

The Limits of Justice

Liberalism and the Limits of Justice. By Michael J. Sandel.
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“There are no birds in last year’s nest,”¹ wrote Henry Wadsworth Longfellow, but this statement scarcely applies to political philosophy. A century ago, idealists such as F.H. Bradley, T.H. Green, and Bernard Bosanquet found the nest of liberalism, as we find it today, filled with political theories of two kinds, utilitarian and Kantian. The idealists criticized them both for assuming that the good consisted simply in collective utility, pleasure, or the satisfaction of desire. If liberalism is to succeed as a political theory, the idealists argued, it must recognize a fuller, richer, and more intersubjective conception of the good.

In *Liberalism and the Limits of Justice*,² Michael Sandel offers a similarly persuasive criticism of contemporary utilitarian and Kantian conceptions of the good: “If the good is nothing more than the indiscriminate satisfaction of arbitrarily-given preferences, regardless of worth, it is not difficult to imagine that the right . . . must outweigh it.”³ The kind of liberalism that conceives of the good as the granular competition of individuals pursuing their personal desires must fail as an account of our moral personalities, our communitarian aspirations, and our public lives.

Sandel’s criticism—like the idealists’—extends only to liberalism that defines the good as the satisfaction of personal preference, inclination, or desire. Sandel demonstrates that liberalism must offer a fuller, richer conception of the good if it is to account for the goals and values that individuals conceive of and pursue in community with others—values they know together and cannot know alone.

Yet a liberal in the Kantian tradition may reply that he or she need not offer a full account of the good; for such a person, liberalism may present

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1. H. LONGFELLOW, *It Is Not Always May*, in 1 THE WORKS OF HENRY WADSWORTH LONGFELLOW 68 (1886).

2. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) [hereinafter cited by page number only].

3. P. 168.

a pragmatic thesis about how social cooperation may be achieved among individuals and among communities, each having its own discrete conception of the good. Liberalism, in this view, need not attempt to account for our moral personalities, our communitarian aspirations, or our public lives. Instead, liberalism is essentially a theory of justice within the state and thus addresses justice for communities as well as justice for individuals.

In the first part of this Review, I describe the traditional idealist critique of liberalism. I then discuss how Sandel employs its criticisms against contemporary liberalism, concentrating on John Rawls' political philosophy. Finally, I discuss liberalism's relationship to our emerging understanding of what communities are and how they can reach beyond our interests and sentiments to engage our identity itself.

I. The Idealist Critique of Liberalism

As philosophical terms, "rightness" pertains to voluntary actions, while "goodness" pertains to the consequences of those actions. A utilitarian evaluates actions in terms of the goodness of their consequences; in other words, for the utilitarian, "right" actions are those that lead to "good" consequences. Although "goodness" can be defined in relation to any ideal, utilitarians usually follow Jeremy Bentham and John Stuart Mill and define the good in terms of pleasure, happiness, or the satisfaction of desire.⁴ For a utilitarian, then, right actions maximize happiness, or they follow from rules that, if consistently applied, maximize utility in the long run.⁵

The Kantian or deontological liberal does not necessarily insist on a different conception of the good; like the utilitarian, he may also reduce goodness to pleasure or preference.⁶ The Kantian, however, insists on both the moral and the conceptual primacy of the right. We have a moral duty to keep promises whether or not this maximizes happiness. And our concept of the right must precede our concept of the good because rightness is intrinsic to actions, not derived from their consequences.

Among the objections to utilitarianism that the idealists raised, the most

4. For a summary of the early development of utilitarian moral theory, see H. SIDGWICK, *THE METHODS OF ETHICS* 411-95 (7th ed. 1907).

5. For an account of rule utilitarianism and its analysis of justice in relation to distribution problems, see D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 164-77 (1965).

6. Kant himself, however, thought happiness too indeterminate to provide a criterion for legislation. See I. KANT, *Theory and Practice Concerning the Common Saying: This May Be True in Theory But Does Not Apply to Practice*, in *THE PHILOSOPHY OF KANT* 412, 423 (C. Friedrich ed. 1949) ("[N]o generally valid principle can be offered for legislation [based on happiness]. For the conditions of the time as well as the very conflicting and constantly changing illusions as to what constitutes happiness—and no one can prescribe for anyone wherein he should seek happiness—render impossible all fixed principles . . .").

telling is that utilitarianism fails to offer a credible conception of the self. The utilitarian views the self as a bundle of wants or preferences, a series of pleasures and pains, or a collection of psychic states. What holds this bundle together? What separates one collection from the next? According to an idealist like F.H. Bradley, the moral self “is for us a whole, . . . not a mere collection of states.”⁷

