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Higher Level Moral Principles in Argumentation

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ABSTRACT: Suppose two persons disagree over whether an act is right, justifying their judgments by appealing to divergent higher-level moral principles. These principles function as backing and rebuttals in their argumentation. To justify these principles, we may argue either that they would be accepted in some ideal model or that they are in reflective equilibrium with our considered moral judgments. Disagreement over the model indicates difference in philosophical anthropology but does not preclude resolution through argument.

KEYWORDS: argument culture, backing, considered judgment, harm principle, higher-level moral principle, original position, Rawls, rebuttal, reflective equilibrium, warrant

1. INTRODUCTION

Let us begin by distinguishing various types of deontic statements. If I say that a particular act, performed or contemplated, is right, wrong, permissible, or a duty or obligation, I am asserting a singular moral judgment, also sometimes called a precept.

Bill's smoking in the nursery today while the children were there is wrong.

If I assert that all the acts in some set whose description involves an individual referring expression have some deontic property, I am again asserting a precept:

Bill's smoking in the nursery is wrong.

By contrast, if I assert that acts of a certain kind are wrong, for example

Breaking promises is wrong,
Torturing children is wrong,

where the quantifier 'always' is implicit, I am asserting a general moral judgment. Some writers would call general judgments principles. I would prefer to restrict the use of that term to higher-order principles, such as Mill's so-called harm principle that harming others is the only justification for limiting an individual's basic liberty.

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In (2008), we argued that work in argumentation theory provided possibilities for persons disagreeing over some moral judgment, specifically judgments over the permissibility or impermissibility of a particular act, to resolve their dissensus. We presupposed that the argumentation potentially leading to a resolution of the dissensus would be carried out completely at the level of precepts and general moral judgments, what we here are calling basic moral argumentation. Before discussing higher-level moral principles, let us review this level of argumentation and why we need to go beyond it.

2. BASIC MORAL ARGUMENTATION AND ITS LIMITS

In (2008), we approach forming and justifying deontic judgments through the framework of Ross' ethical intuitionism (1930). How would one come to believe that

John ought to keep the promise he made to Mary?

According to Ross, upon making a particular promise, we recognize that we have an obligation, at least a *prima facie* obligation, to keep it. Perhaps unlike Ross, we regard such a precept as a judgment of our moral sense. From several experiences of promising, perhaps both making promises and being promised something, our ethical intuition recognizes a general connection between making a promise and being obliged to keep it. Ethical intuition is recognizing that the *prima facie* obligatoriness of a promise supervenes upon its *being* a promise. General judgments of supervenience amount to Toulmin's warrants:

Given that x has promised to do A
One may take it that x has a *prima facie* duty to do A .
Should A 's having been promised be its only morally relevant feature, then x 's duty to do A would be not only *prima facie* but overriding.

By virtue of our ethical intuition, we may recognize a host of *prima facie* duties and thus a host of warrants. A may have a number of properties deontically relevant to its rightness. But A may also have a host of properties deontically relevant to its wrongness. A may pose a conflict of duties. Insofar as A is the fulfillment of a duty, it is right. Insofar as its performance excludes the performance of another act which is a *prima facie* duty, A is wrong. How might one resolve such a conflict? One might weigh all A 's right-making against A 's wrong-making properties to decide. The result would be one's considered judgment, to use Rawls' term, of the moral propriety of doing A . Characteristically, ethical intuitionism holds that in most cases, conflicts of duties need to be resolved in this intuitive way. Intuitionists are thus sceptical of whether there are many higher-level general principles or rules of priority one can appeal to in resolving such conflicts. As Ross puts it,

This sense of our particular duty in particular circumstances, preceded and informed by the fullest reflection we can bestow on the act in all its bearings, is highly fallible, but it is the only guide we have to our duty (1930, p. 42).

Presenting a survey of the right and wrong making features of an act as

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

justification for one's considered judgment is presenting a moral argument. Let us characterize such arguments, together with arguments that acts *prima facie* have certain deontic properties, as *basic moral argumentation*. That is, basic moral argumentation proceeds at the property level, arguing that an act is right or wrong because it satisfies some conjunction of deontically relevant properties. Ross' claim that considered moral judgments are highly fallible suggests that basic moral argumentation is limited. As we discussed at length in (2008), a challenger could respond in three ways to a basic moral argument. She could question one or more of its premises. She could claim that an act satisfied some further deontically relevant property which would tip the balance of rightness over wrongness the other way, or she could claim that the act possessed some further property nomically connected to a deontically relevant property. This further property again would tip the balance the other way.¹ Given such a challenge, argumentation theory lays out ways proponent and challenger could proceed to resolve their dissensus. But it seems quite possible that two people could be in complete agreement over all the deontically right-making and wrong-making properties of some act and yet come to opposite considered moral judgments. The disputants disagree over the weighing of the properties. Their disagreement cannot then be resolved at the property level, i.e. the level of basic moral argumentation. Must we concede that our disputants are involved in deep disagreement here, one which cannot be resolved, at least through rational deliberation? We mooted that possibility at the end of (2008). An intuitionist like Ross might well need to concede deep disagreement. But right here Ross's intuitionism is open to dissent. Some will hold that in light of certain higher-level principles, such disagreements may be open to resolution. Ross himself allows that there are some rules of priority, primarily that duties of perfect obligation take precedence over other duties, but in general priority rules are not available. By contrast, Rawls in (1971) envisages a host of principles, not limited to priority rules, with two principles for the social justice of institutions being fundamental. As Boone points out in (2007), those arguing to a deontic conclusion may at points appeal to higher level principles directly. Rawls sees higher level principles and considered judgments as standing in a mutually reinforcing and mutually correcting relation which he calls "reflective equilibrium." That certain of our considered judgments are expected, given certain higher-order principles, confirms both the higher-level principles and our confidence in our considered judgments. By contrast, a conflict between a higher-level principle and a considered judgment gives an opportunity to revise and adjust either the principle or the judgment. Hence, again as Boone points out, it

