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Welfare, contract, and the language of charity

Chandran KUKATHAS
Singapore Management University, kukathas@smu.edu.sg

Published in Philosophical Quarterly, Volume 39, Issue 154, Pages 75-80
https://doi.org/10.2307/2220352

WELFARE, CONTRACT, AND THE LANGUAGE OF CHARITY

By Chandran Kukathas

I

In a recent issue of this journal, Jeremy Waldron tries to justify a particular kind of welfare provision by showing that the welfare state is best understood as an 'institutionalization of . . . charitable giving' or 'a form of government-directed charity'.[1] In Waldron's view, certain objections to welfare provision 'depend crucially on a particular view of what charitable giving is' (p. 463). If we adopt a somewhat different image of charity, however, he suggests, complaints about the morality of compulsory charity become less convincing.

Yet, in the argument Waldron offers, very little actually turns on our adopting of the language of charity. The real work in the case he presents is completed in the 'contractarian' arguments offered in section VII.

That argumentative core is the focus of this reply. My primary concern is to show that Waldron's main argument misunderstands the nature of contractarian method. In what follows I shall briefly outline Waldron's central contractarian thesis, and then criticize that thesis, explaining why it rests on a flawed understanding of contractarian argument.

II

The aim of Waldron's argument is morally to justify *minimum* welfare provision by the state. To this end he suggests that we regard such provision as an attempt to satisfy *basic needs*, and asks that we accept the following general principle as one which is 'intimately involved in the justification of the modern welfare state' (p. 476):

> (Q) Nobody should be permitted ever to use force to prevent another man from satisfying his very basic needs in circumstances where there seems to be no other way of satisfying them. (p. 476)

To justify this principle, 'Rawlsian or contractarian' (p. 476) considerations are adduced. This principle would be acceded to in a hypothetical contract by parties who, while not able to specify fully determinate rules of property, would none the

[1] Jeremy Waldron, 'Welfare and the Images of Charity', *The Philosophical Quarterly*, 36 (1986), pp. 463–82, at p. 463. Parenthetical page references are to this article.

less be able to *exclude* rules or prohibitions. Such a contract would yield the following conclusion:

> A rule or prohibition is excluded if it could not have been agreed to in advance in good faith by those who are to be subject to it, and it is limited or qualified to the extent that those who are bound by it could not have given a *bona fide* undertaking to abide by it in its unqualified form. (pp. 476–7)

Since it is 'unthinkable' (p. 477) that someone in desperate need would refrain from helping himself to whatever resources were readily available, it is equally unlikely that parties to a hypothetical contract could plausibly agree to abide by rules requiring them to 'refrain from taking' those resources 'should they ever be in that situation' (p. 477). So the contracting parties would, without doubt, endorse principle (Q).

III

There is, in fact, no good reason to suppose, as Waldron does, that a contractarian approach will yield (Q). There are, I think, two mistakes in his argument. The first concerns his understanding of the nature of the contractarian agreement. In suggesting that the parties to a hypothetical contract could not plausibly agree to obey rules they know they would not be able to obey, he assumes that this agreement must be agreement *to refrain* (in the future) from certain sorts of behaviour. Yet we come closer to the truth if we recognize that what contracting parties really do is not simply agree to refrain from certain actions but agree *to bind themselves* or, more accurately still, have themselves bound, so that they cannot behave in certain ways in the future. Now, in making such an agreement they clearly must recognize that beyond the realm of the hypothetical contract they will, at times, be sorely tempted to break their agreements. This is why they agree not merely to keep their words, but to institute procedures (rules, laws) which will effectively bind them, and prevent them from yielding to temptation. In practical terms, this usually involves transferring to others the authority to bind or restrain them should they think to go astray. Just as Ulysses, eager to listen to the song of the sirens, authorized his crew to bind him and to ignore his foreseeable pleadings for early release, so would the parties to a hypothetical contract in fact authorize others to ignore their special pleadings. So it is not in the least bit implausible to suggest that parties to a hypothetical contract could agree to a rule which they know they would, in some circumstances, be irresistibly inclined to break.

There are two responses immediately open to Waldron at this point. Both should be considered – and rejected. The first response is to be found in Waldron's arguments defending the 'negative use of the contract idea' which is 'in fact quite common in liberal philosophy' (p. 477). Theorists such as Hobbes, Locke, and Rawls have all recognized the implausibility of expecting contracting parties to agree to abide by rules they would be (psychologically) incapable of obeying. Thus

Hobbes, for example, 'regards it as conclusive against any rule prohibiting self-defence in political society that human psychology is such that no-one could undertake in good faith to obey such a rule' (p. 477).

Had Waldron intended these observations to respond to the objections I have raised, they would clearly fail. For they do not disturb my contention that the concern of the contracting parties is not so much to agree to obey rules in the future as to *bind* themselves to ensure that all will in fact abide by the best (or chosen) rules. It is this point that Hobbes so clearly recognizes in his account of the social contract, for individuals in the state of nature authorize the sovereign to restrain them (forcibly, if necessary) from behaviour that threatens the peace. In Hobbes' psychology, it is man's inability to pursue peace without bonds that requires the institution of authority.

