purview, and I sketch how contractarianism would go about addressing them. Finally, in §6-9, I respond to four natural objections to contractarianism as a political morality.

1. Characterizing Contractarianism

Contractarianism, as I understand it, begins with a state of nature thought experiment. The state of nature is a situation in which there are no generally effective checks on individual behavior. This may be because there is no widespread recognition of moral constraints, or rather simply because however much individuals might agree on what the moral constraints are they nevertheless cannot rely on each other to obey those constraints and agree about which actions constitute violations.

The second essential element of contractarianism is, of course, contracting. The idea is that rational individuals would perceive the state of nature as a non-ideal circumstance and therefore attempt to avoid it, and would do so by contracting with each other to create some publicly recognized authority. This authority could take the form of a list of rules, a sovereign ruler with unlimited discretion and a monopoly on coercive force, or anything in between.

I'm interested in what moral/political question is supposed to be settled by this contracting, according to contractarianism understood the way I've described it. My contention is that there is a set of important moral questions that needs to be answered—a set I call 'political morality'—and that contractarianism escapes its standard shortcomings when construed as answering only them.

2. Legitimacy

We begin, however, by examining the idea—which comes to us from Hobbes and Locke—that contractarianism can be used as a theory of legitimacy. The question of the state’s legitimacy is often understood to be the question of the individual’s obligation to obey the state’s dictates (Kavka 1986: 22; Simmons 2001: 106), and the basic idea of contractarianism as a theory of legitimacy is that individuals are obligated to obey the state because through a contracting process that’s what they did agree to or would agree to. But this is a seriously deficient theory of legitimacy no matter how it gets worked out. The problems here are familiar and much discussed, so instead of trying to add anything new I will simply review what seem to me to be the key objections.

David Hume was perhaps the first to point out the most obvious problem, which is that most or perhaps all current states (Hume said all current states) were *not* founded through contracting, which is problematic because only *actual* contracting is morally transformative.⁴ Furthermore, even if current states were formed through contracting, that fact would seem to be irrelevant to the question of whether the *current* denizens of the state are obligated to obey its dictates, except in the rare case of a state whose current denizens are its founders.

Contractarianism has room for maneuver here if we are willing to be accommodating regarding what it takes for a theory to qualify as contractarian. There may never have been any contracting in the sense of a group of individuals coming together and striking an agreement to form a state vested with a certain measure of authority over their behavior, but we may be able to at least understand individuals as consenting to the authority of the state. Admittedly, such an action might not really

⁴ David Hume, ‘Of the Original Contract’ (in Locke, Hume and Rousseau 1947: 145-66). Michael Lessnoff (1986: 87-90) emphasizes this problem as well.

qualify as contracting, since it isn't reciprocal in the way that contracting is generally supposed to be. But if we construe the underlying spirit of contractarianism-as-a-theory-of-legitimacy as the idea that a state gains its legitimacy over the individual through an act of that individual's will, then the consent theory would still qualify as contractarian.

Nevertheless, problems persist, as Jean Hampton has nicely illustrated. There are four ways of understanding the connection between the individual agreeing to something and her having an obligation to obey the state, but there is trouble no matter which understanding the contractarian plumps for (Hampton 1986: 266-68). The first theory is simple: We are obligated to obey the state because our predecessors consented to the authority of the state. This theory, however, succumbs to Hume's objection; no such thing ever happened and if it did it would nevertheless be morally irrelevant today. The second theory proposes that currently living individuals actually consent to be subject to their state's authority; its problem of course is that this is simply not true, as most people have never been invited to register their consent or dissent. The third theory is that currently living individuals provide tacit consent, through their actions, to the state's authority, while the fourth theory is that currently living individuals would, *hypothetically*, consent if they were invited to do so. But both of these theories confront the same problem: tacit and hypothetical consent don't seem to have any moral force. It seems plausible to suppose that we are bound to do what we have *actually* agreed to, but the moral considerations underlying this thought lend no support at all to the idea that we are bound to do what we *would* agree to do (Dworkin 1989; Williams 2007: 479) or what our actions suggest we are content with.