seems to be a brute fact [...] about moral deliberations, including cases of dissensus that they involve a "common appeal to both moral facts and general moral principles" (2007, p. 3).

Moral argument extends beyond, and as these considerations suggest, extends significantly beyond basic moral argumentation. Hence one is not justified in conceding deep disagreement until one has brought not only all relevant deontic property considerations to bear but also all relevant principles and still not resolved a moral disagreement. Granting the presence of higher-level principles in moral argumentation raises two questions:

¹ See sections 2, 3, and 4 of our (2008).

- (1) How do such principles function in argumentation for moral precepts or general moral judgments?
- (2) How are such principles in turn established or argued for.

Does argumentation theory have resources that can help answer these questions? We consider each in turn.

3. MORAL PRINCIPLES AND THE RESOLUTION OF BASIC LEVEL MORAL DISPUTES

Suppose John and Jim have a friend Bill, an inveterate but considerate smoker. Whenever Bill smokes, he first removes himself to an isolated place so that there is no chance of his harming others through second-hand smoke. The only person he is putting at risk is himself. Jim judges that Bill's smoking is wrong, while John judges that it is perfectly permissible. Let's suppose that John and Jim both agree that acts producing pleasurable experiences, whether for oneself or others, are *prima facie* permissible and that acts which diminish the chances of one's remaining a productive member of society, indirectly harming others by diminishing society overall, are *prima facie* wrong. Let's assume that both acknowledge that Bill is jeopardizing his health by smoking, and both would admit that this is a *prima facie* wrong-making feature of his habit. They agree then both on the deontically relevant features of the act and that their survey of its deontically relevant features is complete. But they hold opposite deontic judgments concerning Bill's smoking. The key difference is over the weighting of Bill's directly harming himself through his smoking.

How are John and Jim arguing here? They agree on the premises of their arguments. They disagree on the warrants which get them from their premises to their divergent conclusions. John is reasoning this way:

Given that x 's smoking is producing pleasure for x , even though harming x and marginally harming others,
One may take it that x 's smoking is right (simpliciter)

By contrast, the warrant of Jim's reasoning is

Given that x 's smoking is harming x and marginally harming others, even though x 's smoking is producing pleasure for x ,
One may take it that x 's smoking is wrong (simpliciter)

For anyone familiar with the Toulmin model, such dissensus immediately raises the issue of backing. As Toulmin puts it,

Standing behind our warrants [...] there will normally be other assurances, without which the warrants themselves would possess neither authority nor currency—these other things we may refer to as the *backing* (B) of the warrants (1958, p. 103, italics in original).

Toulmin also holds that the type of backing will vary from field to field, and leaves it an

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

open question in (1958) on how properly to back warrants in the field of morals, the issue before us. We want to propose that higher-order moral principles may find their place in moral argumentation precisely here.²

We shall argue that higher-order moral principles play a dual role in argumentation, as both backing and rebuttals or defeaters. The defeater role is primary. Given a certain set of conflicting warrants, by defeating some (perhaps all but one) members of that set, the authority and currency of the remaining are enhanced. In this sense, the higher-order moral principle backs these remaining warrants. But what does it mean for a higher-order moral principle to defeat a warrant? We have argued that a warrant presents a principle of relevance.³ Toulmin's warrant generating question "How do you get there?" i.e. "How do you get from your data, grounds, premises to your claim or conclusion?" asks why the data are relevant to the claim. To take Toulmin's famous and now hackneyed example, the warrant

Given that x was born in Bermuda
One may take it that x is a British subject
answers why saying that someone was born in Bermuda is relevant to claiming that he is a British subject.

Unless the connection between data and claim is deductive, as Toulmin points out, a warrant will be subject to exceptions, what he calls rebuttals. Our sample warrant may be rebutted by information that neither of x 's parents were British subjects or x has become a naturalized citizen of some other country. Following recent work in epistemology, we may recognize two types of rebuttals or defeaters—the current epistemological term. Rebutting defeaters, such as our two examples, present information negatively relevant to the conclusion. By contrast, undercutting defeaters call the reliability of a warrant into question, at least under certain circumstances. For example, the information that the British Parliament has recently revised the British Nationality Acts is not negatively relevant to the claim that someone born in Bermuda is a British subject. But it calls the reliability of the warrant into question. Given the revised act, are those in the British crown colonies still British subjects? Notice that this undercutting defeater has not claimed that being born in a British colony is in general irrelevant to being a British subject, but just that we cannot rely on that step in this case, at least with the confidence we would otherwise presuppose.

