RATIONAL CHOICE AND THE LAW

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Early in his rich and provocative book *Risks and Wrongs*,[1] Jules Coleman writes:

> In general, if the norms constitutive of a political, legal or moral order are to be justified, if the force employed to enforce them and the disapprobation that accompanies failures to comply with them is to be warranted, then the content of the rules must follow from the principle of rationality. Justification is a matter of rationality alone.[2]

Coleman goes on to outline his conception of rationality in order to clarify and defend the kind of rational choice justification he will offer in the book. By so doing he aligns himself with the contractarian tradition of justifying political practices initiated by Thomas Hobbes[3] and recently exemplified in the writings of David Gauthier.[4]

But as the book progresses, Coleman admits that justification of some moral and political matters can (and should) be accomplished by more than rationality alone, openly advocating a non-economic theory of the law of torts that he explicitly calls "moral" and which is based upon what he calls "corrective justice."[5] So, he is no narrow-minded Hobbesian. Nonetheless, he is an overly optimistic one. In this paper, I want to outline in greater detail the nature of the Hobbesian-style, reason-based conception of social and political justification, and why Coleman believes that, for at least some normative practices, this is exactly the right justificational approach. However, I will go on

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1. JULES L. COLEMAN, RISKS AND WRONGS (forthcoming 1992). (Manuscript received in July 1991, on file with author; pages cited to manuscript.) (Footnote pages are numbered separately from manuscript pages; hence all references to footnotes will be to the separately numbered footnote manuscript.)

2. *Id.* at 2.

3. *See, e.g.*, THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin Books 1968) (1651).

4. *See, e.g.*, DAVID GAUTHIER, MORALS BY AGREEMENT (1986); DAVID GAUTHIER, MORAL DEALING: CONTRACT, ETHICS AND REASON (1990).

5. The change in tone regarding the justificational base of the book is puzzling. Given the celebration of reason at the start of the book, the reader is left quite unprepared for the non-economic and explicitly moral conception of the operation of tort law developed in the last part. It appears as if Coleman's thought underwent a metamorphosis as he wrote the book; but why didn't the Coleman of Part III return to correct the misguiding exuberance of the Coleman of Part I regarding the justificational strength of reason?

to argue that no sound justification of the social and political practices of a liberal society, including the legal practices with which Coleman is concerned, can rest on rationality alone. Rational choice justifications accomplish less, and are less persuasive by themselves, than Coleman believes.

Moreover, I will argue that without realizing it, Coleman himself consistently supplements his appeal to rationality with certain moral assumptions in his defense of liberal institutions. Thus, although I will be critical of Coleman's explicit statements of his theory of justification in his book, I will not criticize the actual justifications of legal practices he offers us. To the extent that his own justifications of certain aspects of our legal practice are sound, I will argue that this is because those justifications covertly rely on moral norms—in particular, norms of human equality and worth—in addition to norms of reason. Far from undermining his justificational approach, these appeals to certain moral ideas insure that his defenses of certain legal practices are plausible. In the end, I hope to show that despite his overtly Hobbesian sympathies, Coleman's justificational practices are remarkably Kantian, a conclusion that Coleman may find disconcerting, but which I hope to persuade him (and others sharing his views) not to resist.

In a sense, by focusing on Coleman's theory of justification, I am concentrating on the least developed parts of his book. Like his teacher Joel Feinberg, Coleman is at his best when he is doing what I call "middle level theory," which involves the articulation of normative principles and practices for social and political institutions without getting too involved in particular policy recommendations in particular cases, and without getting too involved in abstract philosophical (or meta-ethical) justifications for those normative principles. However, each level of analysis aids the others: I hope to show that a better understanding of his own abstract philosophical commitments will aid Coleman and those (such as myself) who are impressed by his normative outlines of the operation of certain legal practices, to fill in the blanks of those outlines in a plausible way, and to be able to commend his conception of these practices using higher-order arguments rather than mere appeals to our intuitions and good sense.

I. Justification as a Matter of Rationality

At the beginning of chapter 1, Coleman appears to embrace without reservation the hegemony of rationality in matters of justification. In summary, his approach to the justification of social and legal practices in the book involves the appeal to three kinds of rationality:

1) Individual rationality, that is, the reasoning process to which individuals appeal as they attempt to make the best practical decisions possible, most of the substance of which Coleman usually takes to be given by expected utility theory;

2) Collective rationality, that is, the reasoning process to which a group appeals when it attempts to make the best practical decisions relative to its interests, and which Coleman understands by appealing to Pareto optimality (or efficiency);

3) Division rationality (also called "concession rationality"), that is, the reasoning process to which individuals appeal when they are attempting to work out the best solution to a bargaining problem. All three components of rationality are taken by Coleman to be necessary to a successful justification of moral and political practices. Such practices need to be both individually *and* collectively rational, he argues, because:

> Arrangements that exhaust the gains from cooperative endeavors (collective rationality) and do so in a way that makes everyone as well off as he or she might be given the welfare of others (individual rationality) are desirable, feasible and enforceable. Indeed, in conventional rational choice theory, individual and collective rationality provide separately necessary and jointly sufficient motivations for collective action.[6]

Coleman includes division rationality in his justificational approach, on the grounds that it is a necessary but neglected element of rational choice. When there are a number of efficient outcomes possible for a group, members of that group must be able to determine which efficient scheme to select, and because this aspect of cooperation is vitally important to the operation of a political society, Coleman argues that it must be subject to rational analysis. "If the manner in which rules distribute the benefits and burdens of cooperative schemes is relevant to their justification, and if justification is entirely a matter of ra-

6. Coleman, *supra* note 1, at 5-6.

tionality, then the distributive feature of cooperation must be an aspect or dimension of the theory of rational choice."[7]

Coleman goes on to argue that a rational choice justification animated by these three principles will "suggest a contractarian methodology for deriving or articulating the principles of a justified political authority."[8] That is, in order to determine what a justified scheme of cooperation should look like for a group of individuals, Coleman asks what such individuals could agree to, were they all rational:

> [W]e might view a justifiable political morality as the outcome of a hypothetical agreement among . . . persons. It's a scheme of self-imposed constraints by which the benefits and burdens of cooperation, and the risks associated with human interaction that is animated by cooperative and conflicting interests are allocated; it is a contract.[9]

Now why does Coleman say that we "might" use the idea of a contract in the way he describes? Does he mean that we need not pursue justification using this device, but that it is nonetheless a highly useful heuristic for doing so? I found it difficult to answer this question after repeatedly re-reading relevant sections of Chapter One. At times, Coleman suggests that the contract is merely a useful heuristic, a way of calling to mind and applying the three kinds of rationality principles necessary for defining and justifying any scheme of cooperation. For example, he says:

> In seeking an agreement all agents share an interest in having cooperation prove maximally productive; the contract that specifies the terms of cooperation should leave no potential gains unsecured. This is simply what the *collective rationality* condition requires. That common interest aside, each party seeks to maximize his or her relative share of the gains. Here the principle of division rationality, or what I will call in chapter five, the principle of *concession rationality* is at work. At the same time each agent is concerned to guard against the defection or free-riding of others. Without compliance, agreement is empty, a waste of time. This feature of rational cooperation, compliance, is expressed by the principle of *individual rationality*. Thus, the contractarian methodology of the market paradigm follows from the principles of collective, individual and concession rationality. Collective

7. *Id.* at 12.
8. *Id.* at 18.
9. *Id.*

> rationality demands that all the gains from trade be exhausted; concession rationality distributes the gains from trade; and individual rationality requires that the distribution of the benefits and burdens of cooperation—its terms—be enforceable.[10]

This passage suggests that imagining the kind of cooperative scheme each person "could agree to" were each person rational is just a way of figuring out what cooperative schemes the three rationality principles permit, given each person's interests. The contract device would seem to be particularly useful insofar as it highlights the importance of concession rationality (by representing the selection of the cooperative scheme as the outcome of a bargain),[11] and insofar as it highlights the importance of securing a result with which everyone will be motivated to comply.[12] But Coleman's discussion suggests that it is the three principles of rationality that are doing all the work in justifying the cooperative scheme, so that the hypothetical contract does not contribute anything *by itself* to the justification process.[13] If this is right, the contract method is merely a useful heuristic for applying the principles.

