

24. Here the defense mechanism of rationalization is of great help.
25. At p. 35. If investigation of the adoptive family was had beforehand, ordinarily it is a sound rule to treat the placement as permanent, subject, however, to possibly overturning the decree on the basis of fraud or coercion. *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y. 2d 185, 269 N.E. 2d 787, 321 N.Y.S. 2d 65 (1971), is a horrible example of a violation of sound principles regarding the finality of placement. However, fact patterns are so varied that one hesitates to form an absolute and unqualified principle.
26. At p. 37. An alternative position is that followed by courts, namely, child custody awards are always subject to modification due to changed circumstances. In addition, courts having a professional staff may make regular checks on how the child fares under custodial arrangements. The *Rothman* decisions, set forth in Chap. 6, do not support the argument of the authors.
27. Of course, as the authors acknowledge, disruption of the continuity of relationship has different impacts at different ages. See also Patton, GROWTH FAILURE IN MATERNAL DEPRIVATION 38 (1963).
28. The *parens patriae* function of courts is deemed to be a serious responsibility and it has been said that "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." Botein, TRIAL JUDGE 273 (1972).
29. It is interesting to note that several states with adoption of no-fault divorce, viz., California, nonetheless admit fault evidence on the issue of child custody.
30. See Foster and Freed, *A Bill of Rights for Children*, 6 Fam. L.Q. 343 (1972); and Foster, *A Bill of Rights for Children*, 1 Bull. A.A.P.L. 199 (1973).
31. The partnership was formed in *United States v. Durham*, 214 F.2d 862 (D.C. Cir. 1954), went into receivership in *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967), and finally was dissolved in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The phrase "entente cordiale" is borrowed from its use by Glueck, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? (1962).
32. See *Washington v. United States*, 390 F.2d 44 (D.C. Cir. 1967).
33. See Reiwald, SOCIETY AND ITS CRIMINALS (1949) for a discussion of this phenomenon.
34. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), abandoned *Durham* and adopted a modified version of the Model Penal Code's provision on the insanity defense. One of the most helpful publications on the insanity defense is that by Abraham S. Goldstein, THE INSANITY DEFENSE (1967).
35. See Foster, *What the Psychiatrist Should Know About the Limitations of Law*, 1966 Wis. L. Rev. 189, 224-234, for a discussion of the psychiatrist as an expert witness and his role in the legal process.
36. It is frequently said that the usual rules regarding the insanity defense place too heavy a burden on the psychiatric witness. See Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways"*, 51 Judicature 370 (May 1968). On the other hand, state court decisions have held that it would be unconstitutional to abolish the insanity defense and to eliminate psychiatric testimony at the trial. See *State v. Strasberg*, 60 Wash. 106, 110 P. 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); and *State v. Lange*, 168 La. 958, 123 So. 639 (1929).
37. Ordinarily, no duty of care is owed to a trespasser, and the usual obligation owed to an invitee is to warn him of concealed dangers.
38. See Guttmacher, THE ROLE OF PSYCHIATRY IN LAW 74 (1968), for a discussion of the history of expert testimony. The rules of evidence ordinarily preclude the giving of opinion testimony, the expert witness is one exception.
39. It may be noted that the facts also bring into question the wisdom of Solomon. King Solomon reputedly had 700 wives and 300 concubines. What time did he have for thinking?

A THEORY OF JUSTICE. By John Rawls. Cambridge, Mass.: The Belknap Press of Harvard University Press. Pp. 607. 1971. Price \$3.95 (paper).

Many philosophers and many laymen who have tried to read the writings of English-speaking moral philosophers of this century have found them in large part trivial and uninteresting. In the wake of G. E. Moore's wholesale attack on the tradition of European moral philosophy (*Principia Ethica*, 1903), most philosophers abandoned the attempt to develop systematically (and, if possible, justify) particular substantive moral outlooks. Impressed with the arguments by which Moore tried to show that this is an impossible task, undertaken only in confusion, they retreated to the new subject of "meta-ethics," which dealt exclusively with formal questions, leaving the substance of morality to one side. Increasingly over the past 15 years signs of counter-

revolution have begun to appear; but we have only now, with the publication of *A Theory of Justice*, by John Rawls, Professor of Philosophy at Harvard, been given a comprehensive moral theory which draws on and attempts to carry forward the great tradition of European moral philosophy as it existed before Moore's onslaught. In this book Rawls develops systematically and in impressive detail a theory of justice first sketched in an article 14 years ago and elaborated in a number of papers since then. The Oxford philosopher Stuart Hampshire has declared it to be the most substantial and interesting contribution to moral philosophy in English since the war; it is arguable, I think, that it has no serious rivals in this century altogether for depth of insight, power of argument, and comprehensiveness of vision.

