IS JUSTICE BEST ACHIEVED AS A "RIGHT" OR A "GOOD?"

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With what one economist called a "cognitive metaphor," Adam Smith's "the invisible hand" has garnered in capitalism a level of admiration and explanatory power that is unrivaled. While the debate about what Adam Smith intended by the metaphor continues to this day, for the purposes of my paper I will use the metaphor in its generally accepted meaning: *Individual self-interest in a market economy will, if left to its own devices, best provide overall social and personal prosperity.* Focused on "rights" and freedom of choice, the amoral free market achieves a measure of economic justice for the majority as an unintended moral outcome and reinforces right as a foundation principle.[1]

However, since such justice is often unevenly distributed, government regulation may be needed to address egregious circumstances, infringing as little as

[1] See the following (Note: One must have access to a library's system which already includes the paid fee to use such resources): Emma Tieffenbach, "The Virtual Reality of the Invisible Hand," *http:journals.sagepub.com/doifull/10.1177/0539018415608966#articleShareContainer*;
Paul Oslington, "God and the Market: Adam Smith's Invisible Hand," *Journal of Business Ethics* (2012) 108:429-438;
Karvous Ardalan, "Invsible Ideology of Mainstream Economics: 'The Invisible Hand'," *http://www.jstor.org/stable/10.13169/worlrevipoliecon.5.3.0297?seq=1&cid=pdf-reference#references_tab_contents*;
Emma Rothschild, "Adam Smith and the Invisible Hand," *The American Economic Review* (Vol. 84, No. 2, Papers and Proceedings of the Hundred an Sixth Annual Meeting of the American Economic Association (May 1994), pp. 319-322.
James R. Otteson, ed; *What Adam Smith Knew: Moral Lessons on Capitalism from Its Greatest Champions and Fiercest Opponents* (New York: Encounter Books), 2014.

possible on the rights citizens have to pursue their ends in a legally appropriate manner. A democratic, free-market society requires a method to rectify injustice reasonable people can support. In his groundbreaking work *A Theory of Justice,* philosopher John Rawls develops a method whose metaphor "the veil of ignorance" now rivals the "invisible hand." In this paper I wish to first outline the philosophical reasoning behind Rawls' proposal, then review Michael J. Sandel's critical assessment of Rawls published in *Liberalism and the Limits of Justice*.[2] Lastly, I will too briefly explore the notion of justice and the method for achieving it outlined in Scripture and defended in the work of Nicholas Wolterstorff.

RAWLS: THE VEIL OF IGNORANCE

Rawls theory of justice grows out of his conviction that the right must have priority over the good, a deontological rather than teleological approach.[3] Justice as fairness requires certain individual rights, such as freedom of speech, to have priority over individual and societal goods. Since we differ over the good far more than we do over the right, prioritizing good makes agreement on how justice should be pursued immensely more difficult. In Rawls view, "A conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons."[4]

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[2] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, Kindle Edition).
[3] Rawls, 396.
[4] Ibid., 137.

For him, Enlightenment (and some "post-enlightenment") public epistemology liberalism must be challenged because it saw foundationalism (largely in the scientific method, but also in culturally dominant religious beliefs) as the only morally appropriate reasoning to "improve" the distribution of justice in a liberal democracy. Rawls goal is to find a way to bracket all religious convictions and teleological reasoning from public discourse. What is needed is a "public epistemology liberalism" *not grounded* in a comprehensive theory of the good, one that is intrinsically neutral. He suggests a doctrine of "reasonableness" that skirts the difficulties of earlier schemes and paves the way for justice as fairness. " The principles of justice . . . are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[5] Two formations of justice are offered; "a proper balance between competing claims" and a " . . . set of related principles for identifying the relevant considerations which determine this balance."[6] He asks: under conditions of fair agreement which principles of distribution would be chosen? "Fairness" is achieved not by identifying which principles are just (teleological arguments), but by getting agreement in a fair manner from individuals with competing worldviews. If we wish to arrive at just decisions for social institutions in a situation of moderate scarcity, Rawls proposes a single procedure reasonable individuals would adopt. Goods such as opportunity, income and social bases of self-respect are to be distributed equally unless an *unequal distribution of them advantages the least fortunate*. This is the objective inside the veil of ignorance.

[5] Ibid., 135.
[6] Ibid.

