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FAIRNESS IN AMERICAN POLITICS AND CULTURE

A Dissertation

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the

degree of

Doctor of Philosophy

By

JERRY E. HERBEL, JR.
Norman, Oklahoma
2001

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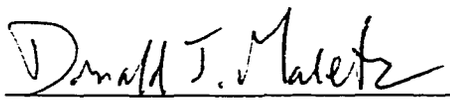
A Dissertation APPROVED FOR THE
DEPARTMENT OF POLITICAL SCIENCE

BY



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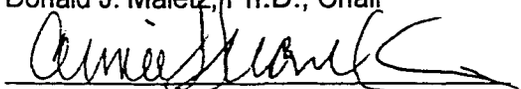

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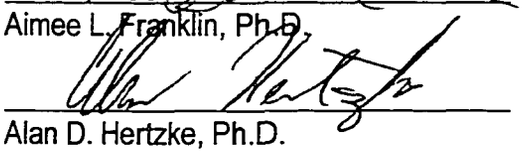

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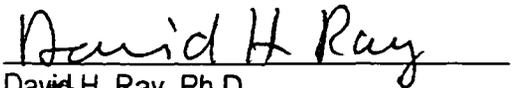

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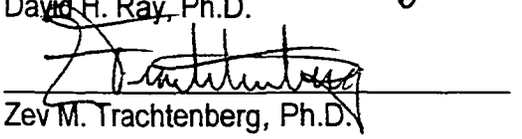

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CHAPTER 1

Introduction

The result of the American struggle to realize the full promise of a more perfect union has been the construction of political and social institutions which are increasingly fair. When viewed against an historical backdrop, the progress made in building a fairer life for citizens in Western democracies has been remarkable. Ancient barriers of race, religion, age, gender and disability have been gradually pushed back as the edifice of fair laws, procedures and institutions has expanded. But many believe this effort, great as it has been, is not yet complete. The reforms of the past half-century, for instance, may have offered solutions to obvious unjust and unfair practices, but have left the direction of further reform less clear. This is at least partly because of widespread disagreement as to precisely what fair public policy consists of. In order to continue the already impressive progress made in creating fair institutions, greater clarity about American beliefs about what the term "fair" means is needed.

In this dissertation I hope to clarify the meaning of the term fairness. Because this project is an attempt to understand a word as it manifests itself in politics and public policy, it is more than an etymology. It is an attempt to draw meaning both from what we can observe in political action and what we can glean from the work of political theorists. As such, it will include an analysis of how the term is used in everyday life, how

concerns for fairness affect public policy and how theorists have understood it as a construct describing a facet of political morality.

Giving a common and supposedly well-understood term such a lengthy treatment as this may seem unnecessary. But clarifying the meaning of fairness, if it can be done, could illuminate the conflict in so much of our public policy designed to advance the cause of social well-being. This alone would merit significant analysis. It could also advance our knowledge of how fairness is related to core democratic principles like justice and equal treatment. Further, if connections can be found between what lawmakers, judges, administrators and political theorists believe about fairness, we will know more about how issues of political morality are worked out in practice. We may thereby gain a better understanding of the age-old question of how theory and practice are related.

Perhaps the simplest reason this analysis is needed is because arguments about fairness abound in the public square even though its precise meaning is seldom debated. Consider, for example, the contested Florida presidential vote recount. Advocates for Al Gore asserted that only a careful hand recount of all Florida ballots could produce a fair result. In arguing before the Florida Supreme Court on behalf of Gore, David Boies asserted that it would be unfair not to conduct a hand-count of all ballots in all Florida precincts before declaring a winner. It would be unfair, he argued, because all ballots would not receive the same careful scrutiny to determine voter intent.[1] This understanding of fairness appears to be based on a desire for equal treatment, where each ballot, and by extension each voter, receives the same consideration in the same manner. Thomas L. Friedman bolstered Boies' argument, calling the Gore proposal to hand-count

[1] "Arguments Before Florida's Supreme Court on the Presidential Recount," *The New York Times*, 21 November 2000.

every ballot cast in four Florida counties a "fair proposal" because it constituted an open and straightforward attempt to produce a legitimate president.[2]

Other commentators focused on the fairness of the public discussion about the contested ballots. Editorial writers for *The Washington Post* argued that it was important to keep the contest in the political arena where open discussion would produce a result "that most people will accept as legitimate and fair."[3] Here, fairness seems to be related to procedural concerns, greater fairness being the product of greater openness. By this proposal, partisans would conduct the debate through the news media; they would assert and rebut in public using simpler language than the language typically used in court. As a result, the final outcome could be considered fair no matter who won because the reasons for the outcome would be made clear. But David Broder remained skeptical that there was much hope of a transparent process with a fair outcome in the political arena because the two camps were overcome by ambition. He wrote that "the candidates for the highest office have been discerned – correctly, I am afraid – as being more interested in exploiting the gaps in the election system for their own advantage than in restoring public confidence in the fairness of the outcome." There is an implication in Broder's view that fairness and ambition collided here, and that ambition won. Procedural remedies seemed to him to be unlikely.[4]