It is interesting to find that Coleman worries about contractarian defenses of certain procedures and rules of contract law (for example, those advocated by Alan Schwartz[14]) precisely because the appeal to a contract in such defenses seems at best a mere heuristic, and at worst theoretically irrelevant (and perhaps even deceiving to the extent that this irrelevance is not clear in the context of the argument). In contract law, the appeal to an ideally rational hypothetical contract is supposed to establish the correct resolution of a quarrel that has arisen because the real contract did not foresee, and resolve ahead of time, the issue that led to the quarrel. "Here's what you would have decided, had you been in ideal circumstances and fully

10. *Id.* at 18-19 (emphasis in original).

11. *Id.* at 28.

12. *Id.* at 20.

13. For example, when he discusses the way in which the contract method highlights the importance of getting a result that people will be motivated to support, he notes in passing that it isn't the contract that requires such compliance, but the principle of individual rationality (which is naturally expressed in the context of thinking about what each of us could agree to, given our interests). Thus in his discussion of the way in which the contract method emphasizes the importance of compliance, Coleman writes, "We might put this by saying that individual rationality requires that an agreement be enforceable." *Id.* at 20. So why talk about ideal contracting at all?

14. *See, e.g.*, Alan Schwartz, *Interpreting Torts, Explaining Contracts*, 15 HARV. J.L. & PUB. POL'Y 747 (1992).

rational," the court is supposed to reason, according to these contractarians. But, as Coleman notes, critics of this style of argument ask, "What [does] the agreement among ideal circumstances have to do with the circumstances in which the parties find themselves?"[15] In particular, if the resolution in the non-ideal world is, for one or more parties, actually irrational, the fact that it would have been rationally agreed upon in an ideal world seems completely beside the point. Coleman characterizes the critics' conclusion about such ideal agreement arguments as follows:

> The appeal to the theory of rational bargaining under ideal circumstances is irrelevant to the interests of the parties to a contract; real agents do not find themselves in anything like idealized circumstances. Their actual bargain reflects the reality of their situation; so should any hypothetical bargain struck between them. Moreover, the appeal to the principle of rational bargaining under idealized circumstances is insincere. It is a mask. Instead of completing the contract between the parties—even in an attenuated sense—the principle of ideal rational bargaining is just a stand in for the real principle: the principle of efficiency.[16]

In other words, on this view, the "ideal" nature of the circumstances and reasoning of the parties in the hypothetical contract situation is sufficiently different from the real contracting circumstances and the real reasoning of the parties, both *ex ante* and *ex post*, that the results of any such agreement are irrelevant to the problem in which the parties now find themselves—a problem that any economist will assume should be resolved on grounds of efficiency. And because these are the appropriate grounds, an economist will maintain that if a theorist were to appeal to a hypothetical contract to resolve the problem, his resolution would only be plausible if that contract were subtly introducing the efficient resolution after all. So, either the appeal to the ideal contract is just a mask for an appeal to the principle of efficiency, in which case it makes sense but does no real work (and is at best a heuristic), or it is a way of solving the problem along other, supposedly "ideal" grounds, in which case it is likely to be an irrational, inefficient solution insofar as the circumstances of the contract are not ideal.

The specific attacks on the use of an idealized contract in

15. COLEMAN, *supra* note 1, at 283.
16. *Id.*

contract law can be generalized and used to attack this argumentative strategy as it is used by political theorists generally: Why should political theorists make such heavy weather out of idealized contracts when the agreement process they celebrate is genuinely irrelevant to the facts of real, non-ideal circumstances? And doesn't that appeal make sense only if it is a way (and maybe not a very good way) of calling to our attention those principles of reason that do the *real* work of solving problems and justifying those solutions?

Coleman defends the appeal to an ideal contract both in contract law and in political theory. For example, he maintains that we can explain why the appeal to an ideal contract does real work in contractarian justifications of contract law by thinking of the ideal contract to which the court should appeal as specifying the *procedures* the court will use to complete the contract, should it prove incomplete. According to Coleman, the court should realize that rational agents would contract *ex ante* "to have courts impose *ex post* efficient terms upon them. Thus, *ex ante* they would have bargained to have a court impose efficient terms upon them *ex post*."[17]

At one point Coleman, in a jocular tone, calls this defense a "trick," but his economist critics would likely think it an apt and suitably disparaging description of it. For, on their view, if the efficient resolution of the flawed contract is the right one, why not say so upfront? How does it help to defend that resolution by saying that rational people in ideal circumstances would agree upon it? Doesn't it make sense that such "ideal" people would do so only because, as they see it, this is the right resolution? In this case, the appeal to the ideal contract *assumes* the rightness of the efficient resolution; it neither yields nor explains it. Thus the ideal contract is genuinely irrelevant to a justification of the kind of resolution Coleman wishes to commend to the court.

Not only when he discusses contract law, but also when he argues on behalf of his contractarian style of political justification, Coleman continually tries to resist the idea that the hypothetical contract is only useful to the extent that it reveals the right justificatory principles, and not as a device that either generates or legitimates them. But his attempt to show why the

17. *Id.* at 284.

appeal to contract is necessary in the context of political justification does not fare much better than his argument on behalf of contractarian reasoning in the law of contracts. For example, he continually emphasizes the way in which, unlike other theorists who insist that justification is a matter of simply determining what arrangement is rational, his method emphasizes rational *choice*, thereby implementing the liberal idea that political justification must be "to every individual against whom the authority of the state is to be employed."[18] Such talk suggests that his contract is more than a way of marshalling and applying justificatory principles, but also a way of involving and binding our *wills*—that is, the wills of actual people such as ourselves—to the cooperative arrangements legitimated by those principles. But clearly the wills of actual people are not the same as the wills of their idealized counterparts in the agreement process. And why should I feel that *my* will is bound to some social arrangement just because an idealized version of myself, in special circumstances, would have consented to that social arrangement? To quote a well-known passage from Dworkin's writings: "A hypothetical contract isn't a pale form of an actual contract; it is no contract at all."[19]

So the most a contractarian can say, according to the method's critics, is that an appeal to a contract is a mere heuristic that calls to mind the *real* justifactory principles—in Coleman's case, the three principles of reason—that do the work in the argument. Has Coleman any reason to resist this conclusion, given the centrality of those three principles to his justifications? Has he been misled by the rhetoric of his heuristic device into thinking that it performs justificatory work on its own? If, in political matters, "justification is a matter of rationality alone" as he claims,[20] the answer to all these questions is "yes." But as I hope to show in what follows, we have good reason to reject this conception of political justification, and thus good reason to respond negatively to these questions.

II. The Primacy of Individual Rationality

Even if the contract is a mere heuristic device, Coleman's use

18. *Id.* at 16.