For the veil to produce justice, the parties must not know particular facts about themselves or each other. In that way, whatever they decide will either harm or benefit them without their knowing which.[7] Choices within the veil are to have nothing to do with the personal commitments or convictions of the parties. In this way, Sandel believes, Rawls' connection to a deontological ethic begins to emerge. Kant argues that human nature is defined as a free and equal rational being who acts autonomously when choices arise from her nature. When one makes choices on a different basis (social position or any other contingency), one is presupposing a particular conception of the good.[8]

How this rendering of the issue affects equal liberty as well as social and economic inequalities is clearly laid out. "Social and economic inequalities are to be arranged so that they are:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality and opportunity."[9]

While the sophisticated implications of applying these principles are beyond the scope of this paper, regardless of any good that they may or may not produce, they are right . It is not that Rawls discounts the good but wants it in the background

[7] One may not know one's place in society, class position, social status, natural assets and abilities, intelligence, strength and so on. Nor does one know his conception of the good. One is ignorant of his or her actual circumstances.
[8] Ibid., 252.
[9] Ibid., 302.

playing a supporting role. Nonetheless Rawls believes that the two principles will ultimately produce good. Sandel observes:

> The priority of justice [and right] is accounted for, in part, by holding that the interests requiring the violation of justice have no value. Having no merit in the first place, they cannot override its claim. In justice as fairness, unlike utilitarianism, the individual's right to equal liberty in the face of majority preferences to the contrary is unconditionally affirmed.[10]

For Rawls it is not the ends we choose that define our personhood but *that we can choose them*. Therefore, in an important sense, a self must be prior to the ends it selects. The relative independence of the right allows it to stand "aloof from prevailing values and conceptions of the good, and makes his conception deontological rather than teleological."[11] This perspective establishes that one is not at the "whims" of experience or circumstance, but is always an "active willing agent, distinguishable from my surroundings and capable of choice."[12] If they are to possess dignity beyond their roles or the ends they choose, persons must be autonomous.

While a self should not be defined by its ends, Rawls nevertheless believes it must also be prior to its ends epistemologically. As in justice itself, the self needs a

> . . . standpoint of appraisal independent of the prevailing social values. In the case of the person, we need a notion of the subject independent of its contingent wants and aims. As the priority of justice arose from the need to distinguish the standard of appraisal from the society being appraised, the priority of the self arises from the parallel need to distinguish the subject from its situation.[13]

SANDEL'S CRITIQUE OF RAWLS

[10] Michael J. Sandel, p. 18.
[11] Ibid., p. 19.
[12] Ibid., pp. 19-20.
[13] Ibid., p. 20.

For Sandel, Rawls' schema entails significant consequences for politics and justice. "Since the self owes its constitution . . . to the concept of right, we can only express our true nature when we act out of a sense of justice. This is why justice is the preeminent virtue of social institutions."[14] And, in the veil of ignorance, the parties must choose the principles of justice in temporary ignorance of their personal values, aims and purposes in life. This establishes a glaring contrast: while Rawls views the nature of the moral subject as a given and then moves to the principles of justice, Sandel takes the principles of justice as "provisionally given" and argues back to the nature of the moral subject differently. " . . . assuming we are beings capable of justice, and more precisely, beings for whom justice is primary, we must be creatures of a certain kind, related to human circumstances in a certain way."[15] Even when our liberties and equal opportunities are justly distributed, Rawls wants to regulate the distribution of social and economic benefits if they end up over time favoring those with superior talents and advantages.[16]

Sandel challenges deontological understandings of human nature. " . . . I am not merely the guardian or repository of the talents and capacities that happen to reside in me, and as such have no special moral claim on [the fruits of my accomplishments]."[17] Recall that for Rawls, favored ones *must* use their endowments to improve the fortunes of those who have lost out. No individual deserves his or her greater natural capacity nor merits a more favorable starting place in society. Our talents are not individually owned. They are common assets.

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[14] Ibid., 22.
[15] Ibid., 49.
[16] Ibid., 70
[17] Ibid.

Sandel complains that Rawls seeks

. . . in justice as fairness an Archimedean point that "is not at the mercy, so to speak, of existing wants and interests." Unlike classical Greek and medieval Christian conceptions, the universe of deontological ethic is a place devoid of inherent meaning, a world 'disenchanted' in Max Weber's phrase, a world without an objective moral order. Only in a universe empty of telos, such as seventeenth-century science and philosophy affirmed, is it possible to conceive a subject apart from and prior to its purposes and ends. Only a world ungoverned by a purposive order leaves principles of justice open to human construction and conceptions of the good to individual choice. In this, the depth of opposition between deontological liberalism and teleological world views most fully appears.[18]

Rawls' dependence on Kant's project also troubles Sandel.

Similarly for Kant, the moral law is not a discovery of theoretical reason but a deliverance of practical reason, the product of pure will. The elementary practical concepts have as their foundation the form of a pure will given in reason, and what makes this will authoritative is that it legislates in a world where meaning has yet to arrive. Practical reason finds its advantage over theoretical reason precisely in this voluntarist faculty, in its capacity to generate practical precepts directly, without recourse to cognition.[19]*

Sandel notes that he, along with several political philosophers writing in the 1980s, challenged the notion that justice could be detached from considerations of the good. Alasdair MacIntyre and Charles Taylor are examples cited. Sandel takes exception to those who accused them of a "communitarian critique" of liberalism. As he sees it, that description is distorted. "The question is not whether rights

[18] Ibid., 165.