1. Rawls's theory of justice is an attempt to apply and develop some of the basic insights of the traditional theory of the social contract. He argues that this theory provides the correct perspective for the assessment of rival conceptions of justice, i.e., different sets of principles by means of which to settle conflicting claims, lodged by persons living together in social cooperation, to powers and freedoms and other good things distributed by their political, social and economic systems. Those principles are correct, Rawls argues, which free and equal rational persons would decide to adopt for this purpose, if their decision were made jointly and by agreement with one another under certain definite conditions. These conditions he sums up in the conception of a "veil of ignorance" behind which this hypothetical decision is conceived to take place. Generally speaking, the veil of ignorance blocks out all the particular knowledge that persons normally have of their own actual circumstances—age and sex, specific likes and dislikes, economic position, family background, level of education, and so on. Assume a group of rational persons who lack all such particular information about themselves and about one another, but possess as much general knowledge as you like of psychology, sociology, economics, and so on, including the knowledge that human beings standardly have reason to want more rather than less of such broadly useful goods as health (mental and physical), food, clothing, money and the like: then, Rawls claims, if these persons should be asked to jointly agree upon a set of principles to use in settling the conflicting claims referred to above, the set of principles they would agree to, whatever this set might turn out to be, *are* the correct principles for human beings generally to use for this purpose. The decision between rival conceptions of justice thus becomes for Rawls a special problem in rational decision theory, and in explicating the different conceptions and arguing in favor of one of them, Rawls draws extensively upon the mathematical theory of games and the associated literatures of decision theory and probability theory. The power and interest of his analysis is to no small degree enhanced by the use he is able to make, in this and other instances, of well-developed theories in areas not belonging to philosophy proper.

But not only does Rawls adopt a contractarian point of view for the assessment of rival conceptions of justice; the particular such conception which he attempts to defend, by arguing that the decision-problem described in the last paragraph would be solved by the adoption of a set of principles defining it, is itself a version of the theory of justice developed by Locke, Rousseau and Kant, the main traditional social-contract theorists. In Rawls's statement of it this theory holds that justice is realized in a society if two principles are satisfied: "First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (p. 60) and, second, "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (p. 82). This is, of course, at bottom not an unfamiliar conception of justice, but in Rawls's treatment it is expounded and applied with greater than usual subtlety. In Rawls's view justice requires true (and not merely *formal*) equality of status, and demands that the social and economic system be regarded as in the strictest sense a scheme of *cooperation*, a pooling of resources and talents for the *common* benefit. The social product must be distributed in such a way that those whom nature has favored least are given as full a share as is possible: the more intelligent and otherwise more fortunate must be better rewarded only to the extent that their greater rewards work out in the long run to the greater advantage of the worse-off, by increasing the total social

product to be distributed. A striking feature of Rawls's principles is the way in which they thus provide a basis in the theory of justice itself for the neglected ideal of fraternity, as well as for liberty and equality (p. 105). Rawls argues, very convincingly in my opinion, that his principles provide the best available defense of the kind of democratic society that many Europeans and Americans have been aspiring to since the eighteenth century. In particular, these principles of justice provide a much stronger defense of a democratic society than the utilitarian moral and social theory that has since the nineteenth century been so often coupled with this ideal. Of special interest to lawyers in this connection is Rawls's good and careful explication, on a contractarian basis, of the moral ground for obedience to law and constituted authority, and his original and profound account of civil disobedience as a breach of law in which at the same time one affirms one's fidelity to law (ch. V).

Philosophical discussion of Rawls's views has so far centered on the leading elements of the theory: on the arguments he gives to show that precisely the two principles he states, and not something else instead, *would* be adopted by his hypothetical persons deciding behind the "veil of ignorance," and on the question why we, as we *actually* are, should accept as correct whatever principles for settling conflicts we *would* decide to accept if we were forced to decide behind the veil of ignorance. Why should the decision one *would* make under those peculiar circumstances be declared the correct one to abide by *now*, when our circumstances are quite different? Rawls says a great deal in defense of his views on these matters (see sects. 3, 4, 9, and 87), but though his ideas are powerful here as elsewhere, they have also proved controversial.