What makes this attack on utilitarianism particularly powerful is how the idealists turn it against the “opposite pole,”⁸ that is, against the Kantian conception of a moral agent as a wholly generalized being, a “pure will” doing its duty “for duty’s sake.”⁹ Bradley contends that the Kantian formula, like the utilitarian, ignores the nature of actual persons. It does this not by dissolving the person into a set of interests, but by abstracting him or her from his or her interests. The utilitarian ignores the distinctiveness of individuals, and ignores the boundaries separating persons; instead, the utilitarian treats all pleasures and preferences as if they belonged to a single social aggregate. In contrast, the Kantian defines the person by looking only at the boundaries, and considers only universal ethical principles; the Kantian gives the individual only a formal identity devoid of particular content.

According to T.H. Green, Kant’s error lay in his belief that the individual must act either upon desire or upon a universal moral principle.¹⁰ Idealists believe instead that a person identifies and realizes himself not by satisfying every passing desire or by acting from a universal, abstract moral law, but by forming and pursuing long-term plans that have meaning and value within a cultural community and can therefore be viewed as achievements.

That the idealists emphasize the particular over the abstract or universal, and that they insist on the obligations of actual social union, rather than those of hypothetical social contract, does not imply that they are committed to relativism. Bradley, for example, argues that a person “can not take his morality simply from the moral world he is in”¹¹ That

7. F. BRADLEY, *ETHICAL STUDIES* 68 (2d ed. 1927). “We have learnt,” Bradley writes, “that the self to be realized is not the self as this or that feeling, or as any series of the particular feelings of our own or others’ streams or trains of consciousness. It is, in short, not the self to be pleased.” *Id.* at 160.

8. *Id.*

9. *Id.*

10. T.H. GREEN, *Lectures on the Philosophy of Kant: The Metaphysic of Ethics—The Good Will*, in 2 *WORKS OF THOMAS HILL GREEN* § 119, at 139 (1886) (“It is not true, as Kant seems to hold, that human motives are reducible either for desire for pleasure on the one side (in which case the will is ‘heteronomous’), or desire for fulfilment of the moral law on the other (in which case alone, according to him, it is ‘autonomous’). . . . His error lies in supposing that there is no alternative between the determination of desire by anticipation of pleasure and its determination by the conception of a moral law.”).

11. F. BRADLEY, *supra* note 7, at 204. Bradley asserts that moral progress must be achieved by historical, evolutionary means, rather than by philosophical means. *See id.* at 190.

world, being part of history, will contain contradictions. A person, therefore, "must thus stand before and above inconsistencies, and reflect upon them."¹² The individual must be self-critical and must maintain what Bradley calls a "cosmopolitan morality"¹³ in his or her loyalties, projects, and plans.

A cosmopolitan moral perspective, however, depends upon critical judgment, ethical intuition, and human sympathy, rather than upon a system of philosophical abstractions, such as the one deontological liberalism provides. We can rely to some extent on a general sense of moral progress: We "know to some extent what is thought right or wrong in other communities now, and what has been thought at other times; and this leads to a notion of goodness not of any particular time and country."¹⁴ Grounding the good in a historical and cultural perspective can save us from both Kantian over-abstraction and utilitarian reductionism. Developing a cosmopolitan conception of the good can make political theory relevant to political life and avoid the emptiness of Kantian and utilitarian theories of justice.

The idealist influence today—as we are about to see—lies in the idea that society is not a collection of pre-defined, pre-motivated individuals, but instead "an organism in which I am a member, and in whose life I live"¹⁵ The self has a moral identity only within the political and social world it inhabits. It has no pre-political goals or natural rights on which to build a universal, atemporal structure of political institutions.¹⁶ We develop our identities in communities—some intimate and familiar, others professional, cultural, or political—within which we share aspirations and a sense of the meaning or the fitness of things. Accordingly, idealists reject the idea of a pre-political social contract and with it the methodological individualism that they find in both utilitarian and deontological theories of the state.

II. Sandel's Use of the Idealist Critique

Utilitarian liberals—contemporary welfare economists come to mind¹⁷—define the good as the satisfaction of preferences, wants, or desires. The utilitarian erects a structure of rights upon a set of rules that maximizes the satisfaction of these preferences, taken as an aggregate,

12. *Id.* at 204.

13. *Id.*

14. *Id.* at 204-05.