19. Ronald Dworkin, *The Original Position*, *in* Reading Rawls 17-18 (Norman Daniels ed., 1976).

20. Coleman, *supra* note 1, at 2.

of it not only involves employing the three principles of reason articulated above, but also expresses a point that Coleman explicitly makes in Chapter One, namely, that individual rationality is the most important of the three principles of reason. Although collective and distributive rationality are distinct conceptions in their own right, nonetheless, as Coleman defines them, both presuppose individual rationality. In order to be able to determine that which is collectively rational (that is, Pareto-optimal) or that outcome which is distributively rational, Coleman's analysis requires that we first be able to determine what each individual finds rational, given her interests. So, the conception of individual rationality is basic to Coleman's justificational approach. For this reason, Coleman insists that this principle animates all of his analyses and defenses of legal institutions:

> The individual rationality condition imposes the constraint that legal, political and moral institutions must ultimately be in each individual's interest, at least from an *ex ante* perspective. That is, the norms imposed by either a justified morality or a political authority must enhance each individual's utility, or, put slightly differently, each rational individual would agree to comply with the norms of a political morality only if each perceived compliance to be in his or her interest *ex ante*. If political norms are constraints on the pursuit of individual interest, then they can be justified only if each rational agent could understand compliance with them to be in furtherance of those interests. Rationality counsels constraint on the pursuit of individual interest only when constraint furthers those interests.[21]

Unfortunately, Coleman does not spend very much time clarifying or developing what he means by the rational pursuit of individual interest, and when introducing individual rationality in the first chapter, says only the following:

> When pursuing a non-cooperative strategy a rational agent seeks to maximize her utility; under conditions of uncertainty, she seeks to maximize her expected utility.[22]

Later in Chapter Two, Coleman refers to this as the "economic conception of rationality,"[23] thereby inviting us to fill out the conception of individual rationality basic to his approach using

21. *Id.* at 6.
22. *Id.* at 3.
23. *Id.* at 38.

the assumptions and beliefs about rationality usually accepted by rational choice theorists and economists. It is important for my purposes to spell out some of these assumptions and beliefs.

The most important of these assumptions is the conception of rationality as exclusively instrumental in function, serving interests that are subjectively defined. Rational choice theorists are normally unabashed Humeans, maintaining that the "basic" or "ultimate" ends of our actions are defined by non-rational elements of our psychology, for example, desires or emotions, and that these ends are not themselves subject to rational assessment.[24] On this view, only the subject can define what his interests are, and only those "motivated" ends of action that are means to basic ends can be rationally assessed, because only these ends are valued instrumentally as causes of effects desired for their own sake. Hence, only these ends are subject to cause-and-effect reasoning. Now Coleman does tell us he is not a pure Humean: He is prepared to accept that reason does have *some* ends that it directs us to pursue. For example, he argues that to claim (as rational choice theorists always do) that people ought to maximize utility (understood as preference satisfaction) is a way of attributing to them an end generated by reason. Albeit controversial, the example shows that Coleman is ready to part company with those who see reason as exclusively instrumental in function, although his commitment to the "economic" conception is sufficiently strong that one suspects he would assume that most of our ends are subjectively and non-rationally defined. Unfortunately we get no details of his precise position on this matter, and as I shall note later, precision on this matter is important in clarifying the nature of his justification. But clearly this is not a book written by an Aristotelian: When Coleman tells us that rational practices are those that satisfy the people's interests, by and large he takes those interests to be subjectively and non-rationally defined.

Coleman is also prepared to welcome arguments by rational choice theorists that it can sometimes be rational to constrain one's utility-maximizing behavior.[25] However, he notes that

24. For an introduction to rational choice theory, see THE LIMITS OF RATIONALITY (Karen Cook & Margaret Levi eds., 1990).

25. *See, e.g.*, COLEMAN, *supra* note 1, at 41.

these critics' arguments defend such "reasonable" behavior only insofar as that behavior is instrumentally valuable to the pursuit of one's interests—where that pursuit is evaluated using expected utility theory. Thus, he sees these arguments as indirectly supporting and presupposing the portrayal of human reason given by expected utility theory, a portrayal that is at the heart of his conception of justification.

Indeed, this same style of argument is roughly the one Coleman will use to defend legal and moral institutions: Although such institutions will place constraints on the pursuit of our interests, Coleman will defend them by maintaining that, properly understood, these constraints are rationally justifiable (only) insofar as they further the maximization of individual utility in the long run.

III. The Market Paradigm

How can this conception of individual rationality, when supplemented with collective and distributive conceptions of rationality, work to justify fundamental institutions of liberal democratic societies? Coleman explains that it can do so via a well-known argument known as "the market paradigm," which he is prepared to accept only after making some important modifications to it.

That justification begins with the first fundamental theory of welfare economics, which states that under conditions of perfect competition, rational utility maximizing strategies yield a Pareto-optimal outcome. This theorem implies that in a perfectly competitive economy, there would be no productive role for moral, political, or legal institutions, because no one would be in a position to benefit from such institutions, were they to play such a role. While these institutions could play a redistributive role, by determining *where* on the Pareto frontier the society should settle, they could not do anything to get the economy *to* that frontier. Hence, it would be irrational for an individual to participate in creating or sustaining such institutions if she wished them to perform any productive role.

As Coleman notes, it is commonly believed, on the basis of this argument, that moral, political, and legal institutions are therefore irrational in a perfectly competitive economy, and thus can only be justified when the economy is not perfectly

competitive, that is, when markets fail.[26] On this view, "moral and political institutions are schemes of cooperation designed to capture the gains created by the failure of cooperation. . . . *Rational cooperation is a solution to failed competition.*"[27] So, the argument concludes that rationality justifies legal or moral practices only because our world is such that competitive behavior fails to effectively serve our interests (which are defined, by and large, subjectively and non-rationally), so that we must accept constraints that force us to cooperate in ways defined by moral and political institutions. These forms of cooperation are therefore rationally justified only insofar as they are instrumentally valuable given our interests, and not for their own sakes.

Coleman argues that there are two reasons why the first fundamental theorem of welfare economics cannot be used to sustain this conclusion as I have stated it. First, even if moral and political practices are not necessary for productive purposes, implicit in the market paradigm argument is the fact that they can serve redistributive purposes. And if Coleman is right that redistribution is something that can be subject to rational definition, then institutions—both moral and political—that pursue rational redistribution can be rationally defined and defended, even in a perfectly competitive market. In particular, such institutions can implement and enforce what I will call "redistributive" norms, the definition of which arises out of the application of division rationality to the bargaining process.

Second, Coleman maintains (along with others)[28] that this argument completely neglects the way in which moral and political institutions are necessary in order to create a market and in order to sustain its functioning. In particular, such institutions must insure that force and fraud do not occur; unless this behavior is effectively prohibited, a perfectly competitive market is impossible. Perfect competition may not be cooperative, but it is nonetheless a state of affairs in which individuals accept what I will call "foundational" norms that lead them to refrain from a variety of behaviors that would make effective trading impossible, including murder, assault, fraud, extortion, and so forth. These norms are what make non-predative inter-

26. For a statement of this view, see GAUTHIER, MORALS BY AGREEMENT, *supra* note 4, at 21-59.

27. COLEMAN, *supra* note 1, at 33 (emphasis in original).

28. *See, e.g.*, Daniel Hausman, *Are Markets Morally Free Zones?*, 18 PHIL. & PUB. AFF. 317-33 (1989) (making this same point in criticizing Gauthier).

action among human beings possible and mandate that competitive behavior in a marketplace be non-coercive and free of fraud. Coleman argues that competition presupposes that there is wide-spread acceptance of such norms because, as he sees it, competition is itself the product of failed cooperation, so that its possibility presupposes that people have already accepted the foundational "moral" norms that make cooperation possible.