2. Although it is perhaps natural that philosophers should concentrate on these central features of his theory, I am inclined to think that the most original and interesting things Rawls has to say lie elsewhere. The book is divided into three parts, entitled "Theory," "Institutions," and "Ends." The first part sets out and argues for the basic theory, and in the second this theory is made to yield an account of the social and economic institutions that a just society must have. The arguments and contentions of these parts seem so far to have attracted all the attention of his readers, but the neglected third part is, if anything, even more rich in insights. For we tend to think of justice not merely as something which each person *owes* to others, as something each has a *right* to demand from and must reciprocally *grant* to others, but also as an object of personal aspiration. We incline to think that we would each of us be better off, somehow, if we were ourselves just, and that we would all be better off and *happier* if we were just persons living together under just social and economic conditions. On the other hand, we are also inclined to be skeptical of these claims. We feel, at times, that in aspiring to be just we are the victims of an illusion more or less deliberately fostered by society itself as a mechanism for ensuring control over us. Are we mistaken, or not, in feeling that the justice of a just person is a very good thing, not only for those who associate with him, but even for the just person himself? Rawls faces this most difficult Platonic question in the third part of his book, and gives what seems to me the most powerful and comprehensive answer it has yet received.

Suppose a "*well-ordered*" society regulated by Rawls's principles of justice, i.e., a society in which everyone accepts these principles and knows that the others accept them, and in which the basic social institutions satisfy, and are known to satisfy, this commonly shared conception of justice (pp. 453-4). What would it be like to live in such a society? Rawls's answer is given in various places in the third part of the book and drawn together in section 86. Two elements in his response may be singled out for comment here.

First, there is the way in which a just person living in a just society, as defined by Rawls's principles of justice, will be given certain psychological resources from which to fashion a firm sense of his own self-esteem. Self-esteem, Rawls argues, is perhaps the most important basic good, since without it hardly anything else one might do or get will be found satisfying. Self-esteem consists in the secure conviction that one's conception of one's own good, one's plan of life, is worth carrying out, and in the confidence that one has it in one's power to fulfill one's intentions (p. 440). Obviously if we lack self-esteem, if we feel that our plans have little value or if we are plagued by failure or self-doubt, we cannot be much contented with our lives. Rawls argues that

those living according to his principles of justice can reasonably hope to be free from such disabilities. For these principles affirm in a precise and strong form the worth of each person. To begin with, each person's right to the most extensive equal, effective liberty possible is guaranteed by the first of Rawls's two principles. This means that, since in the well-ordered society under consideration everyone is known to accept this principle, each person can feel that what he does with his freedom, provided he does nothing unjust, is respected and valued by others, since they protect and defend him in all such expressions of his own freedom. But secondly, the other principle forbids the direct distribution of the social product according to talent, intelligence, family connections or other contingencies in the assignment of which sheer luck plays so large a role. Hence it dictates a social and economic system in which public policy declares the effects of good or bad fortune not to be in themselves legitimate grounds for either reward or deprivation. It follows that, in affirming the correctness of this judgment, just persons renounce every claim to deserve special privileges merely on account of prized qualities of mind or character, and the like, that they may have fallen heir to in the "natural lottery." Thereby a potent ground of inferiority feelings and lack of self-esteem among the majority of human beings is done away with. It is true, of course, that these two features of a society effectively regulated by Rawls's principles do not guarantee that each person in it will have a firm sense of the value of his own life. A host of factors in one's upbringing and private circumstances obviously have their share in determining one's attitudes towards oneself. What Rawls claims, and I think he is clearly right in this, is that if such a society could be created, certain pervasive ways in which social arrangements themselves undermine the self-esteem of most people would be removed.