15. *Id.* at 116.

16. See T.H. GREEN, *Lectures on the Principles of Political Obligation: The Grounds of Political Obligation*, in 2 WORKS OF THOMAS HILL GREEN, *supra* note 10, § 22, at 347-48.

17. See, e.g., J. HARSANYI, *ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION* (1976); Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

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over the long run.¹⁸ The deontologist, as Sandel suggests, disagrees not so much with this conception of the good, but rather with the attempt to base a theory of rights upon it. For the deontological liberal, the satisfaction of desires has value only if those desires reflect an individual's freedom and autonomy. Thus, a theory of rights or of justice must precede an analysis of utility, efficiency, or the satisfaction of desires.

Sandel points to the appearance of this thesis in the works of many liberal philosophers. Charles Fried, for example, thinks that concepts of right and wrong override concepts of the good "because they establish our basic position as freely choosing entities."¹⁹ The norms of right and wrong, Fried argues, express the value of persons and thus "are absolute in respect to the various ends we choose to pursue."²⁰ John Rawls argues that desires that violate the conditions of freedom and autonomy—desires that violate justice—have no value. "Having no merit in the first place, they cannot override its claims."²¹ Accordingly, Rawls contends:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.²²

Against this thesis of Rawls and deontological liberalism generally, Sandel directs the same attack that Green and Bradley direct against Kant—though Sandel, curiously, never mentions Green, Bradley, or any of the idealists.²³ Sandel employs the idealist solution to the dilemma that both Kant and Rawls have posed. Kant and Rawls argue that the will must be constituted prior to its ends or be dissolved in them. Sandel responds that the self may constitute and realize itself. It may determine its

18. See Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

19. C. FRIED, *RIGHT AND WRONG* 8-9 (1978).

20. *Id.* at 29. For similar expressions of this idea, see B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 48-49 (1980); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 30-33 (1974); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 135-36 (S. Hampshire ed. 1978).

21. J. RAWLS, *A THEORY OF JUSTICE* 31 (1971).

22. *Id.* at 3-4.

23. Green charged Kant with supposing mistakenly that the will must be determined either by a universal conception of morality (a conception of right), in which case the will is autonomous, or by an arbitrary, heteronomous desire (a conception of the good), in which case it is enslaved. See *supra* note 10. Green and Bradley agreed with Kant that if we assume that the good consists in the psychic states of individuals—their pleasures, the satisfaction of their inclinations—then we will not be able to explain the identity of a person or the boundaries that separate one individual from another. They argue against Kant that individuals may find in the aspirations they share in communities, in the ideals and loyalties they do not choose so much as recognize as theirs, a much more powerful conception of the good, capable of explaining the unity and commonality of persons as well as their separateness and plurality.

own unity through life-long plans and projects that are neither private nor arbitrary, schemes that are appreciated and respected within the culture and the aspirations of the communities to which individuals belong.²⁴ These values give individuals identity and character; they reflect what they are, not just what they want.

Although Sandel and the idealists are certainly correct when they claim that the self in community with others has an identity that reflects more than its own personal interests or desires, it is unclear how this insight of moral psychology provides the basis for a political theory. Sandel believes that Rawls and other Kantian liberals believe that conceptions of right compete with conceptions of good in constituting the identity of the individual. Thus, if Rawls really intends to erect a system of justice on an individualistic foundation, then Sandel is plainly right in questioning the belief that justice is more important than a fuller, richer conception of the good. Yet a deontological liberal like Rawls could surely argue that political institutions must have the virtue of justice to arbitrate among conflicting conceptions of the good, however rich, however full. The priority of the right may thus be defended in political theory without being derived from a deeper truth of moral philosophy.

III. The Development of the Just and the Good

Sandel observes an important common theme in deontological liberalism from Kant to Rawls, namely, that the self is constituted or identified prior to its ends. Kant provided a metaphysical argument: He observed that all of our psychological states, whatever their content, exist in time, and form a series or stream of consciousness, the unity of which requires a substrate or ground. Kant denied that a person can discover this ground by introspection; it must be presupposed.²⁵ Rawls agrees that the self must be constituted prior to its interests or ends, but recognizes that the Kantian will, behind its veil of appearances, is too disembodied, formal, and empty to produce determinate principles of justice or legislation applicable to actual people in the actual world.²⁶ Thus, Rawls introduces the concept of the original position; there, ignorant of the circumstances that separate them, parties agree on principles of justice. The description of the original position provides a non-transcendental way of separating the self from its

24. See B. WILLIAMS, *Persons, Character and Morality*, in *MORAL LUCK: PHILOSOPHICAL PAPERS*, 1973-1980, at 1, 5-19 (1981) (criticizing Kant and Rawls for being insufficiently concerned with individual "character," that is, an individual's concerns and projects).