3. Interpersonal Morality

Having dispensed with contractarianism as a theory of legitimacy, we now move on to consider contractarianism as an interpersonal morality, or what we would ordinarily simply call “morality”—i.e., the set of moral obligations and permissions that apply to moral agents as such in their dealings with other individuals. This version of contractarianism is found in the works of 20th- and 21st-century theorists such as John Harsanyi (1980), David Gauthier (1986), Gerald Gaus (2011, 2013), Jan Narveson (2013), and Jeffrey Reiman (1990: Chs. 1-2).

As to whether contractarianism is an adequate interpersonal morality, I’ve argued elsewhere, in detail, that it is not (Sachs unpublished a: Ch. 2). The argument, briefly, runs as follows. First, moral theories, in general, have an explanatory job to perform; specifically, they must not only identify which actions are wrong but also identify what it is about them that makes them wrong. Second the contractarian explanatory story is substantially impersonal. When an action is wrong, the explanation of this, according to contractarianism, is that it would be forbidden by the contract that would be agreed as an alternative to the state of nature. This explanation is impersonal in that no particular individual, aside from the perpetrator, is mentioned in it.

Now the key move: Note that the explanatory story that a theory tells determines what that theory says about wrongdoing—where “wronging” is a kind of wrongdoing that has a direction in that it is something that one individual (the perpetrator) does to another (the victim) and that has further implications in terms of the appropriateness of resentment, apology and forgiveness. Depending on what the explanation of a certain instance of wrongdoing is, we can determine whether that instance of wrongdoing is an instance of wronging.

The payoff of all this is that since the contractarian explanatory story for each instance of wrongdoing is impersonal, then according to contractarianism no wrongdoing counts as wronging, since wronging is a *personal* relation between a perpetrator and a victim. Therefore, contractarianism is an inadequate theory of interpersonal morality, as some violations of interpersonal morality are indeed cases of wronging (rape, for instance).

One possible response is that contractarian explanations of wrongdoing do indeed mention individuals other than the perpetrator, namely all the parties to the contract. But to say that a case of rape is an offense against everyone is just as counterintuitive as to saying that it's an offense against no one.

Note, finally, that if we treat contractarianism only as a morality governing the state, which is what I later will suggest we should do, the impersonal nature of the explanatory story it tells is no longer a problem. Suppose, for instance, that the state fails to dictate which side of the road its denizens should drive on, and that this leads to many fatal car accidents. I assume we all accept that this constitutes wrongdoing on the state's part. Contractarianism as a political morality will say that this constitutes wrongdoing on account of its constituting a failure on the part of state to do what the contract demands that it do (solve life-threatening coordination problems, perhaps). This wrongdoing is a wrong to all parties to the contract equally, if anyone. I see nothing unreasonable about such an implication.

4. Justice

In this section I investigate the idea that contractarianism should be understood the way Rawls (1999) understood it, namely as a theory of the state's obligations of

justice—or, to put it more succinctly, as a *fundamental theory of justice*. The basic idea is that the content of the contract settles what justice fundamentally requires the state to do. So if the contract secures freedom of expression for everyone, then the state has a fundamental obligation of justice to allow individuals to express themselves.

G.A. Cohen (2008: Chs. 6-7) rejects this use of contractarianism. His argument is long and complex and unfortunately I can do no more than summarize it here. Briefly, it runs as follows: First, ultimate normative principles—principles regarding what an agent ought to do—are fact-insensitive. In other words the fundamental truths about what individuals ought to do are not sensitive to what the non-normative facts are. Second, the principles that emerge from the contractarian thought experiment are fact-sensitive, because the contractors are stipulated to be in possession of knowledge of the facts and their knowledge of those facts influences their thinking regarding which principles to advocate. Cohen takes Rawls as his target here, noting that Rawls allows his contractors to have knowledge of basic sociological and psychological facts as well as knowledge that the circumstances of justice obtain. But, as Cohen (2008: 294) notes, the claim applies to contractarianism *per se*.⁵ This is the case because a universal feature of contractarianism is that it imagines the contractors as being given the task of agreeing principles to regulate some domain of affairs, and we cannot sensibly imagine the contractors having preferences on how some domain of affairs should be regulated if they know nothing about how the domain works. From these two premises we may conclude that contractarianism does not yield fundamental principles.