Therefore, Coleman concludes that the standard conclusion based on the market paradigm is simply wrong because it assumes all norms that would be instituted by a legal institution would be "productive," and neglects the way legal institutions can be used to apply and enforce distributive and foundational norms. So, even in a perfectly competitive economy, we would require social and political institutions to implement these latter two norms, and in a world such as ours, which is not perfectly competitive, they are also necessary to implement "productive" norms, enabling us to reach the Pareto frontier in situations where perfect competition is not possible.

To conclude, Coleman's way of reconstructing the market paradigm argument to justify moral, political, and legal institutions, taking into account all three norms, goes as follows:[29] A perfectly competitive market is neither necessary nor sufficient to create by itself all opportunities for mutual advantage or to solve all problems of cooperation. Norms, and the political institutions that enforce them, are therefore necessary not only because the market fails, but also because, even where it doesn't, they insure the market's operation (and indeed, produce it in the first place) and insure that the distribution of market resources is mutually advantageous. Hence, the norms that Coleman defends, and the institutions that put them into effect, are defensible only insofar as they are rationally justifiable given human interests.

But exactly how do they serve human interests? Coleman argues that all three do so insofar as they work to insure a *stable society*. Following Hobbes, Coleman argues that our interests are such that their satisfaction requires a stable society, and stability is purchased through markets and certain institutions (primarily legal ones) enforcing foundational, redistributive,

29. COLEMAN, *supra* note 1, at 67.

and productive norms that insure the market's effective operation in our world (where the productive norms also are necessary insofar as perfect competition is impossible). So his argument makes moral and legal institutions dependent upon their connection with a state of affairs, namely stability. And as Coleman appreciates, on his argument,[30] stability is not a value in and of itself, but is only contingently important given how human beings happen to define their interests. Were we glory-prone, war-loving, stability-shattering creatures, the norms Coleman defends and the institutions that realize them would have no appeal to us. But Coleman assumes (as all followers of Hobbes do) that our natures as persons tend to lead us to desire "peaceable, sociable and comfortable living."[31] And for the reasons he describes, it is rational to create and sustain moral and legal institutions, to the extent that they are instrumentally valuable in achieving that goal.

IV. Hobbes and Neutrality

Why defend the practices of a liberal market society in this way? That is, why insist that they are justifiable (only) in virtue of the fact that they are instrumentally valuable given our interests?

There are two basic reasons why someone might insist that political and legal institutions must be given a rational defense, in the fashion that Coleman describes.[32] There are what I will call "metaphysical" reasons for doing so, and there are what I will call "epistemic" reasons for doing so.

Metaphysical considerations can lead one to embrace a rational choice justification of social and political institutions insofar as one is convinced that moral justifications are in some fashion metaphysically suspect. There are a number of reasons why one might be dubious of justificatory appeals to morality.

First, one can be dubious of them if one is a complete normative skeptic, believing that *all* normative appeals presuppose the existence of inherently prescriptive entities that, in fact, do

30. *Id.* at 61.

31. Hobbes, *supra* note 3, at 216.

32. There are also motivational advantages to such a justification, insofar as it appeals to self-interest. Coleman himself discounts these advantages, however, maintaining they do not capture what is most important about the argument—namely, its solution of certain epistemic problems. In order to concentrate on the latter, I will leave aside here his dismissal of motivation as a central worry in political theory.

not exist. For example, one such skeptic, J.L. Mackie, notes that such entities have never been discovered by science and are, in any case, too "queer" to be real. While such a skeptic can and should admit that human beings do appeal to norms in their daily lives, he will insist that these norms are merely psycho-social phenomena, invented by human beings for a variety of reasons, and whose authority over their lives is neither objectively necessary nor inevitable—despite the representations of those who commend the norms to us. However, normative skeptics such as Mackie and Gilbert Harman still believe that justifications of moral and political institutions are possible based on rationality, because these skeptics hold that, in the end, such appeals can be reduced to matters of fact fully analyzable using the best available science. Such skeptics, therefore, would embrace the rational choice defense of the law Coleman has outlined insofar as they believe not only that these institutions actually are rational given our interests, but also that the norms of reason to which such a defense appeals can be reduced to matters of fact.

But Coleman is not a normative skeptic and (sensibly, in my view) denies that a reduction of rational norms to matters of fact is possible. On his view, rationality is itself a substantive and not merely a formal notion, the defense of which itself rests on normative notions that cannot themselves be grounded in fact.

So, should we consider him a partial normative skeptic, that is, one who accepts the reality of many norms—including norms of reason—but denies the reality of moral norms? Such a "moral skeptic" accepts that rational appeals cannot be reduced to matters of fact, but insists that norms of reason are real, even while denying that norms of morality are anything other than psycho-social phenomena. We may think we "know" what is good or right, says this skeptic, but there is no fact of the matter about what is good or right. Such a skeptic would therefore support a rational choice justification of the state insofar as the defense appeals to what he takes to be real norms of reason, and not the illusory norms of morality.

This form of skepticism is not easy to defend, for if norms exist, why deny the existence of moral norms? Most skeptics have objected to normativity *per se*, and not the particular content of (reputed) objective norms. But in any case, Coleman

rejects this defense of his method also, making it clear in a footnote that he is not espousing his justification of the law because he has qualms about morality:

> The argument I am advancing is compatible with skepticism but does not require it. For disputes among citizens about fundamental values may in fact have a correct resolution, but as long as people disagree about what the truth is, a scheme of cooperation that requires agreement on that truth as a condition of social intercourse may well be ineffective and undesirable. It is not so much moral skepticism that justifies the market within the form of rational choice liberalism I am exploring as much as it is the concern for stable social practices.[33]

Thus, as Coleman makes clear in what follows, it is primarily for *epistemic* reasons that he commends the rational choice justification of a market-based liberal political regime. Coleman believes moral and political institutions are necessary because, whether or not there is a fact of the matter about what counts as good or right, in our world there is enormous disagreement about such matters. So, even if moral norms exist and are in principle norms that we can know and follow, the disagreement in our world about the content and authority of such norms indicates that human beings do not have clear and reliable epistemic access to such norms. Moreover, even in situations in which people do believe they know what the norms require, they may have insufficient information or they may be in conditions of uncertainty, such that applying the norms is difficult and subject to controversy. Thus Coleman insists that

> the form of rational choice political theory I favor believes that the central problems facing rational agents in a state-of-nature is not defective motivation or the tension between individual and collective rationality. Rather the core problems are *epistemic*; they are problems of uncertainty and incomplete information.[34]

For Coleman, metaphysical worries about norms and morals are almost irrelevant to politics and markets: Whether or not norms are more than psycho-social phenomena, we quarrel about them and have trouble getting enough information about our world to agree about how to act on them.

The cure for these epistemic problems in Coleman's view is

33. COLEMAN, *supra* note 1, at 72 n.22.
34. *Id.* at 73 n.26.

the creation of a market-based liberal society, operating according to certain legal practices that he will defend. And he believes he can sell us on the idea of such a regime as a "cure" by appealing to interests that he takes to be universal, and a conception of rationality that virtually all of us share and which commends that regime as a way to satisfy those interests.