Now the fact that Hobbes recognized that men could not be expected to refrain from self-defence does not change this; nor does it help Waldron's case. For Hobbes does *not* deny to the sovereign the right to restrain the individual trying to defend himself. In Hobbes' careful formulation, the individual does not have the right to resist; rather, he is *not* obliged *not* to resist. The double negative is significant, for Hobbes takes great pains to make clear that, while we cannot expect that individuals will act in ways which are inconsistent with their natures (and, in this case, inconsistent with their intentions in establishing a commonwealth), we equally cannot require the law to *allow* them to resist. We do not need to accept everything Hobbes argues to see the force of his position. All we need to do is note that the law is constantly confronted by, and prosecutes, individuals who acted wrongfully in circumstances in which we would not have expected otherwise. For example, a man who, having incurred massive gambling debts, is threatened by the Mafia and so driven to murder and steal to save his family, is bound to be prosecuted and punished if caught. Or, more classically, the man who, faced with the option of betraying his son or betraying his country, chooses to save his son is also bound to be prosecuted for treason. In both of these cases, the 'offenders' could not have done otherwise. Yet neither could the law.

A second response Waldron might make would be to deny my account of contractarianism: to deny that contracting parties agree to bind themselves and to assert that what they agree to is to live by principles and under institutions which, in Rawlsian terms, satisfy their 'public and effective conception of justice'.[2] In other words, they agree not so much to be bound by the law as to be governed by a public morality which they can, as moral persons, properly accept. The law ceases, then, to be understood as the body of inflexible rules that it appears to be under the legal doctrine of a command positivist such as Hobbes. And our obedience to particular rules becomes a more open question, to be decided only after the law is subjected to closer critical moral scrutiny. Perhaps now it is clearer that such rules as those requiring the strict upholding of property rights against the claims of those in desperate need would be rejected, since a critical evaluation of our public morality would reveal that we could not agree to live by rules we would sometimes be irresistibly inclined to break.

[2] John Rawls, 'Kantian Constructivism in Moral Theory', *Journal of Philosophy*, 77 (1980), p. 539.

Such a move does not really solve the problem. The fact remains that what the contracting parties agree to is to bind themselves to ensure that they will be governed by a stable system of rules. What has changed is that the emphasis is now on their being bound by (allegiance to) a public morality rather than more directly by the force upholding the law. But they remain bound none the less. And there is no reason to suppose that in the hypothetical contract they would not have so bound themselves. Now Waldron's claim is that they would not have bound themselves in this way since they could not plausibly be shown to agree to rules which they would sometimes be irresistibly inclined to break. But, again, it is the very fact that they know themselves to be governed in real life by the interests they acquire as particular persons in particular circumstances that would incline them to bind themselves (in this case by a public morality) to ensure that everyone acted in ways which were consistent with the interests of all, and that no one could claim exemptions solely because of personal circumstance. It is because of the very fact that they know they are sometimes psychologically unable to resist breaking certain laws that the contracting parties agree to bind themselves morally. Knowing that they have bound themselves helps them to overcome the inclination to break such laws to advance more parochial interests which harm the interests of all.

If anything is to be gained by using the contractarian method, it is because it enables us to develop arguments from which we are not distracted by considerations which, while revealing of the complexity of moral experience, do not (we think) bear directly on the problem in focus. Thus, for example, Rawls uses the hypothetical contract to isolate our moral personalities and, so, explain how we would reason about principles of justice if not distracted by knowledge of our actual interests. *A Theory of Justice* suggests what principles we would choose if *not* able *not* to prefer the long-term interests of society and ourselves over the immediate interests to which we are attached in our actual circumstances. Rawls clearly recognizes that there may be a conflict between our own immediate interests and our more remote common interests as members of society.

Waldron's move, however, makes this conflict between our immediate and our remote (real) interests vanish. For the parties to his contract cannot choose rules which they might, as members of society, be unable to obey. Yet it is precisely this conflict between immediate and real interests (or between the demands of interest and the demands of morality, as some, like Kant, would have it) that gives the use of the hypothetical contract its point. Waldron's move renders the use of this device pointless.[3]

Waldron's first mistake, then, was about what the contracting parties *do* when they make agreements. I turn now to his second mistake, which lies in his claims about what the parties would agree *to*. Again I hope to show that there is no reason to think that the contracting parties would exclude certain rules or prohibitions and so endorse principle (Q).