Higher-order moral principles are more radical defeaters, ruling certain putative warrants completely out of account. Although the condition in the premise may seem intuitively relevant to the condition in the conclusion of the warrant, in light of the

² Warrants may be backed in more than one way. If the step from P to Q is self-evident, then the warrant

Given that x_1, x_2, \dots, x_n are in relation P
One may take it that x_1, x_2, \dots, x_n are in relation Q

is self-backed. It may, however, be backed by some further considerations, constituting an independent case for its "authority or currency." The type of backing deemed available may be determined by one's epistemological views. For example, Rawls, as opposed to Ross, is profoundly sceptical over whether basic moral principles are self-evident and this forms part of his disagreement with ethical intuitionism.

³ See specifically our (1992) and (2005, 331-32).

higher-order principle, this intuition should be rejected. The premise is just not relevant to the conclusion. The warrant is defeated not just due to some contingent circumstance, dependent on some individual's acts or those of the British Parliament, but on more universal conditions. That higher-order moral principles have this defeater function can be illustrated by priority rules. The most basic form of such a principle may simply be a general claim that a conjunction of one or more deontically relevant properties takes precedence over another conjunction of deontically relevant properties.

Suppose *A* is an act of promise keeping and *B* an act of benevolence. Suppose these two acts, at least in a given circumstance, are mutually exclusive. Hence, we may describe *A* as both an act of promise keeping and a failure of benevolence. Let us grant, with Ross, that both promise keeping and benevolence are *prima facie* duties. Hence, we grant the authority and currency of the warrants:

(1) Given that *x* has promised to do *A*
One may take it that *x* ought *prima facie* to do *A*

(2) Given that *x*'s doing *A* is a failure of benevolence
One may take it that *x* *prima facie* ought not to do *A*

But in addition, we have the following two warrants:

(3) Given that *x* has promised to do *A* although *x*'s doing *A* is a failure of benevolence
One may take it that *x* ought (*prima facie*) to do *A*

(4) Given that *x*'s doing *A* is a failure of benevolence although *x* has promised to do *A*
One may take it that *x* *prima facie* ought not to do *A*

Now consider the priority rule

(PR1) *Ceteris paribus*, duties of promise keeping take precedence over duties of benevolence.

(PR1) rules out warrant (4). (3), being the remaining warrant of this incompatible pair, is backed. Another way of analyzing the effect of (PR1) on argumentation is to say that when an act *A* is an instance of promise keeping, the information that it is also a failure of benevolence is irrelevant to determining whether or not it is a (*prima facie*) duty. It is a counterconsideration without force. Warrant (3) gives us as strong a reason for saying that *x* has a *prima facie* duty to do *A* as does warrant (1).

We may regard our simple priority rule of promise keeping over benevolence as a special case of a more general priority rule ranking duties of perfect obligation over duties of imperfect obligation. A duty of perfect obligation mandates some specific act, such as keeping a promise made or the paying of a debt incurred, while a duty of imperfect obligation may enjoin an act of a certain type, but not a specific act. That I have a duty to give to charity does not tell me which charity I should give to or what amount I

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

should give. Ross believes that Kant held this view. Duties of perfect obligation “admit of no exception whatever in favour of duties of imperfect obligation” (1930, p. 18). By having our simple promise keeping over benevolence rule as a logical consequence, our more general priority rule backs it. But by so doing, it both defeats the warrants our simple rule defeats (and a host of others ruled out by other consequent simple priority rules) and backs the warrants it backs (again backing a host of other warrants).⁴

Included within our higher-order moral principles may be more general statements yet, and appeal to these principles also may resolve dissensus, as long as there is agreement on the higher-order principles. Returning to John and Jim, let us assume that both agree in accepting Mill’s principle of maximal liberty without harming others, his harm principle for short, which claims, as Boone points out, that “the only justification for making actions impermissible is when those actions harm or threaten harm to others” (2007, p. 2). According to this principle, Bill should be free to obtain pleasure as he sees fit, unless he harms others. But Bill is scrupulous not to expose others to second hand smoke. Once John reminds Jim of the harm principle, Jim reverses his weighting of the property of harming oneself over gaining pleasure and so agrees that Bill’s practice is characterized by a balance of *prima facie* right or permissibility-making properties over wrong-making properties. Jim now accepts a priority rule, a consequence of the harm principle, that being free to seek one’s own pleasure absent harming others takes priority over any issues of harming oneself. Jim’s original warrant is defeated, while John’s is backed. The property of harming oneself is no longer regarded as a deontically relevant property.

Of course, the dissensus between John and Jim was resolved because they agreed on the harm principle. John simply had to make the principle salient to Jim to bring about agreement. However, one might expect that the original dissensus between John and Jim would point to their disagreeing over the harm principle, at least over Mill’s formulation which John accepts. As Boone points out in (2007), at least two philosophers have presented stronger versions of Mill’s harm principle. H.L.A. Hart includes a legal paternalism provision “wherein sanctions may also be imposed on actions which harm or threaten to harm the agent himself or herself” (2007, p. 2). Joel Feinberg includes an offence clause, “in which sanctions may be imposed on actions that cause, or threaten to cause, profound offence to others” (2007, p. 2). We should expect that Jim accepts Hart’s version of the harm principle, which defeats John’s warrant and backs his. John and Jim dissent over at least one moral principle. How may that dissensus be resolved?

