NORMATIVE EVALUATION AND LEGAL ANALOGUES

Amartya Sen

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Custom, that unwritten law

By which the people keep even kings in awe.

So wrote Charles Davenant, in Circe, about three hundred years ago. There are not many kings left in the world, but custom, in various forms, does still link closely with law. Indeed, norms and laws are intimately connected and influence each other. The influences work in both directions.

Norms have an impact on the actual rules of operation in a society in at least two distinct ways. First, the conduct and behavior of people are influenced, to varying extents, by the established norms in a society. Norms can impose obligations and constraints which work like law, and this is perhaps the most direct manifestation of norms as "unwritten law" to which Charles Davenant referred. At the very least, norms can supplement legal rules (the "written law," as it were) that are in force.

To consider an often discussed example, the enforcement of economic contracts can be made much easier if the power of legal force is supplemented by appropriately conformist behavior. Voluntary compliance can, in this sense, play an auxiliary but important part in the enforcement of contracts, for which policing may be the last resort. This recognition, incidentally, is not in conflict with Douglass North's critical argument, which I find entirely persuasive, that "neither self-enforcement by parties nor trust can be completely successful," and that "a coercive third party is essential" for the enforcement of contracts." But as North himself points out, to accept the stubborn necessity of institutional enforcement does not require us to believe that "ideology or norms do not matter; they do."\(^{(1)}\)

Norms and their operation cannot altogether supplant legal rules and their enforcement, but they can certainly supplement the latter effectively, which is the point at issue here.

Second, norms can motivate law and have a substantial influence on what gets codified as law. This can work either directly through legislation, which may be influenced by demands linked to norms and established values and priorities, or through judicial interpretation of what the legal codes actually say or mean, which too can respond to prevailing values and general "moral sentiments" (to use Smith's
terminology). Even if we do not want to go as far as Cicero in claiming that "the good of the people is the chief law" (De Legibus, III, iii, 8), it is hard to deny the role of established norms in influencing legislation and judicial interpretations.

Legal and Normative Thinking

I have begun by discussing the influence of norms on the law, but that is not what is going to be the principal focus of this lecture. Rather, I shall be mainly concerned with influences that work in the converse direction, in particular the way frameworks of law and legal thinking influence the discussion and formulation of norms. Since these connections from law to norms have received less attention than the connections that work in the opposite direction - from norms to law - they need, I believe, more explicit examination. In discussing the relationship between "norms and the law," which is the subject matter of a conference that is currently occurring here (at the School of Law of Washington University in St. Louis), and of which this lecture is a part, we must pay attention to influences that work in both directions, and this is why I have begun by acknowledging the importance of the influence of norms on law. But the main concern of this lecture is with the influence of law and legal thinking on norms and normative thinking.

I should, however, also warn that my task is not confined to praising the virtues of legal or quasi-legal thinking in moral affairs. I shall argue that the influence of legal analogy and legal thinking has sometimes been quite counterproductive in ethics and political philosophy. I shall be particularly concerned with the arbitrary narrowing of the range and reach of moral and political analyses resulting from the tendency to concentrate too exclusively on some very specific - and rather confined - legal frameworks. My task, therefore, is both (as it were) to bury Caesar and to praise him. My hope is that a more explicit consideration of the role of legal thinking in moral and political analysis can serve a constructive as well as critical purpose.

Poverty and Norms

The organizers of this conference made the suggestion - indeed the very reasonable suggestion - that in discussing norms and the law, I should pay some attention to problems of poverty. (Indeed, they had proposed "Norms, Law and Poverty" as the title of the requested paper, and indeed it could have worked for the paper I am presenting.) That the need to remove poverty must be crucial for the ethical adequacy of any system of social norms has been well discussed for a long time - most effectively, in recent decades, by John Rawls. (2)
One of the clearest articulations of this priority can be found in Adam Smith. "No society," he argued, "can surely be flourishing and happy, of which the far greater part of the members are poor and miserable." Indeed, it is not adequately recognized (given the championing that Smith gets from the hard-nosed right) that even Smith's severe criticism of state intervention in many fields of economic activities drew, to a significant extent, on his fear that state intervention would typically be in favor of the rich and the powerful (including capitalist employers - "the masters," as he called them), rather than the workers and the poor. Indeed, Smith's distinction between helpful intervention and harmful interference turned substantially on the way the workers are treated compared with their "masters." He wrote in the Wealth of Nations:

> Whenever the legislature attempts to regulate the differences between masters and their workmen, its counselors are always the masters. When the regulation, therefore, is in favor of the workmen, it is always just and equitable; but it is sometimes otherwise when in favor of the masters.  