Initially this appears to be a deeply Hobbesian justificatory strategy. Consider Hobbes's defense of the commonwealth: There are, he insists, moral facts, which he calls "the law of nature," and which he considers authoritative over our lives, but nonetheless the law of nature is, in his words, "of all laws the most obscure; and has consequently the greatest need of able Interpreters,"[35] so that a political regime must be created to resolve the controversies and establish peace. Whereas Hobbes talks about peace, Coleman commends stability. Liberal market societies are, in his view, a means to producing a stable social regime, and insofar as such regimes are taken by him to advance our interests, they are instrumentally valuable, and thus rationally justified. Moreover, just as Hobbes defended his conception of a sovereign-based commonwealth by appealing to a conception of reason he thought was universal, Coleman defends the practices of a liberal market society on the basis of a rational choice justification that he takes to be common currency in that society, and for that reason capable of being a justificatory base that is neutral between competing moral and religious views that prevail in contemporary pluralist societies.

Let me dwell on this second point for a moment. Coleman is making two claims. First, he wants to argue that the kind of practices he is defending—that is, market-based economic practices buttressed by components of the legal system that facilitate its operation—will generate stable and mutually advantageous interaction in contemporary pluralist societies in which controversies abound regarding moral matters.[36] Second, he wants to argue that the *way* in which he defends these practices—that is, the rational choice justification—builds from common assumptions and interests in these pluralist societies, so that, despite the abundant disagreement about moral matters in these societies, all will come to see that these practices are mutually advantageous, hence instrumentally valuable,

35. HOBBES, *supra* note 3, at 322.
36. COLEMAN, *supra* note 1, at 59.

hence justifiable.[37] So, on Coleman's view, not only the practices themselves, but also the rational choice justification of those practices, contribute to a stable society conducive to the satisfaction of preferences in modern pluralist societies.

Now superficially Coleman's argument bears some affinities to that of Rawls's defense of what Rawls calls an "overlapping consensus" on matters of morals and law to govern pluralist liberal democracies. Tolerance demands, according to Rawls, that the fundamental charter of such regimes not reflect or be justifiable to only one kind of moral or religious viewpoint in the pluralist society. Arguably, Coleman's way of defending various economic and legal practices would be a way of generating political structures, as well as a defense of those structures, which all could agree upon, despite their differing moral beliefs. However, Rawls would likely accuse Coleman of being too "Hobbesian" in his construction of the overlapping consensus. According to Rawls, one shouldn't defend liberal practices on the basis that they constitute a good *modus vivendi* for a society that is inclined to divisiveness and conflict because, if this conflict were ever resolved, there would be no reason for liberal practices—a result that is unsatisfactory to committed liberals.

Coleman might respond to Rawls as follows: Any form of political association is dependent upon the prevailing interests of human beings and the prevailing conditions of their social organization. Thus, there can be no *one* "right" way to organize a society, and liberal modes of organization therefore cannot be defended as "right" unless they are instrumentally valuable given those interests and conditions. Consider Coleman's remarks at the end of Chapter Two, in which he asks us to imagine

> those whose institutions we seek to understand and evaluate as trying to organize social institutions. With respect to this question, they see themselves as rational cooperators. As rational cooperators, it is open to them to express their commitment to cooperate in a variety of different institutional forms: in markets, in political processes, etc. The forms of social organization that are rational for them will depend on a variety of empirical factors, from the size of the geographic area they occupy to the personal histories and cultures they share. No substantive conclusions about the reasonableness

37. *Id.* at 61.

> or the rationality of the ways in which individuals organize their collective lives together can be derived from an abstraction, from, in particular, the ideal of rationality alone.[38]

So for Coleman (as for Hobbes), working out a rational social *modus vivendi* is what social and political organization is all about; there is no such thing as a political methodology being "too Hobbesian." And this means that by its very nature, justification must be contextual, taking into account the facts of culture and personal preferences to which rationally constructed institutions will have to answer.

However, there is one obvious way in which Coleman's outlook is not Hobbesian: The political conclusions he draws are nothing like Hobbes's own. Stability is best pursued, according to Coleman, through liberal institutions, and not through the creation of an absolute sovereign unlimited by liberal constraints, and under no obligation either to respect or foster the divergence of views that exists in modern pluralist societies. Can Coleman argue that the *only* reason he rejects the Hobbesian alternative is that liberal institutions foster stability better than Hobbesian ones?

In fact he never makes such an argument, and generally ignores the Hobbesian prescription for peace and stability. But isn't this dismissal based not so much on the idea that the Hobbesian prescription is an inferior method for pursuing stability as it is on the idea that, whether or not Hobbes's cure would work, such a cure is morally unacceptable? The "advantages" of market and liberal modes of organization are partly moral, and by the end of Chapter Two Coleman even admits as much:

> It would be foolish to claim that the only value of markets is the one I set out above: namely, to maximize social intercourse without raising questions about the scope and extent of any underlying consensus, thus contributing to social stability. Markets have other values, values that are broadly speaking both rational and liberal. Free markets embody the liberal value of autonomy. . . .[39]

Philosophers will recognize this "liberal" value as a moral one. Moreover, Coleman appears to agree with defenders of liberalism from Jefferson to the present that the tolerance inherent

38. *Id.* at 63.
39. *Id.* at 65.

in such a regime is not only productive of peace but also morally required in its own right, insofar as it promotes individual self-determination and liberty.

But in the end Coleman seems to accept the idea idea that moral norms play a role in his justification of liberal political institutions because, by Chapter Three, he admits that there are some moral and institutional practices of a liberal market society such as our own the best justification of which is *not* one based on rational choice. Insisting that philosophers should use that reductive base appropriate for understanding normative practices they wish to understand, he goes on to say:

> It is ludicrous to believe that all of the law in liberal democracies is designed either to make markets possible or to rectify for their shortcomings. The Constitution of the United States is not void of economic import or impact, yet it is probably more useful to view it as articulating the basic framework of a political community. It expresses the fundamental norms and political values that define the American political culture.[40]

So, he admits that some of the norms that define and govern our political and legal institutions admit of an "expressive" rather than a rational choice justification (although he never tells us precisely what an "expressive" justification is, or even why "expression" is a form of justification at all).[41] He thereby rejects the idea that political justification is *exclusively* a matter of reason although, at least arguably, the components of a liberal regime he is most interested in, for example, markets, contract law, and tort law, are best justified by appeal to reason alone.

However, I now want to argue that even Coleman's conception of reason, and the idea that certain components of our political life are best justified by an appeal to that conception, are both products of covert moral and metaphysical assumptions about the nature of persons. This is so for two reasons.

First, consider that the nature of practical reason is something about which people in a pluralist society can reasonably

40. *Id.* at 69.

41. For example, why should we believe that, say, the First Amendment is a justifiable component of our political society in virtue of the way it "expresses" American culture? Why it *ought* to be part of American culture is a question calling for justification of the norm itself, and Coleman has little to say about how such a question should be answered.

differ. The (roughly) instrumental conception of reason that Coleman assumes is not obviously right, even if it has been philosophically popular. And if, as Coleman believes, expected utility theorists are actually attributing to people a goal other than a goal set by their own preferences when they demand that rational people maximize utility, then isn't such an attribution motivated by some kind of an ethical norm defining human good? And shouldn't we assume that such an attribution can be controversial—perhaps even rightly questioned and rejected? We, therefore, have good reason to believe that this conception of reason cannot be considered commonly shared among members of a pluralist society, and thus cannot be taken as a neutral reductive base for justifying political practices. Still *it might be right*, and thus the base we should insist upon; and if, like Coleman, we believe this, our insistence rests not on what we think, in fact, *is* the common ground, but what we believe *ought to be* the common ground.