As Boone points out, Mill seeks to justify his harm principle “by further appeal to the principle of utility” (2007, p. 3). John has further recourse, then, in trying to resolve his dissensus with Jim. He can attempt to show how the harm principle follows from the utility principle in the hope that Jim accepts (or will accept) the utility principle. We expect that John would concede that with the utility principle, he has reached his most basic moral principle. Mill’s system, of course, is not the only system of moral principles available. In (1971), Rawls has given extended attention to moral principles, not only higher-level moral principles but those corresponding to Ross’s *prima facie* duties. Furthermore, his first principle of justice for institutions, which he regards as the most

⁴ To point out this logical consequence between the general rule and certain specific priority rules does not imply endorsement of the general rule. Rawls (1971, p. 342) rejects perfect over imperfect obligation as a general rule. We discuss the justification of higher-order principles in the next section.

fundamental of principles, bears striking resemblance to Mill's harm principle:

Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. (1971, p. 60)

If harming some other person, physically or psychologically, constitutes one way to limit his or her liberty, and conversely if to limit someone's liberty is one way to harm him or her, Rawls's first principle is equivalent to Mill's harm principle. Further yet, Rawls has considered the issue of justifying moral principles at length. Does his discussion have implications for argumentation theory and does argumentation theory have implications for his discussion? We may address these questions after we examine Rawls' account of justification for moral principles in the next section.

4. RAWLS ON JUSTIFYING MORAL PRINCIPLES

Rawls holds that a complete theory of right will include three kinds of principles—for institutions, for individuals, and for the law of nations. He only briefly considers the law of nations in (1971). His discussion of principles for institutions and individuals suffices for our purposes here. Rawls holds that the theory of right needs to address institutions before individuals. This is because some duties for individuals presuppose just institutions, most obviously the natural duty to support institutions which are just (1971, p. 110). Furthermore, Rawls sees justice as basic.

Justice is the first virtue of social institutions [...] Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust (1971, p. 3).

Given this view, first principles for the justice of social institutions then will be basic moral principles, and thus basic principles in the system which backs some warrants while defeating others.

Besides the equality principle putatively equivalent to Mill's harm principle, Rawls proposes a second basic principle of justice for institutions:

Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (1971, p. 60).

However, the first or equal liberty principle takes precedence over the second or inequality principle. In setting up a just society, or evaluating the extent to which a society is just, one is concerned first with whether the equality principle is satisfied, and then considers the second principle. Although these principles are basic, Rawls believes they may be justified. He proposes two distinct ways for justifying these and moral principles in general. The first involves the construction of a model, which he calls the original position. The second involves what he calls "reflective equilibrium." We shall consider each in turn.

4.1 The Model of the Original Position

Rawls asks us to consider an association of "free and rational persons concerned to

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

further their own interests” (1971, p. 11). He describes them as “mutually disinterested,” i.e. “as not taking an interest in one another’s interests” (1971, p. 13). Their rationality is expressed in seeking “the most effective means to given ends” (1971, p. 14). What fundamental principles of justice, principles regulating all future modes of social and political co-operation, would these persons accept if choosing from behind a “veil of ignorance”? The veil covers the advantages or disadvantages each individual person may have as the result of natural endowment or social position. Lacking this knowledge, the parties to the original position cannot knowingly adopt principles which could unfairly advantage their own self-interest by disadvantaging others.

Given this model of a hypothetical original position, we may “read off” from it principles which these agents would chose. But Rawls believes we may demonstrate that they would choose these principles, and that their choice is normative. For Rawls to justify his principles, then, he needs to justify the original position as a model and to justify that the parties in the original position would choose these particular principles. At least, they would choose them over the principles of any rival conception which has been presented to them in the original position.

Why is the original position appropriate? Rawls holds that there are certain broadly shared presumptions about the conditions under which the principles of justice should be chosen. To justify the original position, one shows that it satisfies these conditions. For example, one presumption about a proper situation for choosing the principles of justice would be that no person should be able to rig the principles to his own advantage at the expense of others. If one is choosing from behind the veil of ignorance, one of course has no conception of what would be to his particular advantage. Thus one may justify the veil of ignorance as characterizing the original position. Besides being free, rational, and concerned to further their own interests, Rawls describes the parties to the original position as also equal and rational. Why should the original position be characterized as having parties satisfying these conditions? Again, it would seem that the constraints result from an intuitive understanding of justice. If the parties to the original position were not both free and equal, in particular if they could not have equal access to the ongoing dialogue framing the principles of justice, could the original position be regarded as just and thus could we regard the resulting principles chosen in the original position as principles of *justice*? Certainly, it would seem that the resulting conception need not be of justice as fairness, which Rawls seeks to explicate.