25. "Yet beyond this character of himself as a subject made up, as it is, of mere appearances he must suppose there to be something else which is its ground—namely, his Ego as this may be constituted in itself . . ." I. KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 119 (H. Paton trans. 1956).

26. Rawls, *The Basic Structure As Subject*, 14 *AM. PHIL. Q.* 159, 165 (1977).

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ends and thus of asserting the primacy of the agent over the interests or goals he or she may pursue. In this way, Rawls hopes to have deontological liberalism without “metaphysical embarrassment.”²⁷

Is the original position an appropriate way of thinking about justice? Are the principles chosen there just? Rawls gives two reasons to believe that the principles chosen by free and equal individuals behind the veil of ignorance should be considered superior to the goals they pursue, individually or collectively, in their natural lives.²⁸ The first involves what Rawls calls a “reflective equilibrium” among our considered judgments and shared intuitions.²⁹ The second, which Sandel examines in a later chapter, appeals to the tradition of the social contract and thus “connects the theory of justice with the theory of rational choice.”³⁰

A. *The Reflective Equilibrium*

Sandel argues that not all the conditions embodied in the original position conform to our shared assumptions. In particular, Sandel questions the idea that no quality or goal can be constitutive of the self, in other words, that the self possesses its interests, aims, goals, and other attributes detached from the experiences it happens to “have.” Sandel contends that we do not in fact conceive of ourselves as “antecedently individuated subject[s]” whose bounds are fixed prior to our particular beliefs and experiences.³¹ On the contrary, we find or identify ourselves in our relationship to the objects and ideas we encounter and to which we attach meaning. Sandel denies, then, that we can assume, without begging important questions, subjects whose identities are prior to the things they have, independent of all their interests, ends, and relations with others.

Sandel argues that the deontological notion of the self precludes any conception of the good that goes to what a person is, not just what he or she wants or has:³²

It rules out the possibility of any attachment (or obsession) able to reach beyond our values and sentiments to engage our identity itself. It rules out the possibility of a public life in which, for good or ill, the identity as well as the interests of the participants could be at stake. And it rules out the possibility that common purposes and

27. P. 14.

28. See Lyons, *Nature and Soundness of the Contract and Coherence Arguments*, in *READING RAWLS* 141 (N. Daniels ed. 1975).

29. J. RAWLS, *supra* note 21, at 20, 48.

30. *Id.* at 17.

31. P. 55.

32. For the deontologist, the self may come to know itself, then, not as a being that chooses its ends but as one that recognizes or discovers them, and its fundamental preference (as the ancient philosophers thought) may be for conditions that enhance knowledge rather than choice. P. 22.

ends could inspire more or less expansive self-understandings and so define community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations. More generally, Rawls' account rules out the possibility of what we might call "intersubjective" or "intrasubjective" forms of self-understanding, ways of conceiving the subject that do not assume its bounds to be given in advance.³³

Rawls' original position could be construed, however, as a fairly intuitive, almost commonsensical, tool for securing social cooperation and political harmony among people who might not agree on any conception or theory of the good. In this reading, the "veil of ignorance" does not perform the metaphysical function of dividing the essence of personhood from its coincidental or contingent qualities. Rather, it performs the heuristic function of suggesting how citizens might structure basic social institutions through which, as free and equal persons, they may then choose their own communities and pursue their own lives.

B. *The Idea of Individual Desert*

You may have a fuller sense of the richness and subtlety of Sandel's argument when you learn that so far this Review has covered, and sketchily at that, only the introduction and the first of four chapters of his dense, crowded book. Sandel later criticizes Rawls' conception of contract in the original position. First, he examines Rawls' denial of the concept of individual desert. Rawls claims that "no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society."³⁴ The idea that a person deserves the rewards brought by his hard work or good character is equally problematic, "for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit."³⁵

Sandel mobilizes Robert Nozick's well known argument that the difference principle—which allows only those inequalities that work to the advantage of its least advantaged members—undercuts deontological liberalism's promise to take seriously the plurality and distinctness of individuals³⁶ and to assure that these individuals "treat one another not as means only but as ends in themselves."³⁷ Rawls acknowledges that "the

33. P. 62. The idealists also made this attack on liberal political theory. See B. BOSANQUET, *THE VALUE AND DESTINY OF THE INDIVIDUAL* 46-47 (1913).