Second, can't we assume that the priority of individual rationality in Coleman's reductive base is itself something that is motivated by a normative conception of the importance of the individual over the group? As I've noted, the way in which Coleman uses the contractarian device shows the priority of individual rationality over collective rationality. But that device also suggests that this priority is simply a function of his conviction that all political justifications must start with the individual, and not with the group. The deep-seated belief in the priority of the individual is a central component of liberal thought, and not universally shared. Those who call themselves contractarians are united in opposing utilitarian or communitarian beliefs in the justificatory priority of the community, and their appeal to a contract is a way of expressing their conviction that the individual is where political justification must start. Hence, Coleman's whole style of justification betrays adherence to a normative belief that is characteristic of someone committed to liberal moral values and potentially controversial in a pluralist society.

Of course, such ideals may have a *better* chance of knitting together a diverse population than any non-liberal contenders (something I actually believe). But the fact is that they are normative ideals, and not only normative but moral, so that insofar as Coleman's reason-based defense of certain political practices

assumes them, that defense rests both on rational *and* moral norms. Moreover, commitment to these norms is, in fact, not universal, so that they cannot provide a neutral justificatory ground for certain political practices. To pretend, therefore, that this method of justification will automatically be stability-enhancing in a pluralist society is to ignore the way in which this method is motivated by deep-seated and controversial moral and metaphysical commitments that, in the past, many liberals knew they could not take for granted and for which they were prepared to fight.

Let me make clear that by giving these arguments I am not asking Coleman to give up, or even modify, his reason-based, individual-first justification, nor the norms upon which such a justification rests; indeed, I accept those norms and like that style of justification for at least some social and political practices. Instead, I am merely asking him to recognize that he and I and, indeed, all liberals, want to see our society operate on *our* liberal terms, and therefore are committed to *eschewing stability* to the extent that we must do battle to insure that these liberal terms, and the reason-based arguments that support them, actually prevail.

V. Kant and The Primacy of Moral Norms

In the preceding section, I have argued that Coleman's rational choice style of justification of certain liberal institutions is motivated by certain normative, non-reason-based beliefs. In this section I want to argue that, without appearing to realize it, Coleman *supplements* his appeal to norms of reason (and the non-rational norms motivating them) by subtly introducing into his argument moral conceptions of the worth and equality of persons. Moreover, I will argue that the contract device is actually the vehicle for the introduction of these conceptions.

Coleman calls the hypothetical contract "ideal," but he does not specify the way in which it is ideal, except for noting that, unlike in real life, all the contracting parties are "fully rational." But what does that mean? Does it mean only that they would never make mistakes in cause-and-effect reasoning, or in logical and mathematical reasoning? Or does it also mean they have full information, such that they know precisely how to achieve the ends that they seek? Or does it also mean that (as

Aristotle would require) all their ends are themselves "rational," that is, the right ends to have?

We get no answers to such questions: If Coleman were to remain a pure instrumentalist, he would have to accept either option 1 or option 2. But, there are reasons to worry that neither is good enough, for each would allow into the contract other-regarding interests that could be either malicious (thus skewing the contract "unfairly" against those who were hated) or beneficent (thus skewing the contract "unfairly" in favor of those who were loved). It is instructive to note that even Gauthier, one of the most Hobbesian of recent contractarians, cleanses the preferences of the parties in his contract, so that they are "non-tuistic," that is, self-concerned, doing so (as I have argued elsewhere)[42] in order to insure that neither form of unfairness results.

Now perhaps Coleman would deny that any such cleansing would be necessary, on the grounds that the ideal contract must not be so removed from reality as to yield results that strike the real-life counterparts of the contracting parties as irrational. But I will now argue that he simply cannot allow into the contract all of the preferences people happen to have, because the contractarian methodology as he uses it presupposes that the parties to the ideal contract accept and act upon certain normative beliefs about the equal worth of persons, which many real people don't have, and which play a role in defining the ideal contractors' preferences with respect to one another.

Consider that in a theory of rational choice taking preferences as subjectively defined, two kinds of ends of action must be distinguished: That is, "basic" ends of action and "motivated" ends of action, where the latter are ends that have been formulated (one hopes through the correct use of reason) as means to the achievement of the former sort of ends, which are themselves unmotivated.

Therefore, on this theory of rationality, a human being can be connected with or related to an end of action either because, as a matter of fact, she happens to be, in and of herself, a "basic end" for a person (for example, because she is loved, or liked,

42. *See* DAVID GAUTHIER, MORALS BY AGREEMENT (1986). For my analysis of Gauthier's conception of the ideal contract, see Jean Hampton, *Can We Agree on Morals?*, 18 CAN. J. PHIL. 331-56 (1988); *see also* Jean Hampton, *Feminist Contractarianism*, *in* A MIND OF HER OWN (L. Antony & C. Witt eds., 1992).

or admired), or because she is perceived as instrumentally valuable for a person in virtue of having some skill, talent, or object. Few of us have positive feelings, generating positive preferences, toward *all* human beings; when such preferences do not exist, it would seem that, on this view, the only kind of value a person can have for us is *instrumental*, such that we perceive that we can use them in some way to benefit our interests. Coleman's claim is that people's ability to benefit us in a scheme of cooperation is such that it is rational for us to engage in a variety of cooperative and competitive practices with them; the content of some of these practices he specifies, for example, when he discusses contract and tort law.

But what if some people have no instrumental value for you at all? Why bother with them? Why not exclude them from the social charter? More ominously, why respect anything about them? If they appear to be in the way of your plans (for example, they live on a piece of territory you want), why not simply drive them off, and if they resist, why not kill them if you have the means to do so? In Nineteenth-Century California, white settlers consciously strived to exterminate native Americans, as a way of seizing land while maximizing their own safety. If, as Coleman sometimes claims, justification is a matter of reason alone, and reason has a merely instrumental function serving the interests we happen to have, then, given the interests of Nineteenth-Century white settlers, such a practice could be perfectly rational for them, and thus one that the social and legal institutions of the white settlers would reasonably endorse and encourage.

Consider another example: What if one group of people decides that another group of people is instrumentally valuable, but socially inferior, and therefore not deserving of equal treatment? This is the view that, for example, American white slave owners took of their black slaves. The white master perceived his black slaves as instrumentally valuable *in the way that*, say, his beasts of burden were instrumentally valuable. Hence, he would see no reason to conform to what I have called "foundational" norms precluding certain kinds of treatment (for example, coercion, rape, theft) for the reasons Coleman gives. "Of course," he would say, "I can benefit from interacting with these people, but these are not the *sort* of people whom I must respect in the way that these norms detail, because they are my

natural inferiors, rightly subjugated to me given their nature, and thus more like animals than like white people. Insofar as they are instrumentally valuable I should not kill or badly injure them, any more than I should not kill or injure my best milking cow or my strongest draught horse; but treat them equally and with respect? Grant them property rights? Don't be ridiculous!" What I mean to suggest using this example is that given the kinds of beliefs and interests real people have had, and continue to have, Coleman's norms of reason are not sufficient to justify the foundational norms precluding "force and fraud" that he supports, and thus the forms of cooperation those norms require. Just because a human being has instrumental value for you does not require that you treat such a person with respect. It is simply false that human beings can only realize instrumental gain from interacting with one another if they conform to norms requiring egalitarian treatment; there can be mutual gain realized in a world in which, nonetheless, there is not mutual respect.