⁵ Actually, Cohen aims his critique at all constructivists, where ‘constructivism’ is the view that “a principle gains its normative credentials through the being the product of a sound selection procedure” (2008: 274). Contractarianism is, as Cohen notes, a version of constructivism.

Third, justice is just one normative domain among many. Fourth, the principles that emerge from the contractarian thought experiment will inevitably be sensitive to the entire range of normative considerations. This, again, is due to the practical nature of the contracting situation.⁶ The contractors are given the task of drafting principles to regulate some domain of affairs, and it would run counter to sensible psychological assumptions to depict the contractors as caring only about justice and therefore designing principles that cater only to justice and to no other normative agenda. From these two premises Cohen concludes that the principles inferable from the contractarian thought experiment are not principles of justice.

Putting the conclusions of the foregoing two arguments together, Cohen arrives at his overall critique of contractarianism as a fundamental theory of justice: Contractarianism yields principles that are neither fundamental nor about justice.

I believe that this argument is sound.⁷ Others deny this, of course, but I lack the space here to defend Cohen against objections. Instead, I will simply assume that he's right.

5. Political Morality

Suppose I were to suggest, in light of all this, that contractarianism be used only as a theory of the state's all-things-considered moral obligations. One would surely think I'd missed the point of Cohen's critique. Justice is an aspect of morality, and therefore if contractarianism cannot reveal the requirements of justice then *ipso facto*

⁶ On the practical nature of the contracting situation and why it is important to distinguish the practical question confronting the contractors from the theoretical question confronting you and I, see *ibid.*, pp. 276-7.

⁷ Specifically, it's a sound argument against Rawlsian contractarianism. Some believe (rightly, I think) that there's a valid way of understanding *A Theory of Justice* on which it's not contractarian. With regard to that interpretation of Rawls, Cohen's objections are irrelevant.

it cannot reveal the requirements of morality all-things-considered. We can be pretty much certain that this is precisely what Cohen would have said in response to such a proposal. We know this because although Cohen never responded to that proposal, he does respond, in *Rescuing Justice and Equality*, to a similar proposal: to construe contractarianism as yielding the all-things-considered correct rules for regulating society. And what he says against that proposal is that although the correctness of a rule of regulation is a function of many things, of which its adherence to justice is only one, such principles should serve justice “as much as principles in all due reason should and can” (1999: 305; see also p.284). Therefore, we cannot know which rules of regulation are best if we don’t know what justice requires (1999: 266-67, 286). Consequently we make a mistake if we skip straight to the question of what the all-things-considered correct rules of regulations are. Similarly, Cohen would no doubt maintain that we make a mistake if we skip straight to the question of what morality requires of the state all-things-considered.

Note, however, that justice is an aspect of interpersonal morality, which is to say that individuals have obligations of justice to each other. Given this, the contractarian can apparently construct an adequate rejoinder to Cohen’s objection by making three moves. The first move is to adopt, in addition to contractarianism, some theory of interpersonal morality—specifically, one that concedes the existence of obligations of justice. The second move is to assert that the state is bound by the requirements of interpersonal morality. Neither of these first two moves is ad hoc. If contractarianism is not itself the true interpersonal morality, as I argued in §3, then there is nothing stopping somebody who accepts contractarianism as a political morality from adopting some other theory of interpersonal morality.⁸ And it is quite