34. J. RAWLS, *supra* note 21, at 104.

35. *Id.* For an idealist account of the apportionment of natural talents, see B. BOSANQUET, *supra* note 33, at 144-48.

36. J. RAWLS, *supra* note 21, at 29 (utilitarianism is anti-individualistic because it "conflat[es]" all systems of desires).

37. *Id.* at 179.

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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.”³⁸ Denying that a person’s traits and abilities form a basis for individual desert, regarding these personal attributes instead as common assets, involves viewing the individual as merely a means to the ends of others, rather than as an end in himself. How can Rawls’ reconstruction of Kant be adequate if it treats people’s abilities and talents as resources for others? Nozick answers: “Only if one presses very hard on the distinction between men and their talents, assets, abilities, and special traits.”³⁹

We can now see why Sandel takes the reader through this familiar territory. It is to emphasize, once again, Rawls’ sharp distinction of the self from what it possesses.⁴⁰ The sharp distinction between the self and its attributes

has the consequence of leaving us with a subject so shorn of empirically-identifiable characteristics as to resemble once more the Kantian transcendent or disembodied subject Rawls resolved to avoid. It makes the individual inviolable only by making him invisible, and calls into question the dignity and autonomy this liberalism seeks above all to secure.⁴¹

C. *Justice and Rational Choice*

Having deployed Nozick’s arguments to underscore this point, Sandel asks “why the original position provides an appropriate way of thinking about justice at all.”⁴² He then examines Rawls’ second method of justification, which connects the theory of justice with the theory of rational choice.⁴³

Sandel points out that a contract among “beings struck with the kind of complicated amnesia necessary to the veil of ignorance”⁴⁴ is hypothetical: It imagines an agreement that never occurred among beings who never existed. The doubly hypothetical nature of the contract, however, gives it the power to justify the principles of fairness and consent that underlie the

38. *Id.* at 101.

39. R. NOZICK, *supra* note 20, at 228.

40. “[S]trictly speaking, there is nothing that ‘I,’ *qua* pure subject of possession, *have*—nothing that is attached, rather than related, to *me*—nothing at least in the strong, constitutive sense of possession necessary to a desert base.” P. 95.

41. *Id.*

42. P. 104.

43. Rawls connects these two ideas by examining “which principles it would be rational to adopt” given the original position. J. RAWLS, *supra* note 21, at 17.

44. P. 105.

legitimacy of ordinary contracts.

To see this, one may ask for the principles that define what may count as "fair" and as "voluntary" in any transaction. Even libertarians, who argue that voluntary agreements are self-justifying, appeal to principles of acceptable bargaining practice to rule out contracts based on coercion and fraud. What justifies the principles we use to determine whether the contracts we make create legitimate expectations and moral duties? Rawls appeals to a hypothetical, unambiguously fair situation involving free and equal agents who rationally agree upon the principles they adopt. The hypothetical nature of this contract and the parties to it suggest that what is at stake is not a contract but a contractarian argument of the sort we have to make if we are to understand how actual contracts bind us. Thus, the idea of the hypothetical contract in the original position is needed to justify actual agreements, not the other way around. "Actual contracts presuppose principles of justice, which derive in turn from a hypothetical original contract."⁴⁵

While Sandel accepts the structure of Rawls' argument as he has interpreted it so far, he criticizes it from another direction. Rawls emphasizes the participation of a group of people in the choice of principles of justice in the original position. The principles are supposed to be the result of deliberation and agreement:

[W]hereas the utilitarian extends to society the principle of choice for one man, justice as fairness, being a contract view, assumes that the principles of social choice, and so the principles of justice, are themselves the object of an original agreement.

[F]rom the standpoint of contract theory one cannot arrive at a principle of social choice merely by extending the principle of rational prudence to the system of desires constructed by the impartial spectator. To do this is not to take seriously the plurality and distinctness of individuals⁴⁶

It is hard, however, to discern distinct individuals behind the veil of ignorance. To guarantee fairness, Rawls postulates that all parties "are similarly situated and no one is able to design principles to favor his particular condition"⁴⁷ In that event, we must wonder what there is to discuss, what room there is for give and take, "since the differences among the parties are unknown to them, and everyone is equally rational"⁴⁸ If everyone is convinced by the same argument, then "we can

45. P. 119.

46. J. RAWLS, *supra* note 21, at 28, 29.

47. *Id.* at 12.