The important contention we must examine is Waldron's claim that it is unlikely that parties to a hypothetical contract could plausibly agree to abide by rules

[3] This criticism of Waldron also tells against Rawls in so far as the latter argues that parties in the Original Position could not accept utilitarian principles of justice, since those principles may demand sacrifices of them in society which they know they could not bring themselves to make. See Rawls, *A Theory of Justice* (Oxford, 1971), pp. 175–6.

requiring them to 'refrain from taking' another's resources 'should they ever be in that situation' (of desperate need). The force of this claim can be seen when we look at how Waldron suggests we should understand 'basic need'. Something counts as a basic need, in his argument defending principle (Q), 'just to the extent that it is the sort of condition that is likely to drive a person to satisfy it and to push aside even the rules that he would otherwise be prepared to agree to' (pp. 477–8). Now if we accept the importance of these basic needs, then presumably we would in a hypothetical contract choose principles of public morality which recognized the need to ensure, as far as possible, that 'no-one should ever be in such abject need that he would be driven to violate otherwise enforceable rules of property' (p. 479). But it is not clear why we would choose principle (Q), or, indeed, exclude principles which conflict with (Q) as principles which could not be agreed to in good faith. What I wish now to suggest is that we may *not* choose (Q), not only because there is no need to do so, but also because there may be good reasons not to. In effect, I want to deny Waldron's assumption that the importance of basic needs, and the ill-effects of failure to satisfy them, are *enough* to incline us to endorse a principle directly requiring the promotion of needs satisfaction. Let me first offer an illustration to highlight the weakness of Waldron's move as a general strategy, before turning to consider the more particular case of basic welfare needs.

Academics, as professional scholars, have what we might call certain basic needs, the most basic of which is the need for publications. This is more clearly so for young, ambitious and untenured scholars. 'Publish or perish': that is their predicament. What principles of (scholarly) conduct should they choose to regulate the distribution of intellectual property and how should they regard the taking by some of the intellectual property of others – that is, what we call 'plagiarism'? If we try to resolve this question using the contractarian method as Waldron would have us understand it, we might reason in the following way. As untenured academics with few publications we are likely to be driven to plagiarize to gain publication. Indeed, so great are our needs that we would probably be prepared, nay, unable to resist the temptation, to plagiarize the work of others, even in the face of the threat of severe punishment for violating the rules governing intellectual property. Knowing this may well be our predicament, we parties to the hypothetical contract concede that we could not in good faith agree to rules strictly enforcing intellectual property rights, since we could not give a *bona fide* undertaking to abide by them in their unqualified form. This leads us to endorse a principle which states:

> (Q1) No scholar should be permitted ever to use words to prevent another scholar from satisfying his basic publication needs in circumstances where there seems to be no way of satisfying them.

Now this, as we might guess, could prove to be very messy as such a principle would wreak havoc on any system of intellectual property. 'Even the staunchest egalitarian would not welcome the sort of disorder and unpredictability that self-help in matters of [intellectual] property would generate' (p. 479). The solution is to be found, then, in the erecting of institutions ensuring a minimum provision for scholars of basic publishing needs.

Clearly, all this is quite unsatisfactory. Yet it is worth asking why, and looking at

how an understanding of this would affect the deliberations of the parties to the hypothetical contract. Now, the only way the provision of basic publishing needs would satisfy me (as a struggling academic) would be if I were given *real* publications (just as a starving man wants *real* food). I want to appear in *The Philosophical Quarterly*, and not simply in the *Albanian Journal of Social Engineering*. Yet if all this is made possible, the value of journal publications (as indicators of one's valuation by one's peers) would be lost, as would the point of publishing academic scholarship. Indeed, the quality of published work would be entirely eroded.

Yet it is clear that the parties in the hypothetical contract would anticipate these consequences and, if they acted sensibly, would choose very different principles to govern the use of scholarly property. They would do well to establish principles rejecting the distribution of publications according to need. With the good of scholarship and the value of intellectual inquiry plainly in view, they would in all probability contract for strong penalties on plagiarism or intellectual theft. In any event, their decision would have been governed by their assessments not only of the plight of the struggling academic, but also of the plight of scholarship and of all academics under the proposed principle (Q1).

The general point here is that it is no simple step to move from the recognition of an evil to the endorsement of a moral principle. More than this, I would suggest that a plausible social theory is needed to explain what decisions the contracting parties would take, and why. This Waldron has not done in claiming that they would choose (Q) as a principle justifying minimal welfare provision. If the parties accepted certain theories about the evil consequences of welfare provision (perhaps agreeing with the claims of Charles Murray that welfare programmes have had the effect of increasing poverty by re-structuring incentives and so locking more and more people into relations of dependence), they might choose quite differently.[4] For example, as a party to the hypothetical contract, I might fear that a welfare state would make it more likely that I find welfare attractive and not make provision to become *independent*. I might prefer to risk destitution to avoid this possibility.

In the end, Waldron does not do enough to show that parties to a hypothetical contract would choose his preferred moral principle. I have tried to show that this failure stems from deficiencies in his view of the nature of contractarian agreements and in his assumptions about how parties to such a contract would choose. So much turns on his contractarian argument mainly because what he needs most to establish is the validity of (Q). Very little is gained by adopting the language of charity. If (Q) is defensible, the rest of his argument is unnecessary; if, however, (Q) is *in*defensible, as I have tried to show it is, the rest of his argument distinguishing two images of charity is irrelevant.[5]

Australian National University

[4] Charles Murray, *Losing Ground. American Social Policy 1950–1980* (New York, 1986).

[5] I would like to thank Brian Beddie, Len Hume, Michael Jackson, Jeremy Shearmur, and especially Philip Pettit, for their helpful comments on an earlier draft of this paper. I am also grateful to the editor of *The Philosophical Quarterly* and an anonymous reader for their helpful suggestions.