⁸ A contractarian might, for instance, emulate Kant, who endorsed contractarianism in political morality (I maintain) but also the categorical imperative in interpersonal morality. Another

plausible to say that the state is bound by the requirements of interpersonal morality.⁹ It makes sense as a matter of theory since the state is an agent, and the requirements of interpersonal morality are supposed to apply to agents as such. (Or, if one is discomfited by the metaphysics of ascribing agency to an abstract entity, we can at least say that the state is an entity through which flesh-and-blood agents exercise their agency.¹⁰) And it has comforting implications for cases; it implies that, like flesh-and-blood agents, the state ought not lie, kill, cheat or steal.¹¹

Unfortunately, the first two moves, when combined, leave us with an apparent contradiction. They imply that something other than contractarianism tells us what the state is morally obligated to do, and yet I proposed at the outset of this section contractarianism is best understood as telling us what the state is morally obligated to do. However, the apparent contradiction can be resolved as long as we make the third move: maintaining that 1) something other than contractarianism, namely the correct theory of interpersonal morality, settles what the state is obligated-qua-agent to do, and 2) contractarianism settles what the state is obligated-qua-state to do. Again, there is nothing arbitrary about this move. It makes no less sense than saying that there are some obligations we humans have simply because we are agents while there

contractarian who employed a non-contractarian interpersonal morality was Locke: he was a contractarian (though about legitimacy, not about political morality) and endorsed natural rights theory in interpersonal morality.

⁹ It may seem odd to suggest that the state is constrained by interpersonal morality, given that (as is commonly thought) one of the state's purposes is to resolve disputes about interpersonal morality. But there's no problem here. I can allow that one role of the state is to resolve such disputes; what I cannot allow is that it resolves them by *making it true* that one party to the dispute is right and the others are wrong. (The reason I cannot allow this is that it would be paradoxical to think of the state as being constrained by a system of norms the content of which it has control over.)

¹⁰ Likewise, if one is discomfited by saying that a state can do wrong, then we can say instead that the state is an entity through which flesh-and-blood agents—in this case, judges, legislators, bureaucrats—can do wrong.

¹¹ One might think that we have another route to the conclusion that the state ought not lie, kill, cheat or steal: namely, we can say that political morality prohibits the state to do these things. However, while political morality can explain why the state has certain obligations to its own denizens, it cannot explain why the state has obligations to anyone else, as it surely does in the case of lying, killing, cheating and stealing.

are other obligations we have because of certain roles we occupy (parent, friend, teacher, e.g.).

I began this section with the idea that contractarianism tells us what the state ought to do all-things-considered. We anticipated that Cohen would respond by objecting that we cannot know what the state ought to do all-things-considered until we first know what justice requires of the state, and of course contractarianism cannot tell us what justice requires of the state (as I admitted in §4). I responded by suggesting that since the state is both an agent and a special kind of agent—a state—it is entirely plausible to think that it will take two moral theories to give us the full story as to what the state is obligated to do. Obligations of justice are obligations of interpersonal morality and surely the state is constrained by interpersonal morality. But what obligations the state has *because it is a state* is a separate matter, and contractarianism could well be the right theory of those obligations even if it would be defective as a theory of justice.

I can now state my thesis: Contractarianism is most plausible when it is construed as political twice over, in virtue of taking as its subject matter the state's obligations and in virtue of taking as its subject matter obligations-qua-state. So, contractarianism is most plausible as a theory of the state's all-things-considered obligations-qua-state. Or, as I prefer to say, it should be understood as a political morality.

6. The Pluralism Objection

One may believe that Cohen's worry about contractarianism failing to distinguish justice from other normative considerations still applies given my suggested version

of contractarianism. For even that version of contractarianism treats the content of political morality as being settled in one fell swoop by the state of nature thought experiment, while someone like Cohen might believe that political morality is a function of many values, each of which must be analyzed separately. To understand whether this objection succeeds, I need to say more than I've yet said regarding the contractarian's position on the grounds of political morality. I do so in what follows.