48. *Id.* at 139.

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view the choice in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached.”⁴⁹

Sandel argues persuasively that the principles of justice thus are not chosen in the original position so much as created by it. The individuals behind the veil do not make an agreement, but rather a discovery that might as well have been made by any of them. Rawls apparently concedes this when he makes the oxymoronic argument that acceptance of the principles “is the only choice consistent with the full description of the original position. The argument aims eventually to be strictly deductive.”⁵⁰

For Sandel, the argument is already strictly deductive; the voluntarism of Kant has already given way to the cognitivism of Spinoza.⁵¹ Why can self-recognition or self-discovery take place only behind the veil of ignorance, only when the mind is separated from every conception of the good but one—the distribution of primary goods secured by justice? If the self can recognize itself and find the grounds for its own unity in a fuller conception of the good, then we have reason to doubt the priority of a conception of right discovered without it. To recognize this fuller conception of the good, Sandel, like the idealists, examines the other side of the plurality and distinctness of individuals—not the claims of separateness but the claims of community.

IV. The Separation of the Self and Its Attributes and the Community’s Use of the Individual

Sandel uses Ronald Dworkin’s defense of affirmative action as an example of the extent to which deontological liberals separate the self from all its traits and then—as if this somehow followed—view those traits as common assets. What is “the relevant community across which ‘my’ assets are properly shared” and how does it establish its credentials?⁵² Rawls (to redeem the notion of common assets involved in the difference principle) and Dworkin (to define the relevant community required by his argument for affirmative action) both presuppose a conception of the common good that is not contingent but constitutive enough of the individual that “when ‘my’ assets or life prospects are enlisted in the service of a common endeavor, I am likely to experience this less as a case of being used for others’ ends and more as a way of contributing to the purposes of a com-

49. *Id.*

50. *Id.* at 121.

51. The eloquent ending of Rawls’ book confirms this suspicion. *Id.* at 587.

52. P. 147.

munity I regard as my own."⁵³ If Sandel is correct, then the morality of right, which "corresponds to the bounds of the self and speaks to that which distinguishes us,"⁵⁴ is not prior to the morality of the good, which "corresponds to the unity of persons and speaks to that which connects us,"⁵⁵ but requires it for its coherence and completion.

Sandel runs through Dworkin's familiar argument that no one, black or white, deserves or has an antecedent right to be admitted to law or medical school and points out its parallels to Rawls' argument that no talent or ability belongs so completely to a person that he or she deserves anything because of its possession.⁵⁶ Even if we accept this argument against meritocracy and agree that no one on the basis of his character or capacities has the right, for example, to go to law school, we may nevertheless ask why society should have any less arbitrary, any better claim on these "assets." Why should we regard them as common resources and dedicate them to collective ends?⁵⁷

The problem can be posed in another way. Dworkin, for example, has argued eloquently that efficiency, preference-satisfaction, or the maximization of wealth—the goals typically asserted by contemporary utilitarianism—have no merit or value and therefore cannot trump the claims of justice or, indeed, any worthy claim.⁵⁸ Why, then, do deontological liberals like Dworkin apparently assume that when individual rights are not at stake, social policy should be decided on utilitarian grounds? Why do they rely upon a maximizing principle except when rights are involved?⁵⁹

Deontological liberalism has an important and convincing reply, one Sandel thinks it must make. We may frame this reply (although Sandel does not) in terms of a distinction Dworkin draws in an essay which appeared at about the same time as Sandel's book.⁶⁰ Dworkin distinguishes between conceptions of the good life and conceptions of the good society.⁶¹

53. P. 143.

54. P. 133.

55. *Id.*

56. Sandel imagines two hilarious letters in which the Dean of Admissions explains this to an unsuccessful and then to a successful candidate. The Dean cautions the latter, for example, against thinking that admission reflects favorably either on his abilities (which are merely traits society needs for its own purposes) or on his conscientious effort to develop those abilities. The Dean concludes: [T]he assumption that you deserve even the superior character necessary to your effort is equally problematic, for your character also depends on fortunate circumstances of various kinds for which you can claim no credit. The notion of desert seems not to apply to your case.

We look forward nonetheless to seeing you in the fall. Sincerely yours . . .