Whether or not we agree with Smith's political radicalism and his extreme suspicion of the rich (on which he wrote very extensively both in the Wealth of Nations and in The Theory of Moral Sentiments), his arguments on the centrality of poverty and disadvantage in the acceptability of social norms are powerful pointers to the need for focus in examining the relationship between norms and the law.

There is, however, an important question regarding the nature and characteristics of poverty. Even though poverty is often defined simply as lowness of income, it is more adequately seen as the lack of the capability to have a minimally acceptable quality of life. Poverty, seen in this broader perspective, is not just the characteristic of having an income level below a prespecified minimal income, but more fundamentally a deprivation of basic capabilities. Thus characterized, the analysis of poverty has to be concerned with various different ways in which a person may fail to have these minimal capabilities.

In terms of causal determinants, the domain of poverty analysis has to include not merely a lack of economic means, but also the deprivation of political freedoms, civil rights, educational and other social opportunities, health facilities, and other enabling conditions. Inadequacies in any of these fields can impoverish the ability of women and men to have minimally acceptable lives. Furthermore, deprivations in these diverse fields can reinforce each other. To illustrate, political unfreedom can contribute to economic insecurity; economic and social deprivation can lead to bad health and premature mortality; the denial of basic health care and
education can sustain economic poverty. \footnote{7} The recent literature on human rights, on which I shall have something to say presently, has been particularly concerned with deprivation and poverty in a wide variety of fields.

**Normative Reasoning and Human Rights**

I turn now to the influence of the law and legal thinking on ethical norms and political assessment. This influence can work in a great many different ways. In this lecture I shall concentrate on two particular examples of the extensive impact of legal analogy on moral and political reasoning: (1) skepticism about the idea of normative rights (including the legitimacy and scope of human rights), and (2) the idea of a hypothetical contract (such as Rawls's "original position") as a foundational device for substantive ethics and political philosophy.

I begin with the first. Legal rights and duties can serve as analogues in analysing normative claims regarding rights and duties. When a proposal is made to extend the domain or scope of moral thinking or to alter its substantive demands, the understanding and assessment of what is being proposed can be made easier by looking for its legal analogue. Legal concepts can thus help to clarify what is to be morally sought as well as to communicate the results of ethical deliberations. Indeed, concepts of rights and duties have such strong legal associations, that it is quite natural to invoke legal comparisons in conducting normative scrutiny. It can, for example, be very tempting to ask how a proposed extension or curtailment or revision of some claims regarding moral rights and duties would be legislated, even if there is no real intention, for one reason or other, to undertake any such legislation. Law can speak loud and clear, and moral reasoning may have use for that legal voice.

This articulation has not, however, been invariably helpful in understanding extra-legal concepts, such as human rights. Human rights differ from legal rights that a citizen of a country enjoys in two different ways. First, idea of human rights extends beyond what the system of law in a country recognizes as rights. They are normative claims, regarding what is important and what needs consideration and support. They differ, therefore, from rights that are specifically legislated or otherwise incorporated within the limits of justiciable law (this may or may not hold for human rights, even to those human rights that are widely accepted). The government of a country can, of course, dispute a person's *legal right*, say, not to be tortured (there may be no such legislated right), but that will not amount to disputing what is seen as the person's *human right* not to be tortured.
Second, the normative status of the human right of a person does not arise from his or her citizenship, or nationality, or membership of a legally relevant collectivist. The notion of human rights builds on our shared humanity. They differ, therefore, from constitutionally created rights guaranteed for specified people (such as American citizens or Frenchmen). Human rights go not only beyond the established law anywhere, but also beyond claims arising from any particular denominational category (such as citizenship), in contrast with the common identity of all human beings.

The idea of human rights has been both strongly championed and severely resisted in recent years. It has become a veritable battleground not merely because the notion of human rights is resisted by people who lack sympathy for the assertion of these alleged rights (such as the spokesmen or other officials of authoritarian governments), but also because many analysts who are not out of sympathy with the politics or ethics that go with the championing of human rights, nevertheless find the idea of human rights to be conceptually muddled, particularly in the form in which these rights are asserted. This is where, I would argue, the use of simple analogies with legal rights has played a rather limiting role.

Legal Analogy and Normative Status

This is, in fact, not quite a new debate, and in some ways represents a return to intellectual disputes that occurred more than two hundred years ago. The idea that "natural rights" may exist irrespective of legal rights is, of course, quite ancient. It was often used to justify privilege and to reject the claims of human well-being, particularly of the underdogs of society, and it was sharply attacked, especially in that form, by Jeremy Bentham. By taking a no-nonsense view of rights as claims that result from legislation, rather than what motivates legislation, Bentham found it easy enough to describe "natural rights" as "nonsense," and the concept of "natural and imprescriptible rights" as "nonsense on stilts" (I take this to be a special species of nonsense that is artificially elevated by props). Bentham did, of course, take a great interest in rights, but not as moral or political priors to legislation, but as institutional implications of legislation. In discussing the typology of rights (Bentham was a true pioneer in this exercise, along with Austin), and in linking the idea of appropriate legislation with the social goal of utility maximization, Bentham made substantial contributions to the literature of legal rights. But by insisting on a fairly literal interpretation of all rights as legislated rights, he managed to dispense with one of the major tools of moral and political reasoning.