Now Coleman would categorically reject the treatment meted out to the "inferiors" in both examples. But, that rejection cannot be based on the fact that such treatment is irrational given people's interests, because in the examples that just is not true. Instead, his rejection must be based on certain *moral* beliefs precluding such forms of treatment no matter whether they are rational or not, the most important of which is the belief in the equality of all persons, such that no one can be taken to be a "natural slave," naturally and rightfully subordinate to people who are their natural superiors.[43] And one can actually find Coleman's support for this belief by looking at his conception of the market: The market, as Coleman understands it, is an institution that operates between and among *all* human beings in a community, all of whom are taken to be the equal of one another. (Indeed, one way of showing, in previous centuries, that women were inferior to men was to severely limit their participation in the marketplace, for example,

43. Although I cannot defend this claim adequately here, I believe Hobbes's contract idea had these notions implicit in it also. For example, Hobbes denies the possibility of real inferiority in view of what he takes to be our rough equality. *See* HOBBES, *supra* note 3, at 183-88. But that equality is something abstract rather than physical, and in any case is not something in which every society has believed. In those societies that have eschewed such a belief, non-market forms of interaction are commonplace and thought to be justified.

by precluding them from holding property.) So, Coleman isn't merely supportive of any kind of market; he is commending to us *a certain kind of market*, one that people in other places and times did not allow, given their interests and beliefs.

Moreover, we know that Coleman rejects the treatment meted out in these examples because of the way in which he uses the hypothetical contract as a justificatory device: His approach using that device *assumes* that people are equally important and rightfully included in the corrected market paradigm. Everyone is taken to have instrumental value, *and* no one is taken to be sufficiently inferior such that he is excluded from being a participant in the market—or in the contractual justification of its operation.

It, therefore, appears that Coleman's justificational approach assumes certain normative beliefs—in particular, that people are, in a political and social sense, equal, such that no one can be taken to be superior to, and thus capable of subordinating (either politically or in the marketplace) another person or group of persons, and that each person is owed a certain kind of respect precluding a whole range of disrespectful (and subordinating) behaviors. These normative beliefs limit and constrain his appeal to reason: They are not justified *by* the rational approach; instead they form part of the justification *for* the kind of rational approach he advocates, in which *everyone's* interests are important, and in which legal practices must be justified as mutually advantageous to everyone in the society.

So now we see how the contract device in Coleman's method contributes something more than the three principles of rationality he articulates. That device is not merely a way of marshalling and applying these three principles, insofar as it requires that we think of legitimate institutions as ones that *everyone* could agree upon, were they rational. It expresses the normative idea that no person in the society can be left out of the decision about how to arrange the cooperative scheme. Each participant in the contract process is equally important and has the same rights and powers as anyone else within that process. This is not to say that, as Coleman understands the agreement process, the three principles he takes to animate it will result in a decision on legal and political rules that will benefit each person equally; given the diversity of people's interests that do much to define their relative bargaining power, this is highly

unlikely. The point is that, as Coleman understands the contracting process, each person's interests will be taken into account in the same way, according to the same rules. No one is barred from participating, and no one is understood to be more important than others, such that her interests (or the interests of people of her "type") are more heavily weighted than others' interests in the contracting process.[44]

Thus, Coleman's hypothetical contract introduces critically important moral components to the conception of what it means to justify a social and political scheme, making it importantly false that Coleman's approach treats social and political justification as a matter of reason alone. His appeal to reason is always made subject to the assumption that each person can and should receive equal respect and consideration by virtue of being a human being. Now admittedly, Coleman has argued persuasively that *if* people's subjective preferences and beliefs are a certain way, then these practices will also be instrumentally rational for them. So, he has argued that there is a kind of limited convergence of the moral and the rational, but this convergence assumes that the interests dictating what is rational themselves satisfy the fundamental constraints of morality.

So interpreted, however, Coleman is a good Kantian contractarian. I have argued elsewhere that there are two kinds of social contract theories, the first based on Hobbes, the second based on Kant. Ostensibly Coleman's argument belongs in the Hobbesian camp. But when one looks closely at the character of Coleman's reasoning as he appeals to the contract, he is just as interested as Kant was in using the "idea" of the "Original Contract" to determine which political policies are just. Consider how Kant appeals to the contract device in the following passage:

> Yet this contract, which we call *contractus originarius* or *pactum sociale*, as the coalition of every particular and private will within a people into a common public will for purposes of purely legal legislation, need by no means be presupposed

44. Even though Coleman's method implicitly incorporates the assumption that each member of society is equal, neither he nor any other user of this method has been able to use it to tell us *who* the members of "a society" are. "Within a society" no human being can be excluded, but who counts as "within a society"? How do we mark out the borders of political participation? His contract method also assumes that this question has been already answered in some satisfactory way. Hobbes himself was not so sanguine that this question admitted of any easy and obvious answer given the complexities of his political world. It is a question that is even harder to answer today.

> as a fact. . . . It is rather a *mere idea* of reason, albeit one with indubitable practical reality, obligating every lawmaker to frame his laws so that they *might* have come from the united will of an entire people, and to regard any subject who would be a citizen as if he had joined in voting for such a will. For this is the touchstone of the legitimacy of public law. If a law is so framed that all the people *could not possibly* give their consent—as, for example, a law granting the hereditary *privilege* of *master status* to a certain class of *subjects*—the law is unjust. . . ."[45]

As I interpret this passage, when Kant asks "what could people agree to," he is not trying to justify actions or policies by invoking, in any literal sense, the consent of the people, given their actual interests. Only the consent of *real* people can be legitimating, and Kant talks about hypothetical agreements made by hypothetical people. But he does believe these make-believe agreements have moral force for us, not because we are under any illusion that the make-believe consent of make-believe people is obliging for us, but because the process by which these people reach agreement is morally revealing. So like the Hobbesians, the Kantian's contract talk is really just a way of reasoning that allows us to work out conceptual answers to moral problems. But, whereas the Hobbesians' use of contract language expresses the way in which moral and social policies should be rationally defined and defended, based on the interests people happen to have, the Kantians' use of the contract is a way of expressing the idea that moral and social policies should be both rational *and* respectful of each person's equal, autonomous nature. For Kant, what is moral should also be rational; but what is rational may not be moral, and thus he insists that our social and political life should insure that rationality prevails within moral constraints—which is in fact also Coleman's view. And Kant insists that moral constraints are generated by the equal importance each of us has as ends-in-ourselves, rhetoric that fits well with the assumptions underlying Coleman's contractarian methods. Indeed, it is striking that Kant illustrates the contract method by showing how that approach rejects proposals that would create a system of nobility and privilege, a system that denies the kind of equal worth he believed in.

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45. IMMANUEL KANT, *On the Common Saying: "This May be True in Theory, But It Doesn't Apply In Practice," in* KANT'S POLITICAL WRITINGS 63 (Hans Reiss ed., 1970).