[19] Ibid. *Related debates among rights-oriented liberalism are also important and fascinating. "Libertarian liberals such as Robert Nozick and Friedrich Hayek argue that government should respect basic civil and political liberties, and also the right to the fruits of our labor as conferred by the market economy: redistributive policies that tax the rich to help the poor thus violate our rights. Egalitarian liberals like Rawls disagree. They argue that we cannot meaningfully exercise our civil and political liberties without the provision of basic social an economic needs; government should therefore assure each person, as a matter of right, a decent level of such goods as education, income, housing health care, and the like." Sandel suggests that this debate corresponds "roughly to the debate in American politics, familiar since the New Deal, between defenders of the market economy and advocates of the welfare state." See Rawls; Sandel (Kindle Location 4226).

should be respected but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good."[20] He asks why our political "selves" may not express the moral and religious convictions we espouse in our personal lives. As an example, he points to our political controversy over the moral status of homosexuality, one inextricably entwined with religious doctrine.

> Some maintain that homosexuality is sinful, or at least morally impermissible; others argue that homosexuality is morally permissible, and in some cases, gives expression to important human goods. Political liberalism insists that neither of these views about the morality of homosexuality should play a role in public debates about justice or rights. Government must be neutral with respect to them. This means that those who abhor homosexuality may not seek to embody their view in law; it also means that proponents of gay rights may not base their arguments on the notion that homosexuality is morally [and religiously] defensible.[21]

When public debate and political discourse about justice must exclude moral and religious convictions, Rawls' ideal of "liberal public reason" is too restrictive. If we are debating the legal rights of homosexuality, or disputing the claim that a person exists from the moment of conception, the range of reasons we may employ should not be unreasonably curtailed.

Following the expansive Sandel comment below, I will reflect on how the church in its commitment to embrace the vision of Jesus regarding justice may move beyond both the limitations of public reason and the teleological response In Sandel.

> With a few notable exceptions, such as the civil rights movement, American political discourse in recent decades has come to reflect the liberal resolve that government be neutral on moral and religious questions, that fundamental questions of public policy be debated and decided without reference to any particular conception of the good. But democratic politics cannot long abide a public life as abstract and decorous, as detached from moral purposes, as Supreme Court opinions are supposed to be. A politics that brackets morality and religion too thoroughly soon

[20] Ibid., 3634 Kindle Edition.
[21] Ibid., 4040-4044.

generates disenchantment. Where political discourse lacks moral resonance, the yearning for a public life of larger meanings finds undesirable expressions. Groups like the 'moral majority' and the Christian right seek to clothe the naked public square with narrow, intolerant moralisms. Fundamentalists rush in where liberals fear to tread. The disenchantment also assumes more secular forms. Absent a political agenda that addresses the moral dimension of public questions, public attention becomes riveted on the private vices of public officials. Public discourse becomes increasingly preoccupied with the scandalous, the sensational, and the confessional as purveyed by tabloids, talk shows, and eventually the mainstream media as well.[22]

GOING BEYOND RAWLS AND SANDEL—A CHRISTIAN APPROACH

Given the (more or less) established commitment in our public discourse to what Sandel calls a deontological liberal concept of justice, John Rawls enticing metaphor is, to my way of thinking, a refinement of the invisible hand. His suggestion that those within the veil must favor the least advantaged if they desire justice helps mitigate the self-interest dimension in Adam Smith's formulation. Further, if one assumes that human nature already possesses a formed self prior to one's choices, Rawls linking of justice and deontology is more plausible.

On the other hand, Sandel's prioritizing of the good (teleology) over the right (deontology) strikes me as a further advance, more consistent with an understanding of justice within the love of God. What is the church but a community in which our religious convictions, aspirations and new identities in Christ define our human nature? A place where justice is realized because the *particulars* of our needs are freely shared and fall on responsive ears? Let me illustrate this point from my own experience.

[22] Ibid., 4190-4202.

While my brothers and I were very young, my father abandoned our family. In difficulty with mobsters over his gambling debts and despondent of ever re-creating his life, he fled to California for almost a decade. My mother had no choice but to fall back on welfare. I won't bore you with the recurring episodes of my childhood poverty; most salient now in my memory is the sense I had no idea what my future might be. I had no aspirations or core convictions. At 14 years old that all changed: I was baptized at the Washington Avenue Seventh-day Adventist church in Brooklyn, New York. More than I understood at the time, I was now being cared for by a new family, filled with minister-father figures. In an instant, my "true" self and my future clearly opened up to me. Ministry called to me with an intensity I could not ignore. In order to be fit for that ministry, I was seized by a passion for a Christian education. Since the Greater New York Academy charged tuition for its program, I worked all summer at the conference campground to earn the $400 I needed (even 65 years ago, that sounds impossibly cheap).