That the parties in the original position are concerned with furthering their own ends again seems implicit in seeing principles of *justice* as the intended goal of the original position. Questions of justice arise in connection with the fair distribution of goods. But could there be any question of a just and fair distribution of goods if there were no persons interested in procuring a share of those goods, in particular where not everyone might get as large a share as he or she might desire? Why should the parties be rational in the sense of seeking to take the most effective means to given ends? If the parties were not rational in this sense, would they be wholeheartedly concerned with their own interests? Why should one settle for less effective means to given ends? Would that not be to acquiesce in a compromise of one’s own interests, with no compensation for such acquiescence? Finally, if the parties in the original position were not moral, capable of “having a conception of their good and capable of a sense of justice” (1971, p. 19), why should one expect the principles chosen in the original position to be principles of

justice? If the parties were not moral in the sense of having the capacity to act on the principles when once framed and being prepared to act on them, how could one meaningfully speak of an adoption of principles being the outcome of the original position? How could principles be said to be chosen, if these principles were not to be followed? That the original position satisfies these conditions justifies it as a model, given Rawls' perspective.

Showing that Rawls two basic principles of justice would be chosen requires showing

that, given the circumstances of the parties, and their knowledge, beliefs, and interests, an agreement on these principles is the best way for each person to secure his ends in view of the alternatives available (1971, p.).

Given that some compromise or harmonization of individual ends is necessary for persons living together in a society, Rawls aims "to show that these principles are everyone's best reply, so to speak, to the corresponding demands of others" (1971, p. 119). Why should a person in the original position first chose equality—an equal right to equal liberty for all compatible with the liberty of others, including equality of opportunity? (1971, p. 151) Rawls argues

There is no way for [this person] to win special advantages for himself. Nor, on the other hand, are there grounds for his acquiescing in special disadvantages. Since it is not reasonable for him to expect more than an equal share in the division of social goods, and since it is not rational for him to agree to less, the sensible thing for him to do is to acknowledge as the first principle of justice one requiring an equal distribution. (1971, p. 150)

But it is quite conceivable that an unequal distribution of wealth could be to everyone's advantage. Allowing inequalities could provide entrepreneurial incentives benefiting more than just the entrepreneur. "The immediate gain which a greater equality might allow can be regarded as intelligently invested in view of its future return" (1971, p. 151). Thus those in the original position would also choose the second principle.

Rawls is satisfied that these two arguments show at least that these two principles are plausible as principles of justice. But he believes he can offer a decisive case for them from the perspective of one in the original position. He asks us to consider the maximin rule for decisions under uncertainty: Chose that alternative whose worst possible outcome is better than the worst possible outcomes of the other alternatives. Now suppose one played a game where one would design the structure of a society, including the positions within it, and his worst enemy would assign him his place. A social structure in which each person had equal liberty and equality of opportunity, where inequalities in the distribution of wealth were allowed only if they advanced the general good, especially the good of the least advantaged, would be a structure in which one's enemy could do one the least damage. Conservative prudence would seem to dictate choosing that structure. Rawls continues that if a situation manifests certain features, the maximin rule is attractive, and that the original position "manifests these features to the fullest possible degree" (1971, p. 153). This is his strategy for giving his decisive argument.

Rawls presents three considerations. First, we may have choice situations where several alternative choices are open to us and several alternative circumstances are possible. For each circumstance, we may know the gain or loss in that circumstance for

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

each alternative choice. The maximin principle tells us to make the choice which would have the best worst possible outcome. Given the principle, we do not take the probability of any of the alternative possible circumstances into account. But if we were making a choice from behind the veil of ignorance, we would not know the probabilities of any of the possible circumstances. So a decision according to the maximin principle is appropriate. Secondly, a person in a choice situation may have little desire to risk the minimum possible gain for some possibly greater gain. For such a person, the maximin rule is appropriate. Now Rawls ranks the equality of liberty principle before the distribution principle.⁵ But he believes that this priority implies “that the persons in the original position have no desire to try for greater gains [greater economic and social advantages] at the expense of individual liberties” (1971, p. 156). Again, the people in the original position are in a situation where the maximin choice principle is fitting. Thirdly, in some choice situations, the consequences of certain choices given certain circumstances, could involve significant loss of value, be disastrous. Likewise in the original position, the choice of certain principles as the principles of justice could lead to disaster for some members of society, such as choosing a principle of the greatest good for the greatest number. Some persons might be left in misery. Why should someone in the original position take such a risk, given that the two principles provide a satisfactory conception of justice? “It seems unwise, if not irrational, for them to take a chance that these outcomes are not realized” (1971, p. 156). These considerations thus constitute Rawls argument that the parties in the original position would accept his two fundamental principles for the justice of institutions.

When we turn to principles for individuals as opposed to principles for institutions, we are dealing in the first instance with general judgments on a par with Ross’s *prima facie* duties, as opposed to the two higher-order principles of justice for institutions. Rawls does acknowledge that there will be priority rules for individual principles, as there are for institutional principles, and these will be higher-order principles. Since our concern in this paper is with higher-order principles, we need only briefly consider Rawls’ individual principles. Ross considered the principles expressing *prima facie* duties to be self-evident. By contrast, Rawls believes one can argue for his counterparts, the justification being that these would be chosen in the original position. Our primary interest, then, is in Rawls’ arguments.