P. 142.

57. See R. NOZICK, *supra* note 20, at 228.

58. See Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980); Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

59. P. 140.

60. Dworkin, *What Liberalism Isn't*, N.Y. REV. BOOKS, Jan. 20, 1983, at 47.

61. *Id.*

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He argues that government ought to be as neutral as possible among conceptions of the good life and the values that enter that life.⁶² Society is best governed by neutral principles that secure for free and equal persons the right to plan their own lives and to pursue the lives they plan.⁶³

While deontological liberalism insists on official neutrality among conceptions of the good life and thus finds the impartiality of markets attractive, it need not insist upon a similar neutrality among conceptions of the good society. Liberalism is not neutral as to what a just society is; it presupposes a theory of justice. Similarly, liberalism is not neutral or utilitarian in regard to the curse of racism; it insists that a good society is unconscious of race and will therefore support affirmative action. Liberals favor progressive programs to improve education, the sciences, the arts, and the quality of the environment; liberals insist that a good society is compassionate, and act to relieve suffering out of sympathy as much as justice. The goals implicit in liberal social programs are not matters of arbitrary preference and are not in that sense utilitarian. Liberalism, to be sure, respects the neutrality of markets on the question of the good life; it need not take its conception of the good society, however, from markets.

Sandel argues that such a view of liberalism can explain why a person's traits and abilities are "common assets," by relying upon a "constitutive" conception of community rather than upon the weaker "sentimental" and "instrumental" conceptions that involve altruistic fellow-feeling or on a commitment to mutual aid.⁶⁴ The stronger conception, Sandel argues, involves not just altruism or a scheme of cooperation "but a mode of self-understanding partly constitutive of the agent's identity."⁶⁵ Community in this sense is not something people choose, but something they know or discover; it is less a matter of voluntary association than of shared understanding and recognition. According to Sandel, Rawls' defense of the difference principle and Dworkin's defense of affirmative action presuppose a community of sharing in this strong sense—"a wider subject of possession capable of laying legitimate claim to the assets necessary to its purposes without using some as means to others' ends"⁶⁶

Sandel turns, finally, to the role of reflection or knowledge, as opposed to pleasure or preference. He argues that Rawls conceives of the good as so hopelessly mired in contingency that we can hardly deliberate about ends, but only means to ends. The choice of ends amounts to little more than a simple weighing of the intensity of our desires.⁶⁷ When conceptions

62. Dworkin, *supra* note 20, at 127.

63. P. 1.

64. P. 149.

65. P. 150.

66. P. 149.

67. Rawls apparently concedes this point: "That we have one conception of the good rather than

of the good are understood as morally arbitrary, it is hard to see why the priority of justice is not simply trivial, why justice itself is not trivial, if all it does is enable us "to pursue these arbitrary conceptions 'as fully as circumstances permit.'"⁶⁸

In the final hurried pages of the book, Sandel argues that given the limited role of reflection in Rawls' view and the arbitrariness of the goals people seek, "the virtues of benevolence and love, as features of the good, are forms of sentiment rather than insight, ways of feeling rather than knowing."⁶⁹ Where there is no knowledge of the good, there can be no shared or final ends that define a community in the constitutive sense, for

what marks such a community is not merely a spirit of benevolence, or the prevalence of communitarian values, or even certain 'shared final ends' alone, but a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of the participants is reduced if never finally dissolved.⁷⁰

Sandel sees the production of this common vocabulary as a "precarious achievement"⁷¹ of politics. A theory of justice that ignores this achievement overlooks the danger that when politics goes badly, dislocations and not just disappointments result. "And it forgets the possibility that when politics goes well, we can know a good in common that we cannot know alone."⁷²

Conclusion

The idealists struck a eudaemonistic attitude: "[N]ow for us (as it was for Hellas) the main question is: There being some end, what is that end?"⁷³ Kant could not answer that question because he divorced the right completely from the good and the principles of morality from the ends of history. The idealists argued, moreover, that Kant too hastily assumed that whatever is not done for duty's sake must be done for pleasure's sake or on the basis of inclination; thus, they charged him with adopting a theory of psychological hedonism that alienates us from all but a few of our actions. Why, then, should we be moral? The idealists worried that Kant had no better reply than to postulate the existence of God to reward

another is not relevant from a moral standpoint. In acquiring it we are influenced by the same sort of contingencies that lead us to rule out a knowledge of our sex and class." Rawls, *Fairness to Goodness*, 84 PHIL. REV. 536, 537 (1975).

68. P. 168.

69. P. 170.

70. Pp. 172-73.

71. P. 183.

72. *Id.*

73. F. BRADLEY, *supra* note 7, at 81.

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morality with happiness after death.