I've suggested that contractarians should construe political morality as role morality—specifically, the morality of being a state. Obviously the role in question should be conceived of as socially constructed as opposed to natural. Having said this much, the contractarian can go on to point out that traditionally we think of the role morality associated with any socially constructed role as being grounded in the purpose of the role, which in turn exists in virtue of intentional human action. Consider the attorney role. Why is it a part of the role morality of an attorney to act in the best interests of her clients? Because attorneys have the purpose of playing the role of advocate in our adversarial justice system, and they wouldn't be good advocates if they didn't act in the best interests of their clients. And of course the adversarial justice system is an intentional human creation.

So if political morality is indeed role morality, then in order to determine the contents of political morality we need to discern the purpose of the state, which in turn requires understanding what intentional human activity grounds its existence. This is exactly what a state of nature thought experiment is used, by the contractarian, to provide.¹² The thought experiment is supposed to provide a rational reconstruction

¹² The state of nature thought experiment is, of course, just that—a thought experiment. One might wonder why, in that case, contractarianism as a political morality isn't doomed, as I admitted contractarianism as a theory of legitimacy is by Hume's observation that no such contracting ever occurred. The short answer, on which I intend to expand in a separate paper, is that while the moral force of contracting certainly depends on its being actual, its teleological force (it's purpose-conferring aspect) doesn't.

of the activity on the part of rational agents that leads to the existence of the state and gives it its purpose.¹³

From all this the contractarian will conclude that an investigation of political morality has to start with a state of nature thought experiment. But the contractarian need not go on to say either of the following two things: 1) That political morality does not contain distinct constituent parts—i.e. is not pluralistic; 2) that the state of nature thought experiment settles on its own the entire content of political morality.

First, the contractarian can allow that political morality is pluralistic, even irreducibly pluralistic. But the *way* the contractarian can allow for that is by telling a plausible state of nature story on which the contractors want the state they're creating to accomplish an irreducible plurality of things. So perhaps the contractors would be concerned that their well-being be augmented, and also concerned that their natural rights be protected, and perhaps neither concern would be reducible to the other.¹⁴

Second, the contractarian can allow that her thought experiment does not settle in one fell swoop the entire contents of political morality. This is true for at least two reasons. First, the contractors might resolve that certain matters of political morality are to be settled by democratic procedures. And second, the contract might contain certain concepts that are left somewhat vague, in which case it would be up to us, as interpreters of the contract, to reason out its implications.

The takeaway from all this is that the state of nature thought experiment is, for the contractarian, the *starting point* of political morality. For the contractarian, every

¹³ I dedicate a whole other essay to explaining how this works. See Sachs unpublished b.

¹⁴ The contractarian might even argue that the contractors would care to see justice secured. It could be, in other words, that the contractors would want the state to take on the role of enforcing that part of interpersonal morality known as 'justice'. The state would then be obligated twice over to secure justice. It would be obligated-qua-agent to do this, just as every other moral agent (we are assuming) is so obligated, and also obligated-qua-state to do the same thing. (Even Cohen would have no objection to using the state of nature thought experiment to establish that the state is obligated-qua-state to secure justice. What he objects to is using the state of nature thought experiment to establish the *content* of justice.)

truth of political morality is grounded somehow in an aspect of the thought experiment. But this grounding may be only partial, and so the contractarian need not and should not say that her thought experiment settles the entirety of political morality.

7. The Fact-Sensitivity Objection Revisited

It may be argued that I'm still missing the point of Cohen's fact-sensitivity critique, which is that *all* the foundational facts about what the state should do, including the foundational facts of political morality, are fact-insensitive, and therefore contractarianism can reveal none of them since its state of nature thought experiment is fact-sensitive.

To evade this criticism, the contractarian should, I propose, make use of the idea advanced earlier of political morality as role morality. What the contractarian should maintain, I suggest, is that contractarianism can reveal the principles that are foundational as far as political morality is concerned, while admitting that it cannot reveal any principles that are foundational strictly speaking.