Rawls distinguishes obligations from natural duties. Obligations are incurred by voluntary acts of an individual with respect to some just institution, while natural duties have no such presupposition. Rawls sees fairness as the root obligation from which all other obligations derive. When an institution is just and one has accepted its benefits or opportunities, one “is required to do his part as defined by the rules of [the] institution” (1971, p. 111). That is, “we are not to gain from the cooperative labors of others without doing our fair share” (1971, p. 112). The institution defines the content of the obligation and our agreement to accept its benefits grounds the moral force of the obligation. By contrast, a natural duty such as the duty of giving mutual aid does not depend on the existence of just institutions nor are particular duties contingent on previous acts of our own. We do not incur duties to aid others in distress through specific acts such as making promises, nor do the rules of some institution spell out the aid we are to give. We have

⁵ Rawls believes the ranking is not just intuitive, but that he can give a case for it “in parts of Chapters IV and IX” (1971, p. 156).

natural duties unconditionally.

How would one argue that those in the original position would acknowledge the natural duties or accept the principles which formulate them? Consider the natural duty of justice, the duty to support existing just institutions and foster establishing such institutions where they do not yet exist. If those in the original position choose institutional principles before individual and Rawls' argument is correct that they would choose his two basic principles of justice, the individual principles they do choose need to be consistent with their institutional choices. They must have overall "a coherent conception of duty and obligation" (1971, p. 334). Accepting the principles formulating the natural duty of justice would create no conflict with the previous institutional commitment, whereas adopting a principle at variance at least at some points with the institutional principle of justice, such as a utilitarian principle to foster the greatest good for the greatest number, could generate conflicts. Suppose two alternative proposals are before a legislator. One accords with maximizing individual liberty; the other with maximizing overall utility. Which should she support? Since those in the original position are rational, they will choose their individual principles to be consistent with their institutional principles.

Although those in the original position are ignorant of their specific advantages and even of their specific interests, they are not ignorant of human nature and the necessary conditions for its flourishing. These include having the respect of others, which is necessary for one's self-esteem, and being confident that others will give aid, if needed. Those in the original position then would accept principles formulating duties of mutual respect and of giving mutual aid. Should the members of a society in general not acknowledge either duty, they would hold each other in mutual disdain, undercutting the ability of each member to maintain a sense of self-worth. Since any rational person seeks to maintain this sense, parties to the original position would accept these duties.

Why should those in the original position accept the fundamental principle of fairness and thus also its corollaries? Individuals enter into institutions, such as the institution of promising, to advance their interests through the co-operation of others. Consider a situation where to bring about some mutually beneficial outcome, *A* must perform some act *X* first and then *B* reciprocates by performing some act *Y*. But why should *A* perform *X* first, unless it is reasonably certain that *B* will reciprocate with the required *Y*? Now suppose *B* has *promised* to do *Y* upon *A*'s doing *X*? Furthermore *B* made this promise while in full control of his mental capacities to understand what he was doing and under no constraint or compulsion. The institution of promising is fair under these conditions and defines *B*'s role as doing *Y*, which he is now enjoined to do by the principle of fairness (or its corollary, the principle of promising). If the principle of fairness has been generally accepted, then *A* can proceed to do *X* in the reasonable expectation that *B* will do *Y*. The situation has been stabilized. If *B* does not reciprocate, the situation becomes destabilized as far as *A*'s trust of *B* is concerned. However, if the principle of fairness were not generally accepted, why should *A* have any confidence that *B* would reciprocate? The situation would be totally unstable. Hence public knowledge of a general willingness to act in accordance with the principle of fairness and its corollaries is

a great collective asset [...] [H]aving trust and confidence in one another, men can use their public acceptance of these principles enormously to extend the scope and value of mutually advantageous

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

schemes of cooperation. From the standpoint of the original position, then, it is clearly rational for the parties to agree to the principles of fairness (1971, pp. 347-48).

4.2 Reflective Equilibrium

As Rawls has indicated, there is another way to argue for higher-order moral principles—reflective equilibrium. Rawls sees this as a two way process, respecting both our capacity to formulate higher-order moral principles and to form considered moral judgments through intuition. The process is mutually reinforcing and correcting. Our considered moral judgments of which we are very confident constrain our principles to those which match the considered judgments. This reinforces our confidence in the acceptability of the principles. By contrast, we may be less than confident of certain judgments, but in the light of certain principles, our ambivalence may be resolved. As Rawls puts it, the principles have extended our considered judgments “in an acceptable way” (1971, p. 19). Clearly, also, even if we are confident of certain general moral judgments, recognizing that they are backed by a higher-level principle constitutes further support for the judgment.

However in some cases, certain moral principles may back judgments at variance with our considered judgments. The principles, or the considered moral judgments, (or both) are then subject to revision. As Rawls puts it, we can go back and forth, sometimes revising principles and at other times reconsidering our judgments “and conforming them to principle” (1971, p. 20). In the end, we should have “principles which match our considered judgments duly pruned and adjusted”—reflective equilibrium (1971, p. 20). Significantly for argumentation, what makes this equilibrium reflective is our knowing “to what principles our judgments conform and the premises of their derivation” (1971, p. 20). However, this equilibrium is defeasible. It can be upset from both sides. Further considerations may lead us to reconsider the characterization of the original position and thus of the principles the parties would adopt, or they may lead us to reconsider our considered judgments.