That tool had been used earlier (Bentham was right to think) in defense of privilege and vested interests. But as a general device of
thought that can accommodate morally and politically reasoned claims and correlated duties, the concept of rights had other possible uses. Indeed, even as Bentham was sharpening his theories, the French Revolution occurred, and the radical demands that were associated with it (including the call for "the rights of man") vastly extended the scope and reach of rights-based reasoning. However, Bentham, the legalist, remained critical of this use of the idea of rights (well reflected in his pamphlet, Anarchical Fallacies). The plausibility and advantage of thinking in terms of rights in demanding more equity and more humanity was extensively brought out, during Bentham's time, by Tom Paine and Mary Wollstonecraft, who were exact contemporaries of Bentham. Indeed, Paine's Rights of Man and Wollstonecraft's The Vindication of the Rights of Women, which were published in the same year, 1792, broadened the political and moral horizon exactly in the opposite direction to the one that Bentham had advocated.

The Domain of Human Rights

Contemporary disputations of the idea of human rights some times follow the Benthamite line (though there is another - conceptually independent - line of criticism which I must also examine presently). In this view, the notion of human rights must be nonsense (if not quite elevated nonsense - "on stilts), since rights are post-legislative phenomena and cannot precede legislation. This argument need not take the form of disputing that we may have good reason to demand fresh legislation to incorporate what are taken to be human rights, and may have excellent grounds for agitating in that direction. Indeed, Bentham himself had done a good deal of just that (even though the normative motivation, in his case, came from utility rather than any pre-legal concept of right). There would, however, in this view, be no right until the appropriate legislation, or a suitable judicial reinterpretation, had occurred.

This position, I would argue, seriously limits and constrains the richness of moral and political ideas that can invoke the notion of rights for articulation, analysis and communication. To claim that a person has a certain right and others have corresponding duties can be a powerful moral or political statement. A non-legislated claim that is seen as a human right differs, for that reason, from a non-legislated claim that is not seen as a human right. The language of normative rights reflects two distinct but interrelated concerns: (1) it aims at the freedom of the right-holder to do certain things or achieve some conditions, and (2) it demands some correlate obligations on the part of others (which can take the form of non-interference or of positive assistance) to help in the realization of this freedom by the right-holder. To illustrate, person A's right not to be assaulted concerns both (1) freedom of A to avoid being assaulted, and (2) the obligation of others to help A to have that freedom, by not assaulting A, and even perhaps by assisting him to avoid being assaulted by others (more on the latter presently).
In terms of broadly consequential reasoning, which both Paine and Wollstonecraft implicitly invoked, and which I have tried to investigate elsewhere,\(^{(9)}\) the comprehensive outcome can be judged to have been worsened on each of these - distinct but interrelated - grounds. If person B were to assault A, this would be a violation of A's right and a breach of B's duty. Both can figure in a broadly consequential accounting, and the moral and political force of such rights and duties can be extremely important even if they have not emanated from legislation. This line of reasoning can, of course, be questioned and scrutinized on substantive moral or political grounds, but it can hardly be summarily dismissed as "nonsense" simply on the basis of an exclusionary analogy with legal rights.

It is also important to note in the context of recognizing the far-reaching distinction between legal rights and normative rights (such as a normatively valued but non-legislated human right) that it is not in general cogent even to presume that if a normative right is important, then it must necessarily be appropriate to try to legislate and institutionalize it as a legal right. The recognition of a human right may have its own importance and work in its own sphere of influence (as social norms generally do, through influencing behavior). For example, in a male-dominated traditionalist society (where significant family decisions are typically taken by the husband on his own), the social recognition of a wife's "human right" to be consulted in family decisions may be a very important move. But it does not follow that a human right of this kind should be put into the rule books through legislation - perhaps with the husband's being arrested, locked up or otherwise punished by the state if he were to fail to consult his wife.

Similarly, the human right to social respect or dignity involves different spheres of activity, some of which can be included in the domain of formal legislation (such as outlawing the practice of untouchability, while others are mainly matters of attitudinal change (such as altering the lack of regard for the "low-born") on which legislation would be difficult and most likely quite ineffective. Many human rights can serve as important constituents of social norms, and have their influence and effectiveness through personal reflection and public discussion, without their being necessarily diagnosed as pregnant with potential legislation. Human rights have their own domain of relevance, and while there may be substantial intersections between this domain and that of appropriate proposals for legislation, the two domains need not be congruent.