For the sake of illustration, consider again the practice of law—our earlier example of an area of activity that contains roles and corresponding role moralities. Suppose someone were to propose that the principle requiring attorneys to act in the best interests of their clients is foundational within the role morality of practicing law. This is a reasonable proposal, as it's not clear what normative principle for the attorney qua attorney could be more fundamental. This is not to say, however, that the proposed principle is foundational strictly speaking. Rather, it seems to draw support from the idea of the attorney as occupying a certain role within the justice

system, namely the role of advocate, plus the principle that individuals should do the things that it is their role to do. Note that this latter principle is not a principle for the attorney qua attorney. Rather, it is perfectly general principle that applies to every moral agent. So the principle, ‘attorneys should act in the best interests of their clients’, is plausibly regarded as foundational within the role morality of the attorney but not foundational strictly speaking. Furthermore, it is fact-sensitive. It is based on the idea that the role of an attorney is to be an advocate, which itself is contingent on the various facts about human intentions and that make it the case that there is this institution known as the adversarial justice system and a role within that institution known as the attorney.

The key to seeing why and how a contractarian can make use of a strategy like this for evading Cohen’s criticism is remembering that contractarianism, as we are now understanding it, coexists alongside some (non-contractarian) theory of interpersonal morality. So the contractarian can, and I propose should, say that the entire enterprise of political morality is an outgrowth of, and is ultimately grounded in, some principle of interpersonal morality. This allows contractarianism to be foundational in the most robust sense that anyone could want from a political morality having acknowledged the distinction between the state’s obligations-qua-person and its obligations-qua-state. It makes no sense to demand any kind of fundamentality from a political morality other than its containing the most fundamental truths regarding the state’s obligations-qua-state.¹⁵

¹⁵ In making this argument I hope to have shown how to avoid another of the classic objections to contractarianism, which is that it needs to presuppose at least one element of morality—the moral bindingness of contracts—in order to get off the ground, and therefore it presupposes the very thing it is supposed to ground (see, e.g., Levy (2009: 209-10)). My point is that contractarianism can be quite useful even if it is not conceived of as a theory about what grounds morality, and therefore contractarians shouldn’t hesitate to take for granted a pre-existing moral framework in which contractarianism as a political morality can find its footing.

Contractarianism can be foundational in this sense *while being fact-sensitive*. As I said earlier, my view is that a contractarian theory should begin with a state of nature thought experiment from which it is inferred that the state has such-and-such a purpose. From such a claim, plus the interpersonal moral principle ‘agents should do what it is their role or purpose to do’ and the supplemental claim that the state is an agent, the contractarian can infer certain obligations incumbent upon the state qua state—that is, the contractarian can infer certain foundational principles of political morality. And all of this will be fact-sensitive because it will be based on a claim about the role of the state, which will itself be supported by the state of nature thought experiment, which includes facts about what the state of nature and the contractors are like.

8. A Political Morality Must do Double Duty as a Theory of Legitimacy

The third objection takes the form of the following argument: A political morality tells us some of the facts about what the state is obligated to do, and presumably the state is permitted to do everything it is obligated to do. Therefore, a political morality tells us, indirectly, something about what the state is permitted to do. Furthermore, since (presumably) the people are obligated to allow the state to do anything that it is permitted to do, a political morality thereby tells us (indirectly, again) something about the people’s obligation to obey the state. And this is the job of a theory of legitimacy, by my earlier definition of ‘legitimacy’. So it seems a political morality must do double duty as at least a partial theory of legitimacy. This argument is problematic for me, as I have been proposing that contractarianism is compelling as a political morality while insisting that it is not compelling as a theory of legitimacy.