Sandel directs the same general criticism against Rawls. But Rawls may plausibly reply that, unlike Kant, he is concerned only with political theory, not with broader moral or metaphysical questions.⁷⁴ If so, Rawls need not attempt to establish the priority of the right over the good in any comprehensive sense; rather, he may offer at most practical or intuitive reasons for designing social institutions in ways that reflect fairness or justice. Someone convinced of a particular conception of the good—for example, happiness—could point out, however, that we do not take happiness seriously unless we allow it to trump justice. Thus, the possibility arises that the right might not take precedence over the good, even in political theory, once we have some stronger, comprehensive conception of the good.

In any event, Sandel argues persuasively (as do the idealists) that Kantians cannot demonstrate the priority of right simply by debunking a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronomous, and mired in contingency that no one could defend it in the first place. By setting up efficiency, wealth maximization, Pareto optimality, or the like as the only competition, deontological liberals may triumph early, but they must reconcile themselves with a richer conception of the good, if not in the afterlife, then at the end of the philosophical day. As we ask Kant why, all things considered, individuals should be just, so we may ask Rawls why a society, particularly one dedicated to a utilitarian conception of the good, should be just. Rawls, unlike Kant, does not promise the just treasures in heaven but he does rely on “the general facts of economics and psychology” to show that an equitable society will not be too inefficient.⁷⁵

The strength of Sandel’s book, like the strength of the idealist thesis generally, is to argue persuasively against the idea of a social contract dependent on possessive individualism. The contractarian view can mistakenly render the state nothing more than a machine for maximizing individual utilities:

But the state’s relation to the individual is quite different from this. Since the state is mind objectified, it is only as one of its members that the individual himself has objectivity, genuine individuality, and an ethical life. Unification pure and simple is the true content and aim of the individual, and the individual’s destiny is the living of a universal life.⁷⁶

74. Rawls has recently replied in a similar way to Sandel and Walzer. See J. Rawls, *Political Philosophy: Political Not Metaphysical* (draft manuscript, Nov. 1983) (on file with author).

75. J. RAWLS, *supra* note 21, at 158.

76. G. HEGEL, *PHILOSOPHY OF RIGHT* § 258, at 156 (T. Knox trans. 1942).

Nonetheless, Sandel does not show that deontological liberalism as represented, for example, by Rawls must inevitably commit this error, that it must always mistake the interests of individuals for the ultimate ends of the state. On the contrary, Rawls' theory of the good, even if it is instrumental, does not necessarily envision the satisfaction of preferences as the goal of political association; his theory seeks only to create the background conditions under which free and equal individuals can pursue their own goals, whatever they may be. The background conditions are the only basis on which we can plausibly unite as a political community. If any other conception of the good can unite us, Sandel has not told us what it is.

The weakness of Sandel's impressive and convincing book lies in its failure to move us beyond Hegel, Green, Bradley, and Bosanquet. In particular, Sandel fails to explain why self-realization must take place within an individual's station and duties within a community, why an individual's values, to be more than mere preferences, must be strongly shared, why they constitute his or her identity only if they are constitutive of the communities to which he or she belongs. Only by assuming the unity of the objective good can Sandel hold it up as a clear competitor to the claims of right. But if the good is many—if there are many communities of sharing—then justice may be needed, ultimately, to arbitrate the conflicting claims of these communities.

Liberalism and the Limits of Justice not only criticizes the deontological project, but also calls for its completion. In this way it is not so much a critique of Rawls as a vindication, for it calls on deontology to complement the theory of right with a theory of good equal to it and suggests that this full theory of the good may speak to what unifies people, just as a conception of right speaks to what separates them. But at this level of analysis, as John Dewey argued in criticizing Bradley and Green, both society and the individual dwindle into abstractions, held together and apart by philosophical theories that do not help them solve the problems they actually have. Dewey argues that political theory, by abstracting the self from its various conflicting commitments and identities and by divorcing society from its various highly differentiated agencies and institutions, leaves unsolved the problem it has tried to address.⁷⁷ For Dewey, reconciling the disparate energies and powers of society and the divided individual poses a more genuine problem than reconciling an abstract individual and an abstract state.

If the course of political theory continues to double back upon itself, as it has so brilliantly in Sandel's book, we may expect, in the next moment of this cyclical progress, a renovation of the pragmatic theory of the good.

77. J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 3-36 (1927).

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If the book that revitalizes the arguments of the pragmatists does as well as Sandel has done in reviving the arguments of the idealists, it too will be a superb achievement and deserve from its reviewers, as Sandel's book deserves, the highest praise.