**Human Rights and Corresponding obligations**

There is another line of criticism of human rights, to which I referred earlier, and which too is strongly influenced, if only implicitly, by an analogy with legal rights. This takes the form of...
arguing that any right must be coupled with an exactly specified correlate duty which imposes particular duties on specific persons or agencies. This is certainly true of many legal rights. For example, if a person enters into a legally binding contract to deliver some goods at some price, then the right of the recipient to have those goods at that price is exactly matched by the duty of the provider to supply those goods at that price. Even when the coverage of legal obligations is not focused on only one person or agency, there can be an exact correspondence. For example, a property right takes the form of combining the entitlement to private property with an exact obligation on the part of everyone else to respect that entitlement, rather than violating it through, say, theft or robbery. We know exactly who is being asked to do what. Since this kind of an exact correspondence often does not hold for what are claimed to be human rights, they should be at best seen (so the argument runs) as loose expressions of goodwill—perhaps even of a lump in the throat—rather than as rigorous formulation of anything that can be seen as rights.

The affirmation of human rights sometimes involves such an exact correspondence, but not always. For example, the human right not to be arbitrarily arrested (no matter whether the laws of the land prohibit arbitrary arrest or not) is quite exactly characterized (the state, in particular, must do no such thing). In contrast, the idea that people have a right to health care or to escape starvation demands, generally though imprecisely, that all those who are in a position to help must consider what they can do to prevent these deprivations from occurring. Human rights can take either form, with or without pinpointing specific duties for fully specified obligation-bearers.

The distinction has a close connection with Immanuel Kant's contrast between "perfect" and "imperfect" obligations. Kant spent a good deal of effort in exploring both kinds of obligations. However, in modern explorations of the Kantian tradition, it is the role of "perfect" obligations that has tended to receive overwhelming priority (so much so that the fact that Kant did extensively discuss imperfect obligations is sometimes entirely overlooked). The inclination to concentrate exclusively on perfect obligations is more in conformity with the legal concept of rights, and the invoking of imperfect obligations related to human rights is sometimes seen with suspicion because of the disanalogy involved with legal frameworks.

In contrast, when human rights are embedded in a broad system of consequential evaluation of a kind that Paine or Wollstonecraft, or Condorcet (a great theorist of the French Revolution), or for that matter Adam Smith, implicitly but firmly invoked, the accommodation of imperfect obligations as correlates of normative entitlements or human rights becomes much easier to grasp. I have discussed this
issue elsewhere, and can draw on that analysis here. Violations of obligations – perfect and imperfect associated with human rights that are taken to be important can be seen as making the states of affairs worse, in a broad consequential system. Even when someone is not directly involved in the violation of a perfectly specified obligation (for example, person A's being assaulted by person B), he or she may have a general duty to help (in this case, to try to prevent B's assault on A). This duty, through a consequential link, may be rather loosely specified (telling us neither who must particularly take the initiative, nor how far he or she should go in doing this general duty), but this broadly formulated imperfect obligation to help may nevertheless be a significant – indeed momentous – moral demand (for reasons that Kant discussed).

In fact, neglect or disregard of obligations – imperfect as well as perfect – can be incorporated into consequential analysis and can be taken into account in the normative evaluation of states of affairs. For example, if a person were severely assaulted in full view of others and her cries for help were completely ignored, it could be argued, in terms of plausible norms, that three bad things had occurred: (1) the victim's freedom was violated and so was her right not to be assaulted, (2) the assaulter transgressed the immunity that others should have from intrusion (in this case, a violent intrusion) and violated his duty not to assault others, and (3) the others who did nothing to help the victim also transgressed their imperfect obligation to help others in the way they could be expected to provide. They are interrelated failings, but distinct from each other.

In contrast with this inclusive accounting, any system of rights that ignores all claims other than those associated with perfect obligations (in analogy with legal obligations) will miss something of potential significance in the field of social norms. This is a serious loss, and the corresponding conceptual impoverishment has had the effect of taking the notion of human rights to be conceptually muddled and problematic in a way it need not be.

There is, in fact, no inescapable conflict with legal thinking in all this (since legal theorizing can be contingently adapted), but there is some tension with the way the analogy with legal rights has contributed to premature suspicion of the important idea of human rights. The belief, often articulated, that human rights are well-meaning but unrigorous nonsense draws on a view of rigor that has some clear sign of rigor mortis.