Our discussion of Rawls indicates that one may support higher-level moral principles either “from above” or “from below.” When one argues that a given principle would be adopted in the original position, one is arguing from above. One understands the characterization of the original position to entail the adopting of certain principles and that adopting as a sufficient condition for justifying the principle. Rawls believes that ideally such arguments should be strictly deductive, although he admits his arguments in *A Theory of Justice* are “highly intuitive” (1971, p. 121). We may conjecture that a full articulation of such an argument would show it to be an enthymematic argument in the sense of Hitchcock (1985, see p. 83),⁶ an argument which is not formally deductively valid, but which is neither a non-sequitur nor a non-demonstrative argument of some sort. When one argues that one or more considered moral judgments match our moral principles, we have a confirming argument from below, analogous to an argument for some universal law from confirming instances. Either type of argument raises the possibility of resolving dissensus. Even should John and Jim initially disagree over the liberty limiting principle each accepts, both may attempt to argue that those in the original position would accept his version. Again, each could argue that his versions of

⁶ For our account of enthymemes, in substantial points of agreement with Hitchcock, see (2009), Chapter 7.

the principle is corroborated by considered moral judgments they both share and that the other's principle is at odds with considered moral judgments of which both are confident. If any of these arguments are successful, John and Jim have resolved their dissensus. Even if none of them are, the need to concede deep disagreement has been postponed from the case of basic moral argumentation where warrants are taken as intuitively self-backed. The argument from above raises the possibility of a deeper disagreement between John and Jim. They could disagree on the conditions characterizing the original position. More radically yet, they could even disagree over whether the model of the original position was appropriate for justifying moral principles. John might be a contractarian, while Jim not, indicating that John and Jim come from different moral cultures and thus different cultures of moral argument. What might that mean for resolving their dissensus through argument?

5. JUSTIFYING HIGHER-LEVEL MORAL PRINCIPLES AND ARGUMENT CULTURES

If Jim is not a contractarian, what might his position be? Jim might hold that by virtue of our being human beings, we have certain genuine interests as moral persons, independently of our perceived interests. In particular, we have these interests, even if parties to the original position do not perceive that they have them. Thus these interests need not influence what someone in the original position would choose, even though that person were rational. Acts which harm these interests are intrinsically wrong (at least *prima facie*) even if a rational agent might find them to advance his perceived interests and not to harm the legitimate interests either of himself or of anyone else. Since such a view presupposes that certain properties are essential to being human, at least given a certain understanding of humanity, and that the rightness or wrongness of certain actions is derived from this essence, we might refer to this view as essentialism. There will be many forms, as views of what is essential to being human differ.

The following dialogue better illustrates how this dissensus might arise than John and Jim's disagreement over the propriety of Bill's smoking:

John: What people do between the sheets is their own business.

Jim: You can't mean that. You are saying that the sexual act has no meaning.

John is a contractarian holding the harm principle. Acts which do not harm others—physically or psychologically—(and presumably one partner in the sexual act will let the other know the limits of the harm he or she will accept) are right or acceptable. John is convinced that such a principle of liberty backs his judgment and defeats Jim's. By contrast, Jim is an essentialist. Since sexual acts are performed by embodied human beings, Jim sees having a body with its functionality or design as essential to being human and investing sexual acts with a meaning which must be respected, independently of the choices parties to a hypothetical original position might make. Again, since human being are not just physically but culturally or institutionally “embodied,” certain institutions, such as the institution of marriage as traditionally defined, may be indispensable to human flourishing and have an integrity demanding respect, again independently of any decisions humans might make upon taking the perspective of the

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

hypothetical original position.

A remark Rawls makes suggests situations where disagreement between a contractarian and an essentialist may become acute:

Justice as fairness is not a complete contract theory. For it is clear that the contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only for justice [...] Obviously if justice as fairness succeeds reasonably well, a next step would be to study the more general view suggested by the name “rightness as fairness” (1971, p. 17).

Can all questions of right be settled on the basis of fairness, where what is fair is understood to be what parties to the original position would choose from behind the veil of ignorance? We can now understand why a disagreement over the basic model—contract versus essential moral principles—puts the dissenting parties into different moral cultures. One sees the choices of free individuals as paramount. The other sees humans and their circumstances as invested with a certain meaning having normative consequences.

How does a difference in moral culture betoken a difference in argument culture? To defend harming others as the only condition properly limiting individual liberty by arguing that the principle would be chosen by the parties to the original position might seem beside the point, for an essentialist. Not recognizing the harm principle, the essentialist furthermore would not recognize that it establishes the “authority or currency” of any basic level warrant or defeats conflicting warrants. Conversely, the contractarian might see the essentialist’s claim that the physical, psychological, and cultural worlds in which humans find themselves have meaning or invest things with meaning objectively in a way which has normative consequences as entangling ethics with a very unpalatable essentialism, which it would be best to avoid. Have we arrived at deep disagreement here? Do contractarian and essentialist have no recourse to further argumentation at this point?