Coleman is not a theorist who has ever been comfortable with Kantian language or theoretical categories, so perhaps he would welcome the following Lockean way of developing the same point. Consider that at one point in his discussion of contract law, Coleman notes that "contracting requires property rights."[46] But this is true not only in real-life, legally enforced contracts, but also in hypothetical ideal contracts: Both sorts of agreement presuppose that the parties have a common understanding of and respect for what each is entitled to offer to the others, and a common understanding of and respect for what each is precluded from seizing from the others. Thus, when Coleman appeals to a contract in his justification of certain political practices, he is not merely appealing to a certain set of principles of reason; he is also importing into the discussion certain rights that this original contract must presuppose, and that govern and constrain the operation of those principles of reason. We can summarize these rights by saying that in his social contract, each person has rights over himself and his traits, characteristics, and skills. But, as Coleman also points out in his discussion of tort law, "the content of rights is given by norms,"[47] and we can specify the normative assumptions behind the attribution of these rights as follows:

1. To attribute to people the right of self-ownership is to accept the normative belief that no individual is naturally subordinate to any other person, and thus to believe (and require that others believe) that each of us is the "natural political equal" of any other person, and the natural slave of no one. It is for this reason, and in *this* sense, that each of us can be said to "own ourselves."

2. Rights to self-ownership also follow from the normative belief that political practices must ultimately be to the advantage of each individual; no person can be used to advantage others when she herself is disadvantaged, because such practices express her natural subordination to the group, a subordination her right to self-ownership precludes.

3. Finally, to accept that each of us is the owner of ourselves involves requiring of us that we respond to one another *as* self-owners, and the content of such a response is given by certain norms of respect and equal treatment. (And I would argue that

46. COLEMAN, *supra* note 1, at 246.
47. *Id.* at 467.

specifying the content of these views is a way to explain what it means to treat people as ends in themselves.)

What makes the contract device so powerful and appealing to many of us in moral and political theory is the way that it can be developed to "picture" this equal and intrinsic human value, and thus call it to mind effectively in the context of trying to solve a moral or political problem.[48] To say that a policy must be "agreed to" by all is to say that in formulating a just policy, we must recognize that none of us can take only herself to "matter" such that she can dictate the solution alone, and also that none of us is allowed to ignore or disregard her own importance in the formulation of the right policy. Therefore, the self-interested perspective each person takes when she uses the test to assess a relationship should not be seen as some kind of arrogant selfishness but as a way of symbolizing the proper self-regard each of us should have in view of our worth, or, as Kant would put it, in view of the fact that we are "ends in ourselves," possessed of *intrinsic, non-instrumental value.* However, by requiring that a policy be one to which we could *all* agree, the contractarian doesn't merely ask each of us to insist on our own worth, but also to recognize and come to terms with the fact that others are just as valuable as we ourselves.

So, without being an explicit theory of how we are valuable relative to one another, the hypothetical, ideal contract brings the appropriate concept of human value to bear on the problems we are addressing. In some sense, therefore, one could claim that, as I understand it, the hypothetical contract is still a "mere device," insofar as it is a mere vehicle for introducing not only conceptions of reason but also other moral conceptions, such as the conception of human worth.[49] But, if it is a device, it is nonetheless a remarkably complex and fruitful one, conveying to us in succinct form the guts of two powerful normative theories, that of reason and that of morality. Indeed, replacing that device with the principles it suggests might not be possible just yet, insofar as (at least arguably) we have yet to fully comprehend the moral norms and beliefs suggested by the contract imagery.

48. These ideas are more fully developed in Hampton, *Feminist Contractarianism*, *supra* note 42.

49. The hypothetical contract also introduces other normative conceptions that I will not address here.

VI. Conclusion

At one point in the book Coleman makes the following remark about liberalism:

> Liberalism stands for the demystification of authority and for the celebration of the power of reason. The rational choice approach to political justification is a form of liberalism in which reason is characterized narrowly as rational decision. For liberalism generally, to justify is to show the legitimacy of authority by an appeal to reason; for the rational choice theorist, to justify is to show the legitimacy of authority by appeal to *rational* interest.[50]

Perhaps by "rational interest" Coleman meant no more than "interests informed by accurate causal information about means to desired ends." But, I have argued that Coleman's method essentially "rationalizes" our interests and beliefs in a much deeper and fundamentally moral way. Only by so doing could he hope to generate a "rational choice" justification of political practices that was recognizably liberal.

If Coleman were to acknowledge explicitly the moral starting points of his rational choice method, he would, I believe, be able to deepen his analysis of the law, and particularly his conception of "corrective justice" at the base of tort law, a deepening he admits to be necessary insofar as he calls his own theory a mere "analytic structure" of the law of torts, with many blanks left to be filled in.[51] But, I would argue that the further specification of the justice after which a civil court strives must be informed by the idea that each person is the equal of every other, an autonomous "self-owner" requiring a certain kind of moral respect. I would propose that Coleman's present conception of wrongs and wrongfulness, of the obligations of the tortfeasor to the victim, of the importance of *fault* in understanding the operation of tort law, and of the remedies that the court should institute, are connected with this conception of

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50. Coleman, *supra* note 1, at 16-17. (emphasis added)

51. Thus he writes in Chapter 18:

> Frankly I do not have a fully satisfactory substantive theory of wrong and wrongdoing, that is, I do not have a theory I am prepared to defend that would pick out exactly which acts are wrong and explain why they are, nor do I have an underlying theory of wrongdoing. I therefore lack a complete substantive theory of corrective justice. My goal here is to get the analytic structure of corrective justice right, to identify what blanks need to be filled in by substantive principles, and to suggest some of the ways in which they might plausibly be.

Id. at 474.

the person—particularly insofar as the notion of reciprocity is important to his analysis. And consider what is perhaps the biggest "blank" in his formulation of the theory: It fails to tell us *why* justice demands that a wrongful loss be corrected by the one who caused it. Granted that, as Coleman details, we agree that it should; nonetheless, why does such a loss (assuming we are able to give it concrete specification) demand correction? (This is the correlate, in tort law, of the following common question asked by those who commend a retributive justification of punishment: "Given that we agree that wrongdoers deserve punishment, nonetheless *why* must a wrong demand *that* kind of response?") A thicker, more Kantian theory of Coleman's conception of corrective justice might be able to generate a plausible answer to this question. For example, one might argue that treatment of another is wrongful when it involves the using, and thereby the degrading, of someone to the status of a mere means, so that when the law requires that a tortfeasor correct losses resulting from such treatment, it is thereby requiring that he undo the implications of his instrumental treatment of the other, and thereby (at least to some extent) undo the degradation of such treatment.

I have attempted something like this style of argument as a way of understanding retributive justice;[52] whether or not it can be used to illuminate corrective justice remains to be seen, and in any case is not something I can attempt here. My aim in this paper has been merely to interest either Coleman, or some morally-minded student of his book, to realize that developing the moral foundations of Coleman's program is necessary if that program is to be completed and its assumptions properly explored.

In addition, it is a program worth completing. I have spent so much time in this paper on the over-arching justificational theory motivating Coleman's middle-level theorizing because I have so frequently found the results of that theorizing highly plausible. I believe careful philosophical consideration of the

52. I agree with Coleman that retribution is a way of "annulling a wrong," but I have argued that one must use Kantian ideas to understand this annulment. *See* Jean Hampton, *Forgiveness, resentment and hatred & The retributive idea, in* JEAN HAMPTON & JEFFRIE G. MURPHY, FORGIVENESS AND MERCY (1988); Jean Hampton, *A New Theory of Retribution, in* LIABILITY AND RESPONSIBILITY (Raymond G. Frey and Christopher W. Morris eds., 1991); Jean Hampton, *An Expressive Theory of Retribution, in* RETRIBUTIVISM AND ITS CRITICS (Wesley Cragg ed., 1992).

foundational normative assumptions of Coleman's "architectural" analysis of certain social and legal practices will lead us to look in very promising meta-ethical directions (and indirectly contribute to our meta-ethical theorizing) as we strive to complete it.