Contracts and Fairness

I turn now to the second example, identified earlier, for examining the effects of particular legal analogies on social norms and
normative thinking. The analogy is with a legal contract, which has been extensively used in contemporary moral and social philosophy. The approach is to a great extent inspired by Kantian practical reasoning, but it has had a remarkable revival over the last half a century. It is well illustrated by the preeminent departure in ethics and political philosophy of our time, to wit, John Rawls's theory of justice as fairness, which draws substantially on an analogy with the legal device of a binding contract. The contractarian approach has also been extensively used by other analysts, for example, by John Harsanyi, to develop a modern approach to utilitarianism, and by James Buchanan, in laying the foundations of a new political economy based on ideas of contracts and consent. In this paper, I shall concentrate on John Rawls's analysis, though many of the issues raised here also apply to the other examples of the contractarian approach.

The contract that is invoked by Rawls (and in fact by the other contractarian authors as well) is an imagined one that is settled in a hypothetical state of primordial equality - what Rawls calls the "original position" - where people do not yet know who precisely they are going to be in the actual society. Since no one knows who exactly he or she is going to be in real life, there is a quality of impersonality here that is meant to eradicate special pleading based on vested interests. This is seen as meeting the demand of "fairness." The rules for the basic structure of the society that are put into the hypothetical contract in the original position are taken to be "just" precisely because they emanate from a fair process yielding an impartially derived contract. The analogy with a negotiated contract, to which compliance is expected in actual social behavior, is central to the foundations of this approach of "justice as fairness."

Questions can be raised about the way Rawls reads the likely contents of the contract that would emerge in the original position and about the rules of justice for the basic structure of the society that he argues would be incorporated in the social contract. Indeed, I have questioned the plausibility of the Rawlsian formulae in earlier writings, and have even proposed some alternative, focusing particularly on the need to take more direct note of people's actual freedoms (or "capabilities") rather than their holdings of resources and primary goods on which Rawls concentrates. With those specific issues I am not directly concerned in this lecture, and I shall not further pursue those arguments here. My focus, rather, is on the use of the analogy with a legal contract and the contractarian approach in general.

One point to note straightaway is that any contractarian approach is deeply dependent on the identification of a fixed group of persons...
who are involved in the process of contracting. The contract is between a specified group of individuals including some persons but not others. As Rawls puts it:

Justice as fairness recasts the doctrine of the social contract... the fair terms of social cooperation are conceived as agreed to by those engaged in it, that is, by free and equal citizens who are born into that society in which they lead their lives.\(^{(19)}\)

Even when the policies of one country affect the lives of others elsewhere, their interests or concerns cannot be directly accommodated through the process of contractarian participation. At least some additional device would have to be added to the structure of country-based contracts to give them some hearing. I shall come back to that issue presently, since it is quite central to the adequacy of political and moral thinking about global inequality and poverty, but before that I want to consider some structural aspects of the contractarian approach.

The Rawlsian framework works through the congruence of three groups of people, and this is part of the discipline of relying exclusively on the device of a contract:

(1) "the negotiating group": those who can be seen as negotiating an gas if" legal contract with each other, in the original position, about the basic structure of the society within which they will each live;

(2) "the affected group": those whose interests are directly involved; and

(3) "the evaluating group": those whose fair and impartial judgments must count in judgments of justice involving all the people whose interests and lives are directly or indirectly affected.

The contracting group of people in the original position is simultaneously "the negotiating group," "the affected group" and "the evaluative group." The insistence on congruence of this kind is difficult to avoid given the logic of contractarian reasoning, especially in the Rawlsian form, in which the original position would lead to elaborate and fixed rules about the basic structure of the society which are then put into institutional practice. Such institutional rules and legal requirements are not easy to arrange across the borders between different countries, and this is indeed one reason for not being able to include in the contractarian approach people who are not "born into that society in which they lead their lives"), even if their interests are strongly affected, and even if their own judgments are of great moral and political
interest. The rigidity of contractual reasoning imposes some serious loss here.

**International versus Global Justice**

It is, of course, possible to supplement this nation-by-nation fragmented analysis of justice by the demands of international justice. In fact, in this supplementary exercise, we can even think of an international get-together — again hypothetical — for arriving at a negotiated understanding of guiding principles for national policies towards other nations. This would be something like an international "original position," in which the representatives of the nations contract together and work out what they might reasonably owe to each other — one "people" to another. The working of such inter-polity interaction and the demands of international justice have been recently investigated by John Rawls himself in the form of exploring what he calls "the law of peoples." \(^{(20)}\) The "peoples" — as collectivities — in distinct political formations consider their concern for each other and the imperatives that follow from such linkages. The principles of justice as fairness can be used to illuminate the relation between these political communities.