A second element in Rawls's defense of justice involves his conception of a well-ordered society as a form of *social union*, indeed a social union of social unions, and his claim that only in the social union is the individual "complete" (section 79). To develop these ideas fully would take more space than I have, but the main points are these. First, as just noted, the just citizens of a just society can be expected to have a firm sense of their own worth. They will therefore be free to develop their natural capacities according to their individual bents, and fashion for themselves lives replete with activities that interest and satisfy them. Rawls's first principle, which ensures effective equality of basic liberties, will also do its part in furthering this process of self-development. But, secondly, since they are agreed among themselves in affirming and accepting their society and its institutions, social, political, and economic, they regard themselves jointly as in a fundamental way the *creators* of their society. Social, political and economic relations for them become a form of mutual and free joint self-expression. Thus the maintenance of the social, political and economic life of their society is a complex activity engaged in jointly and freely by them all; and, according to a basic psychological principle which Rawls puts forward under the name of an "Aristotelian Principle" of motivation (section 65), human beings tend to derive pleasure and satisfaction from complex activities, provided they are freely engaged in. So social life itself, when regulated by Rawls's principles of justice and lived by persons who openly accept these principles and agree that their social arrangements satisfy them, becomes a source of deep pleasure and satisfaction to its participants. Thirdly, in a well-ordered, just society each person shares in and enjoys the exercise of all the variegated set of interlocking developed capacities, excellences and natural assets of all the others. This comes about partly as a result of certain psychological phenomena associated with the Aristotelian Principle (see section 67) and partly because of the perceived justice of the terms of social cooperation in a well-ordered society. In mutually accepting social arrangements as just, persons are enabled to have a secure sense of their own worth, and such persons are free from envy and grudgingness toward others. Having confidence in themselves they are not grudging in their appreciation of others. But it seems to be a psychological fact, connected with the Aristotelian Principle, that human beings, when free of such interfering factors as envy, tend to take pleasure in the excellences and attainments of others, as well as in their own. It therefore follows that in a well-ordered, just society each person has the capacity to share in and enjoy an enormously wider range of human powers

than he could possibly have had access to in his own person alone. Talents and abilities are not equally distributed among humankind; furthermore, each person must be selective in choosing which of the abilities he does possess to develop. These two facts cause an unavoidable limitedness in the aspects and capacities belonging to human nature as a whole that any one person can realize in his own life, taken just by itself. In the social union, however, each person can share in the total sum of the realized natural assets of all the others, and thereby surmount the limitedness to which human beings are otherwise condemned. The resulting extension of the range of human capacities that each person can share in the development and exercise of is in principle unrestricted; we are thus permitted to frame the ideal of just persons in a just society as ultimately participating at once, through their social union, in *all* the realized capacities inherent in human nature as a whole.

In this way Rawls argues that justice in itself is an extremely good thing for each just person. It opens up possibilities of satisfaction for each which would otherwise be either completely closed or at any rate not realizable on so large and deep a scale. At least this is so in a just, or nearly just, society whose justice is mutually accepted by its members. The interest that every person has, if Rawls is right, in the realization of this ideal also serves as a strong motive for anyone who has a sense of justice, but lives in an unjust society like our own, not to regret or wish to be rid of this part of his psychological make-up. It is only by accepting and affirming one's own sense of justice that one has even a hope of achieving some of the deepest and most important satisfactions that are open to any human being.

3. In this review I have dealt with just two of the chief lines of argument and analysis contained in Rawls's book. Along the way he discusses, among other interesting matters, utilitarianism (both in its classical and its revised forms) as a theory of social justice, the question of social investment and saving for future generations, the ethical theory of Kant, the nature and the sources of guilt and shame and other moral sentiments, and the relations between envy and the demand for social and economic equality. Perhaps the most impressive feature of the whole enterprise is the way in which, as I have already mentioned, Rawls draws constantly, as occasion allows, on theoretical results in other areas of investigation than philosophy itself. Economic theory, the theories of games and probability, developmental psychology and the psychology of motivation, all make their contributions to Rawls's moral and political theory. The gain in richness and comprehensiveness over other philosophical work in this area is immeasurable.

On the other hand, reliance on the results of economic and psychological theory brings with it certain risks. For both these sciences have been, and are likely increasingly to be, under attack for uncritically putting forward as universal features of human beings and their interaction, characteristics that may well belong to people only under certain definite conditions. If these sciences, as is often claimed by their Marxist and socialist critics, rest on presuppositions about human beings that hold only where economic and social life is bourgeois-capitalist in structure, then there is a distinct danger that Rawls's theory may turn out not to be free of these assumptions. In that case the validity of his conception of justice would be seriously brought into question. If this Marxist criticism is accurate then we can expect that as scientific work in economics and psychology refashions these subjects and broadens their scope, Rawls's theory of justice also will require recasting, perhaps even radical rewriting. Rawls has, I believe, tried not to involve himself in the assumptions of economics and psychology that seem most obviously limiting in this way. But it is not clear that he has altogether avoided contamination from these sources (nor could one be absolutely certain whether he has or not, in advance of the further development of the sciences themselves). Here lies what seems to me the most fruitful line of new work, critical as well as constructive, in the wake of Rawls's book.