One problem with this argument is its first inference. I don't accept that, in general, agents are permitted to do whatever they're obligated to do.¹⁶ Suppose, however, that that inference is valid. Still, I can construct an adequate defense of my position. The most plausible reason why the first inference would be valid—that is, why it would be the case that role morality obligates the state to do only things that interpersonal morality permits the state to do—is that interpersonal morality constrains role morality: in other words, we cannot obligate an agent qua role-bearer to do anything that she is prohibited-qua-agent from doing. If this principle held, then from the fact that a political morality obligates the state to ϕ we could infer that interpersonal morality permits the state to ϕ and therefore the correct theory of legitimacy requires the people to allow the state to ϕ . But in this scenario the correct political morality, whatever it is, still wouldn't *ground* any of the facts as to what the people are obligated to allow the state to do.¹⁷ And surely a theory doesn't count as a theory of legitimacy if it doesn't tell us how such facts are grounded. So if the first inference is valid then contractarianism could nevertheless be the true political morality while being a false theory of legitimacy.

9. This is a Pyrrhic Victory for Contractarianism

The fourth objection is that the viability of the form of contractarianism I'm describing here would amount to no more than a Pyrrhic victory for contractarianism,

¹⁶ I have an argument for this; see Sachs (unpublished a: Ch. 3).

Moreover, if there are cases in which someone is obligated-but-not-permitted to do something, we would expect to find those cases wherever we find role moralities (which is of course what I've said contractarianism plausibly is—it's the true role morality of the state). This is because role moralities always exist against the backdrop of interpersonal morality, as I explained in §5, and the presence of two moralities creates the possibility of moral dilemmas.

¹⁷ Essentially the reverse would be true, on a case-by-case basis: the fact that the people aren't obligated to allow the state to ϕ would in some cases undermine what would otherwise be an obligation on the part of the state to ϕ .

since it has so many of the critical moral issues being settled by something other than the contractarian theory.

But what this objection describes as a weakness of my version of contractarianism I consider a virtue. This goes back to what I said in the introduction about the historical development of contractarianism. Contractarianism burst on to the philosophical scene at a moment when everything of moral importance seemed up for grabs. But this is no longer the world in which we live. Much has been settled, and the contractarian—and indeed any political theorist, for that matter—should be happy to take on board anything that has found a solid philosophical footing. This is the major payoff of building a version of contractarianism that leaves room for interpersonal morality. The contractarian can take on board the widely accepted moral-equality-of-persons thesis and use it to explain certain constraints on the contracting situation (e.g. that the contract must be unanimously agreed to). Similarly, the contractarian can make use of human rights theory and say that no matter what the outcome of the contracting situation, the state is morally prohibited from throwing people in prison on account of their political beliefs. The contractarian can, in addition, simply bring on board an independently developed theory of legitimacy, such as the idea that the individual is obligated to obey the law just when, and because, it has come into force through a democratic process that meets certain requirements of representativeness, openness, etc.

Even granting all this, there are still plenty of questions to be answered regarding what the state morally ought to do. Some of them, I contend, should be answered by the contractarian theory, though not all of them; there is still more whittling to be done before we find contractarianism's subject matter. For as I said in §6, presumably one outcome of the state of nature thought experiment would be a

decision in favor of democracy, and democracy of course means leaving some decisions in the hands of the people through their representatives. In other words, believing in democracy means believing that many questions of the form, “What morally ought the state to do about X” have the following answer: “The will of the people morally ought to determine how the state acts with respect to X”. Thus we have found yet more moral questions about the state that are not to be answered (except indirectly) by the contractarian theory, even if contractarianism is correct.

However, there are many questions about what the state morally ought to do that aren’t settled by interpersonal morality and that democrats themselves would concede are not to be settled by the will of the people—I have in mind, roughly, what are often called *constitutional matters*. One of them is the matter of which questions are to be settled by the will of the people. Should we plump for a separation of powers in which a constitution and a court with the power of judicial review limit the will of the people, exercised through the legislature? This question has to be answered before the legislature itself is set up. Another such question is how to structure the system of voting and districting.