Is this framework adequate for an understanding of "global justice"? I would argue that while it provides deep insights into the nature of international justice (especially in the skilled and sensitive hands of Rawls), it nevertheless falls short of providing an adequate understanding of "global justice." In this particularist conception of nation-by-nation justice, the demands of global justice — in so far as they emerge — operate through inter-polity relations rather than through person-to-person relations, which are central to an appropriate discernment of the nature and content of global justice.

Global justice is not merely an international or intersocietal issue, but primarily one of justice among persons spread across the world. The questions that remain outside the domain of international justice as formulated through the idea of the "laws of the people" are quite plentiful. How should note be taken of the role of direct relations between different people across borders whose identities include, inter alia, solidarities based on classifications other than those of nationality or political unit, such as class, gender, social or political convictions, or professional obligations? People in different parts of the world interact with each other in many different ways — through commerce, through literature, through political agitations, through global NGOs, through the news media, through the internet, and so on. Their relations are not all mediated through governments or representatives of nations \(^{(21)}\).

Indeed, interpersonal relations in the world may go far beyond international interactions. To illustrate, a feminist activist in...
America who wants to do something to remedy particular features of women's disadvantage in Africa or Asia, draws on a sense of identity that does not work through the sympathies of one nation for the predicament of another. (22) Her identity as a fellow woman may be more important in this particular context than her citizenship. Even the identity of being a "human being" - perhaps our most basic identity - may have the effect, when adequately appreciated, of broadening our viewpoint, and the imperatives that we may associate with our shared humanity may not be mediated by our membership of collectivities such as "nations" or "peoples."

Global justice cannot but embrace identities that go well beyond citizenship. These issues have become especially prominent in recent years, partly as a result of protesting demonstrations -from Seattle and Washington to London and Prague. One of the first features to note about the recent demonstrations against globalization is the extent to which these protests are themselves globalized events. They draw on people from very many different countries and distinct regions in the world. And many of their concerns relate to global issues of poverty and inequality, broadly defined. This is not the occasion for me to try to present an analysis of needed institutional response to deal with issues of global justice and equity (this I have tried to do elsewhere). (23) The concerns of the demonstrators are often reflected in roughly structured demands and crudely devised slogans, and the themes of these protests have been consistently more important than their theses. In the present context, it is, however, particularly important to recognize that the sense of identity which finds expression in these movements - and also in many other expressions of global concern - goes well beyond national identities and international relations. The world is not just a collection of nations, but also of persons, and international justice cannot exhaust the claims of global justice. The nation-by-nation approach of justice as fairness loses out something substantial in moral and political analysis, particularly in relation to issues of global inequality as well as the importance of human rights -economic, social, political, cultural, medical - across the world.

Population Variation and Contractarian Impasse

The contractarian approach is also in particular difficulty in dealing with any policy decision that may influence the size or composition of the population, since that would vitiate the fixity of the contracting group. This would certainly make it impossible to consider population policies through this device. The rub would lie in the undecidability as to who are to be included in the hypothetical deliberations in the original position that can, directly or indirectly, change the size or composition of the population. People who would not be born under some social arrangement cannot be seen to be evaluating that arrangement - a
"non-being" cannot assess a society from the position of never having existed (even though there would have been such a person had a different policy been chosen). On the other hand, to leave out all those who may be potentially born under one policy or another but who are not invariably there would be to disenfranchise them systematically in the original position.

An as-if contract between all the affected parties is, thus, not possible, and there will always be the possibility of under inclusion or over-inclusion (either "Type 1" or "Type 2" error). Indeed, the size and composition of the population are bound to be affected by any substantial variation of general economic and social policy (not just population policy), through changes in marriages, mating, cohabitation and other parameters of reproduction, which are invariably influenced by social change. Thus, the problematic disenfranchisement is not confined only to the special question of what can be thought of as dedicated population policies. Any policy change would tend to change the group that would be born and whose interests would have to be taken into account, and this makes it impossible to achieve a consistent congruence of the affected group and the negotiating group. The contractarian approach, drawing on the analogy of a legal contract between a fixed set of parties, is full of internal tension, even if we abstract, for the moment, from the presence of different countries and distinct societies in the world.

The Impartial Spectator and the Model of Arbitration

Is there any alternative to the contractarian approach, used by Immanuel Kant, and by recent theorists such as Rawls, Harsanyi, Buchanan, and others, without losing the quality of impartiality that can be rightly seen to be central to fairness and justice? I would argue that there is. Indeed, a particularly interesting approach to impartiality was proposed by Immanuel Kant's contemporary, Adam Smith, who had quite a different formulation of the problem of fairness, invoking an "impartial spectator," rather than contracting parties. The basic idea is pithily put by Smith in *The Theory of Moral Sentiments*, in the context of judging one's own conduct, as the requirement to Reexamine it as we imagine an impartial spectator would examine it," or as he elaborated in a later edition of the same book: "to examine our own conduct as we imagine any other fair and impartial spectator would examine it.