In sum, while it is true that Rawls's way of doing moral and social philosophy deprives its results of the status of absolutely certain, necessary truths, to which philosophers have often aspired, it also holds out the hope of a continuing and important role for philosophy in the construction of an adequate over-all theory of moral personality and social organization. One hopes that philosophers will take up the challenge. If they do, then, even if Rawls's own theory is ultimately judged

unsatisfactory, his example will have played the crucial role in causing moral and social philosophy to abandon the parochialism that has been so characteristic of it in this century.

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**THE DANCE OF LEGISLATION.** By Eric Redman. New York: Simon & Schuster. Pp. 300. 1973. Price \$7.95.

This book is a rare treat. It is the almost hair-raising story of the birth of a federal health bill told to us in the first person by the intern assisting his chief in the Senate. Eric Redman, the author, is a junior staff man of that venerable, older senator from the state of Washington, Senator Warren Magnuson. The bill is described as a rather minor one and there is no reason to quarrel with that. But minor or not, it must go through the entire gamut of steps every bill has to take to mature into a law.

Contrary to other writings about the process of law-making, this book is done so vividly and personally, it is very difficult not to identify fully with the author's anguish as the bill plods forward. This identification is magnified by the fact that very few of us know more than the bare bones facts of lawmaking and so we share most of the author's naivety. Completely eschewing the dull, lecture-like approach to civics which I recall from school, the author informs and instructs us with total reality. The bill is a living, breathing entity. Redman cares deeply for its life. He is extremely partisan without being mawkish or exhibiting "bleeding-heart" tendencies. He wants the bill to make it! His wish is so pure and simple, that regardless of your own opinion about the measure, you find yourself rooting for him unconsciously, somewhat like a John Wayne movie. The amount of information you garner trailing this bill through its intricate dance is amazing, and when you finally finish you feel fully satisfied.

The curtain raises in early 1970 when a highly dedicated Seattle pediatrician named Bergman proposes to Redman (and Magnuson, of course) the establishment of a National Health Service Corps—in Washingtonese, NHSC. The purpose of this legislation is to provide medical doctors to smaller, rural areas now deprived of health care. Idealistic young doctors and supporting medical workers would be assigned to such areas with salaries paid by the federal government for two years. Hopefully some would then continue to practice privately in those settings, while admittedly others would leave, but at least there would be two years of medicine and possibly much more. In 1967 the President's Commission on Rural Poverty had suggested such a National Doctor Corps, and as early as the 1930's the colorful Huey Long of Louisiana had opted for such reforms. The idea was not new.

Almost all would agree it was a fine idea, but there were problems. There was the ever-present question of so-called "socialized medicine." Even for the brief span of two years, that might be surmountable. Seemingly insurmountable was the "doctor draft," or service in the military, required for all doctors. It was felt that after military service most doctors want to make a living, and, therefore, would be noticeably less likely to enroll in the program, whereas if the doctor were given an alternative choice to military service, many might select it. Because of the enormous influence of the Pentagon and both Senate and House Armed Service Committees, it was certain that a change in the basic Selective Service, or draft law, could not be accomplished; without changing that draft law the bill would be doomed. But, Dr. Bergman pointed out, using and expanding the then existing U.S. Public Health Service would not require any changes in the draft laws. Unlike the Peace Corps or education that provides mere deferments, service in the U.S. Public Health Corps actually satisfied the military requirement. This appeared to be the only way to proceed with the legislation.

So much for the game plan. The first snag was that Public Health officers are limited by law and tradition to treating only sailors, Indians, and federal prisoners. How to get around that? As the book subsequently unfolds this is only the first of literally dozens of sudden traps, surprises, hangups, double-crosses, egos, selfishness, grandiose schemes, counter-cabals, and back-room manipulations that march continually along the legislative path.