Another two examples: (1) many people believe it is the job of the state to fund the arts and scientific inquiry, and (2) many people believe that it is the job of the state to enforce interpersonal morality per se. But, in each case, others disagree. This is not an issue to be resolved by appealing to the democratic will of the people, since what’s at issue is whether, and if so when, the state should ever refuse to engage in some activity that its people want it to engage in. And despite the fact that the state is constrained by interpersonal morality, these questions cannot be settled by identifying the true interpersonal morality. These disputes seem to be distinctly *about the state*, and as such it takes a political morality to answer them. Contractarianism is

well suited to answer them, not just for the obvious reason that contractarianism is a political morality, but furthermore because contractarianism begins by asking what the role of the state is, which seems like an issue that it would be helpful to have a grip on if we're to determine whether the state should be funding the arts and scientific inquiry and enforcing interpersonal morality. Furthermore, these are very important issues—issues of life and death, in some cases.

So even conceding all I have here, there is still plenty of importance for contractarianism to accomplish, even if not quite the *most* important things or the things on which contractarianism has historically been taken as providing guidance.

Department of Philosophy

University of St. Andrews

Edgecliffe

The Scores

St. Andrews KY16 9AL

U.K.

bas7@st-andrews.ac.uk

REFERENCES

- Buchanan, James 1975: *The Limits of Liberty: Between Anarchy and Leviathan. The Collected Works of James M. Buchanan, Vol. 7*. Indianapolis: Liberty Fund.
- Cohen, G.A. 2008: *Rescuing Justice and Equality*. Cambridge, MA: Harvard University Press.
- Dworkin, Ronald 1989: 'The Original Position'. In N. Daniels (ed.), *Reading Rawls*, pp. 109-27. Stanford: Stanford University Press.
- Gaus, Gerald 2011: *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*. New York: Cambridge University Press.
- 2012: 'Justification, Choice and Promise: Three Devices of the Consent Tradition in a Diverse Society'. *Critical Review of International Social and Political Philosophy*, 15(2), pp. 109-27.
- 2013: 'Why the Conventionalist Needs the Social Contract (and Vice Versa)', *Rationality, Markets and Morals*, 4, pp. 71-87.
- Gauthier, David 1986: *Morals by Agreement*. New York: Oxford University Press.

Harsanyi, John C. 1980: 'Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory'. In John C. Harsanyi, *Essays on Ethics, Social Behavior, and Scientific Explanation*, pp. 37-63. Dordrecht: D. Reidel.

Hampton, Jean 1986: *Hobbes and the Social Contract Tradition*. Cambridge: Cambridge University Press.

Kant, Immanuel 1996: *Practical Philosophy*, trans. Mary Gregor. Cambridge: Cambridge University Press.

Kavka, Gregory 1986: *Hobbesian Moral and Political Theory*. Princeton, NJ: Princeton University Press.

Lessnoff, Michael 1986: *Social Contract*. Basingstoke, Hampshire: Macmillan.

Levy, Jacob T. 2009: 'Not So Novus an Ordo: Constitutions Without Social Contracts', *Political Theory*, 37, pp. 191-217.

Locke, John, David Hume and Jean-Jacques Rousseau 1947: *Social Contract*. New York: Oxford University Press.

Narveson, Jan 2013: 'Social Contract: The Last Word in Moral Theories', *Rationality, Markets and Morals*, 4, pp. 88-107.

Rawls, John 1999. *A Theory of Justice*, rev. ed. Cambridge, MA: The Belknap Press.

Reiman, Jeffrey 1990. *Justice and Modern Moral Philosophy*. New Haven, CT: Yale University Press.

Sachs, Benjamin—unpublished a. [Untitled]

Sachs, Benjamin—unpublished b. 'Teleological Contractarianism'.

Simmons, A. John 2001. 'Philosophical Anarchism', in A. John Simmons, *Justification & Legitimacy: Essays on Rights and Obligations*, pp. 102-21. Cambridge: Cambridge University Press.

Williams, David Lay 2007. 'Ideas and Actuality in the Social Contract: Kant and Rousseau', *History of Political Thought*, XXVIII (3), pp. 469-95.