In fact, Smith's analysis of 'the impartial spectator" has some claim to being the pioneering idea in this general enterprise of formulating fairness that so engaged the world of European enlightenment. Smith's ideas were not only influential among such enlightened theorists as Condorcet (who was also a pioneering social choice theorist), but Immanuel Kant too knew *The Theory of Moral Sentiments* (originally published in 1759), and commented on it in a
letter to Markus Herz in 1771 - though he referred to him as "the Englishman Smith. \(^{(28)}\)

However, the impartial spectator as a judgmental device has some important differences from the framework that emerges from the analogy with a legal contract. While the contractarian approach attempts to eliminate the influence of vested interests by imagining a contract - in the original position - in which people are unaware of their own exact identities and thus of their own special interests, the Smithian approach of the impartial spectator tries to do this through examining how things would look to a "fair and impartial spectator." In doing this, there is, of course, a need to place oneself in the position of others, but this exercise is not restricted by the need to stick to a fixed group of negotiators, whose interests have special status over those of all others.

While the imagined impartial spectator in the Smithian moral exercise has to be impartial between the parties (or would-be parties) whose interests or priorities may clash, this is not a person who is involved "internally" in the negotiations. Indeed, at the risk of some oversimplification, it can be said that Adam Smith's use of the impartial spectator relates to Immanuel Kant's use of a social contract in a somewhat similar way in which models of fair arbitration relate to those of fair negotiation. The judgement imagined can be invoked from outside the perspectives of the negotiating protagonists - indeed can come from "any other fair and impartial spectator" (as Smith put it) - and the linkage between the negotiating parties (bound by the contract) and the fair evaluators (doing impartial evaluation) is, thus, firmly broken.

There is no need in the Smithian approach to have a fixed group of negotiating parties who are the ones who are affected and who also do the evaluation. This avoids a serious difficulty faced by the contractarian approach. In particular, there is no analogous demand here of the congruence of the negotiating group, the affected group and the evaluating group. Indeed, there is no negotiating group here at all (since the analogy with a legal contract is dropped), and the evaluation need not be done from the confined perspective of a fixed subset of the set of all who may be, one way or another, affected.

So the impasse related to population variability does not arise here. Furthermore, there is no necessity to confine the domain of the analysis to the members of a given nation, who are closely tied to each other through the elaborate institutional framework of a given society ("who are born into that society in which they lead their lives," as Rawls put it). The universalism of Smith's concept of fairness is, in this sense, much less restrictive.

I am not arguing here that the Smithian approach is in every way
superior to the Kantian or Rawlsian procedure based on a strong analogy with a legal contract. There are many other issues that would have to be considered in making an overall comparative judgment. No unique and canonical device may be needed anyway to investigate the demands of justice, since moral and political analyses of social norms and practical reason can make use of more than one model of fairness and justice.\(^{(29)}\)

The Smithian approach does clearly have some advantages, including a greater versatility of application and the avoidance of any impasse related to the effect of substantial economic and social policy on the size and composition of the population. What is, however, worth noting in the context of the present argument is the extent to which one approach (based on the idea of an as-if legal contract) has come to dominate contemporary moral and political philosophy.

The limitation does not, of course, arise from the use of a legal analogy in general (of which the analogy with a legal contract is only a special case). Indeed, even Smith's model of the impartial spectator can be compared, as I have just commented, with legal models of arbitration. The problem arises from the tendency to get fixed on some very specific legal analogies, which then come to dominate moral and political thinking in that area.

I am not arguing, I emphasize (to prevent a misunderstanding), against the use of legal analogies in general.

Concluding Remarks

Time to conclude. I shall not summarize what I have tried to discuss, but will attempt to place some of the issues in focus.

First, norms both (1) influence, and (2) are influenced by, the law. While I had a little bit to say on the impact of norms and values on laws and rules, the bulk of this talk has been concerned with investigating the influences that work in the converse direction—from laws and legal thinking to norms and normative thinking.

Second, in dealing with both norms and laws, there is an inescapable need to consider the demands of eradicating poverty—understood in an adequately broad way, as deprivation of economic, political, social, medical and other enabling conditions that allow us to lead minimally acceptable lives. The conceptualization of human rights over an appropriately wide domain can greatly help to broaden the perspective on poverty.

Third, while legal concepts can be of much use in moral and political thinking in several different ways, nevertheless in many cases the influence of legal analogy and legal thinking has been to narrow the breadth and range of ethical and political reasoning. The legal
analyses invoked have often been quite unequal to the demands of the moral or political exercise.