By no means! Let us recall that there are two roles in a basic dialectical situation—proponent and challenger.⁷ The contractarian could assume the challenger role at this point. Recall Jim’s statement to John: “You are saying that the sexual act has no meaning.” Clearly, Jim believes that it does. What could Jim mean here? Given Jim’s conservative stance, we may suppose he believes that genital sexual intercourse between two persons establishes or sustains a union of the two of them (“The two shall become one flesh.”) satisfying one of the deepest human desires. The meaning of the sexual act then is to be a vehicle of this union. That the sexual act has this meaning sets limits to ways in which persons can engage in these acts. Certainly promiscuous acts, acts done outside the context of any committed relationship between the partners, are contrary to and compromise the meaning of the sexual act. If one allows that the human body with its differentiated organs has a functional integrity, acts compromising this integrity would also compromise the meaning of the sexual act. Jim then would commend the warrant:

Given that *A* is a sexual act performed outside the context of a committed relationship

⁷ For a discussion of basic dialectical situations, see our (1991), pp. 18-23.

One may take it that *A* is (*prima facie*) wrong

Jim, we may expect, would commend a stronger warrant, dropping the “*prima facie*.” The desire for union of which the sexual act is one (albeit not the only) vehicle of fulfillment, is an “existential desire.” The fulfillment of this desire is necessary to the fullness of our being human. As such, then, union is a value which cannot be trumped by other values, even liberty. As liberty is to be limited if its expression involves harm to others, so likewise liberty is to be limited if its expression compromises union. So besides the basic level warrant licensing inferring that *A* is wrong from the fact that *A* is a sexual act performed outside the context of a committed relationship, Jim also accepts a higher-level priority rule that preservation of respect for a vehicle of union takes precedence over individual liberty.

John, our contractarian challenger, could now ask Jim for the backing for this warrant. Why does it have “authority and currency”? Given the considerations we have just sketched, Jim could argue that the warrant is a special case of the more general warrant

Given that *A* is a sexual act compromising the role of being a vehicle of union
One may take it that *A* is wrong

and respond that this more general warrant is backed by the priority rule. Upon hearing Jim’s explication of the meaning of sexual acts, John might agree to accept the *prima facie* version of the warrant. Hence he now accepts that an act’s compromising its role of being a vehicle of union is a reason for its being *prima facie* wrong. This means that he recognizes the corresponding generalization to be a considered moral judgment. He still challenges the priority rule.

Jim can now proceed in two ways—from below and from above. He can attempt to show that the priority rule is in reflective equilibrium with our considered moral judgments. A really convincing argument might show both that the principle is in reflective equilibrium with more of our considered moral judgments of which we are confident than the contractarian’s principles and those judgments which conflict intuitively should be pruned. Should John find Jim’s arguments sound, we are moving toward resolving dissensus. But John might not find Jim’s argument persuasive, precisely because he does not accept Jim’s priority rule. One might suggest that to support this priority rule from above one might regard compromising some existential value as one way of doing harm, indeed the most serious kind of harm, outweighing any advantage of being able to choose the act as not posing any perceived physical or psychological harm. As such, the priority rule is entailed by that version of the harm principle proscribing acts which harm both others and oneself. The rule then apparently can be defended on contractarian grounds, as one might defend any other version of the harm principle. But this will not do for an essentialist like Jim. The contractarian is ultimately appealing to what humans would choose in the hypothetical original position. But the essentialist wants to maintain the priority of union as a value, no matter what human beings, however characterized or circumstanced, might choose. The essentialist rejects the contractarian model of the original position.

However we can readily think of how an essentialist like Jim might seek to argue

HIGHER LEVEL MORAL PRINCIPLES IN ARGUMENTATION

for his priority rule from above. The argument is metaphysical. Jim turns to Aristotle as the father of essentialism and argues that existential values are necessary conditions for human happiness, for actualizing the *telos* of a human being. As such they trump other values. We are not claiming this argument would persuade John the contractarian, although it might. The contractarian may revise his position, moving toward consensus. The point we want to make here is that Jim the essentialist has recourse to such argument—argumentation across moral and argument cultures is possible. But suppose John stands firm. He dismisses Jim’s metaphysical argument, maintaining that liberty has a higher value than any existential consideration and, let us suppose, holds that the very notion of a human essence is incoherent. At this point, Jim may not have anything further to advance his argument. But surely, if his backing argument has any cogency, John cannot dismiss it without incurring a burden of proof. Can he simply dismiss an Aristotelian eudæmonistic argument for the priority of a value arguably necessary to being fully human and thus to human flourishing? The roles in the dialectical situation thus switch, the contractarian becoming the proponent and the essentialist the challenger.

John’s burden of proof includes defending his contractarian stance and thus the very appropriateness of his model of the original position. Recall that Rawls has characterized the parties to the original position as being free, equal, concerned to further their own interests, rational, and moral. By identifying these features, Rawls, at least implicitly, is making a statement about what is essential to being human, at least in part. The essentialist might very well accept that humans have these features essentially but insist, as Jim does here, that there is more to being human, that more properties constitute the essence, than Rawls has presented. At this stage of the dialogue, the dissensus has moved from morals to philosophical anthropology. But this has implications for the role of argumentation in resolving moral dissensus, even across divergent moral cultures. People can argue about philosophical anthropology. That the dialogue has reached this stage does not mean we have reached deep disagreement. There seems to be plenty of room for further argument and thus for hope, through argumentation, to move toward a justified resolution of difference.

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[Link to commentary](#)

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JAMES B. FREEMAN

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