Continued eligibility for welfare recipients included regular visits to our apartment from the welfare department. In collecting the most recent information about our family, my mother mentioned I was doing well and going to a Christian school in Queens, not the public Lincoln High School. "Where is the tuition money coming from," my mother was asked.

"He earned it working all summer."

"Well, if he can earn money to go to a private school, he should be using it to support this family." With that welfare took away the $400 from our welfare checks over a period of months. Looked at from a social policy point of view, this is

consistent with Rawls approach: welfare which goes to the least advantaged in a "blind" way is just, regardless of their aspirations and convictions. Looked at another way, one could affirm Sandel that while the policy may be "right," it should be secondary to the "good" being sought.

In a reading group with Daryll Ward and Chuck Scriven some years ago, we read Nicholas Wolterstorff's two volumes: *Justice: Rights and Wrongs*[23] and *Justice in Love*.[24] As I read him, Wolterstorff is dissatisfied with both Rawls and Sandel: neither the right desired in deontological reason nor the good desired in a teleological ethic can adequately account for the "rights" we possess in our humanity (though I suspect Wolterstorff would endorse Sandel as an improvement over Rawls). Our rights are not based on our autonomous human nature, nor are they based on our own aspirations and choices. *Human worth and the rights attached to us are the result of being loved by God.* To see justice in its fullness, we must look for it in divine love.

> What we need for a theistic grounding of natural human rights, is some worth-imparting relation of human beings to God that does not in any way involve a reference to human capacities. I will argue that being loved by God is such a relation; being loved by God gives a human being great worth. And if God loves equally and permanently each and every creature who bears the *imago dei*, then the relational property of being loved by God is what we have been looking for. Bearing that property gives to each human being who bears it the worth in which natural human rights inhere. . . . Being loved by God is an example of what I shall call *bestowed* worth.[25]

Wolterstorff is impatient with any notion of rights that relies on what he calls an ethos of "possessive individualism."

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[23] Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2008).
[24] Nicholas Wolterstorff, *Justice in Love* (Wm B. Eerdmans, 2011).
[25] Wolterstorff, *Rights and Wrongs*, pp, 352-353.

But for the origin of the ethos we have to look . . . to modern capitalism, to that understanding of liberal democracy that says that the governing idea of such a polity is that everyone is to be ensured equal freedom to act as he or she sees fit. And deeper, to the dark side of the human self, to the flaws that afflict all of us and always have, to our inveterate inclinations to pride and to self-preoccupation and to hardening our hearts to the plight of the other. We twist the culture of rights to our malign impulses.[26]

When I claim my rights over against your rights (which seems to be the case in most or all philosophical attempts to define the nature of those rights in the pursuit of justice), care and concern for the other is too easily minimized or ignored. Given our American passion for the Constitution, rights language dominates our public discourse and policy disputes. Groups argue over the "right" to firearms or healthcare or a better wage. Speaking theologically, it does appear that human frailty and sin default to rights when a higher view of justice in love threatens such possessive individualism. Rights language seduces us into thinking that we need do no more than what is legally required; i.e., what is not "evil." But the ethic of Jesus as justice in love makes clear that not doing evil is inadequate. Not stealing from my neighbor is derisory compared to the generosity required in Matthew 25. The call to see justice in love is a call to an exceptional virtue that exceeds any purely philosophical rationale. No rational ethic of which I am aware supports the pursuit of justice inside a supererogatory ethic. It may only be summoned by our love for God and the love of God within us. This may be impossible to embody in the public square other than on rare occasions (though one is tempted to cite the Civil Rights movement as one of those rarities), but may be enviously exhibited within the loving community prayed for in John 17. "Justice in love" ethics impels us to take seriously

[26] Ibid., p. 388.

our feelings, commitments, and preferences, including the preeminent moral responsibilities we have for those nearest to us in our families, friends and fellow believers. "Loving one another as God loves us" is also a daunting summons to embrace a culture-shattering sacrifice beyond those nearest to us. So, while Christian love places our initial focus on the needs of the immediate "neighbors," we also feel equally called to engage the larger needs of society through Christian political advocacy. Simultaneously, we model within the "beloved community[27]" what we want the world to know about justice in love. Pursuing justice in love for society both permits and requires us to enunciate, embody and defend the moral and religious commitments that define us. Within our own fellowship it means we embrace not merely what is "just" to do, or what members may have a right to expect we do, but to what Christian love impels us to do for those in genuine need.

ENDNOTES

[27] Dietrich Bonhoeffer's graceful phrase for the church.