Fourth, while the basic idea of a right has extensive legal associations, normative concepts of rights cannot be adequately understood as some kind of surrogate legal rights. The powerful use of notions of rights of men and women championed by Tom Paine or Mary Wollstonecraft cannot be dismissed as "nonsense" or "nonsense on stilts," in the way Bentham, the legal fundamentalist, tended to treat the claims of non-legal - or "natural" - rights. The dismissal of human rights as being conceptually confounded often follows the Benthamite route, and is no more compelling.

Fifth, normative rights cannot even be adequately understood as potential legal rights in waiting, and the analogy with legal rights, which has been so influential in critiques of the idea of human rights, may well have muddied the waters. The significance of human rights need not lie only in their being putative proposals for legislation and institutionalization. They have their own domain of importance and of effectiveness.

Sixth, another source of difficulty in understanding the discipline of human rights has been the tendency to see correlate duties as "perfect obligations," as they typically would be if the rights in question had been legal rights. Immanuel Kant's distinction between "perfect" and "imperfect" obligations is particularly important here. The duties associated with human rights often take the form of imperfect rather than perfect obligations.

Seventh, the legal concept of contracts has had a profound influence on contemporary moral and political philosophy, well illustrated by John Rawls's contractarian theory of "justice as fairness," along with other contractarian expositions presented by Harsanyi, Buchanan and others. This is a powerful line of investigation, but it is also quite limited because of the rather narrow reach of the contractarian methodology. The problems include that of requiring an exact congruence of the negotiating group, the affected group and the evaluating group. This group fixity makes it an awkward tool of analysis for many economic and social issues (where the size or composition of the population may be - directly or indirectly - influenced).

Eighth, the contractarian approach also makes it difficult to consider the claims of justice across borders. Even though national considerations of justice can be supplemented by an international negotiation (in the lines proposed by Rawls in The Law of the Peoples), this takes inadequate note of the plurality of groups to which any person belongs. Relations between two different persons are not invariably addressed through their respective nations, since there are many other connections, associations and jointness that
link people together. Global justice cannot be seen merely as international justice.

Ninth, an important way of incorporating the impartiality needed for the analysis of justice is to use Smith's approach of "an impartial spectator," rather than the contract-based approach used by Kant, Rawls, and many others. This approach, which can be seen in terms of an analogy with fair arbitration as opposed to fair negotiation, avoids, I have argued, many of the problems that arise with the contractarian line of reasoning.

Finally, the limitations of being tied to very specific legal analogies (to the exclusion of other types of arguments) must not be seen as a claim that legal analogies are, in general, unhelpful in normative thinking. The point at issue, rather, is the danger of being imprisoned within the narrow limits of some very specific legal analogies, neglecting the use not only of other lines of normative reasoning, but also of other legal analogies. There is a need to transcend this limitation, which I believe has already extracted a heavy price.


6. Development as Freedom is, to a great extent, occupied in exploring the interconnections between freedoms in different spheres.

7. For example, the diversity of influences that can contribute to health failures (going well beyond problems with health care
delivery) can be of great significance in assessing health policy, including the demands of health equity. The reach and relevance of these interconnections are discussed in the splendid Harvard thesis of Jennifer Prah Ruger, "Aristotelian Justice and Health Policy: Capability and Incompletely Theorized Agreements," Harvard University Ph. D. dissertation (1998).


12. I have discussed this question in "Consequential Evaluation and Practical Reason" (2000).


17. I have attempted at a more extensive critical review of the contractarian approach in my Wessons Lectures at Stanford University ("Democracy and Social Justice," January 2001).


21. This relates to the general issues of: plural identity as well as reasoned choice of identity, which I have discussed in my 1998 Romanes Lecture at Oxford: Reason before Identity (Oxford: Clarendon Press, 1999), and in my 2000 Annual Lecture of the British Academy: "Other People," to be published by the British Academy (a shorter version has appeared in The New Republic, December 18, 2000).

22. There is a related issue of the tyranny that is imposed by the privileging of an alleged "cultural" or "racial" identity over other identities and over non-identity based concerns; on this see K. Anthony Appiah and Amy Gutman, Color Consciousness: The Political Morality of Race (Princeton: Princeton University Press, 1996), and Susan Moller Okin, with respondents, Is Multiculturalism Bad for Women? (Princeton: Princeton University Press, 1999). I also discuss this issue in my Reason before Identity (1998) and "Other People" (2000).


of Adam Smith on contemporary social choice theory, but I shall not try to explore these connections here.


29. Some apparently contractarian approaches can, in fact, be recharacterized in line with an "impartial spectator" formulation. This applies, I have tried to argue elsewhere (in "Democracy and Social Justice," Wessons Lectures, 2001), to Thomas Scanlon, What We Owe to Each Other (Cambridge, MA: Harvard University Press, 1998).