There are two ways to view this argument that openness instills confidence in the fairness of political outcomes. While it may be true that political debates can be more open to citizen scrutiny than judicial debates, it is not clear that this openness produces greater fairness. In fact it may be that debates carried on in the political arena are less fair because neither side ever seems to be held accountable for the truth of what it says. Partisans can unfairly manipulate press coverage and public opinion, giving the

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[2] Thomas L. Friedman, "Can Gore Ever Win?" *The New York Times*, 21 November 2000.
[3] Editorial, *The Washington Post*, 21 November 2000.
[4] David Broder, "A presidency was lost?" *The Macon (Ga.) Telegraph*, 21 November 2000.

appearance of openness when in fact most of the crucial decisions are made well out of the public spotlight. Judicial deliberations, by contrast, are subject to stringent fairness guidelines. Courtroom procedures such as rules of evidence and discovery, even the amount and manner of debate, are tightly controlled to be scrupulously fair.

The argument that fairness occurs when all receive equal treatment is also suspect. It is rarely the case that true equal treatment is achievable – rarely possible that each case can be considered unmistakably like every other. But beyond this, it is not true that all cases are exactly alike to start with. In the presidential recount issue for instance, some ballots were cleanly marked for one candidate or another and therefore merited less scrutiny. Others included "pregnant chads" or "hanging chads" which required careful interpretation to determine voter intent. These ballots, and by extension these voters, necessarily received closer scrutiny than others. The "unequal" care with which these ballots were considered is probably appropriate and likely to be considered fair. Conversely, it could be seen as unfair to treat all ballots exactly alike, to make a quick judgment on the problematic ballots, or to stretch the recount unreasonably by spending time on every ballot, whether contested or not.

Bush supporters seem to have rejected these views of fairness in favor of the view that fairness proceeds from strict application of the law, perhaps going so far as to assume that fairness means adherence to law and precedent. They proposed that Florida officials stick to the letter of Florida law governing recount deadlines and methods. They asserted that both had been used for years without being considered unfair, and were not considered unfair before the election. Senator John Danforth, the former Senator from Missouri known for his measured language said, ""The idea of mining three heavily Democratic and very populist counties for additional votes is not fair. I don't think it's

stealing an election, but what you are hearing from Republicans is a very strong reaction to something that they consider to be very unfair." [5]

But even this straightforward argument is not without detractors. Michael Kinsley went so far as to describe the Bush strategy as making the law "the enemy of fairness."[6] If law can be the enemy of fairness, then there may be some standard outside law that defines fairness. Where could a standard for establishing the meaning of fairness be found?

The arguments about the fairness of the Florida recount seldom included an analysis of what fairness means. Such an analysis would have begun with the articulation of some principle for determining fairness, for instance that the overriding standard should be procedural equity. Then, arguments for competing views could be made. Judges, administrators, partisans and voters would be able to evaluate the fairness of various proposals against the standard. Clearly defined arguments about fairness would include a statement about what fairness means and how it is related to other concepts such as equality, reciprocity, impartiality, justice and objectivity. Such nicely drawn distinctions are rare in public deliberations, but a debate on the question of establishing fairness could lead to a clear understanding of concepts of political morality generally and fairness in particular. While it is not likely or even necessary that agreement could be reached on the premises for determining fair standards, at least the grounds for debating the fairness of a particular outcome would be known. It is not my intention to resolve here the particular dispute over fairness in the 2000 presidential recount. But I do propose to show the various ways in which fairness is commonly understood and to offer practical guidelines for articulating a clearer understanding of fair public policy.

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[5] Richard L. Berke, "Talk of New Legal Fight Is Met With Growing Democratic Doubt," *The New York Times*, 24 November 2000.

[6] Michael Kinsley, "The Secretary's Discretion," *The Washington Post*, 24 November 2000.

If fairness has a place in civic debate, as I believe it does, the common use of the term must have some foundation. In the case of the presidential recount, the foundations of what constitutes fairness were not asserted by the disputants, although they did present their ideas as if its foundations were well known, for instance that fairness means equality and procedural impartiality. Still, the arguments for fairness were made without setting explicit standards for determining its meaning. We may read between the lines of Boies' arguments and assume he understood fairness to mean equal treatment, but he did not discuss the underlying reasons equal treatment produces fairness. If he had, his reasoning would undoubtedly have been challenged by supporters of Republican candidate George Bush. Voters would then have had a clearer notion of the competing views about fairness and a better idea of how best to achieve it.

Skeptics might believe that the standard for determining what fairness means is political expediency, that fairness is merely a rhetorical tool used to justify a partisan position. They might further believe that fairness is an emotion-laden term used to make a cause appear righteous when in fact it is merely partisan. To answer the skeptics it is necessary to know what fairness means or at least what most people believe it to mean. Examination of public rhetoric will not supply the whole answer. The use of the term fairness in the public realm cannot be evaluated without a theory of fairness that is both widely agreed upon and suitable for resolving political disputes.

Developing a Sensitivity to Fairness

One way to understand the foundations of fairness is to examine common understandings and usages of the term as they have changed over time. Fairness once related to people, objects or ideas possessing a pleasing aesthetic character. It is a somewhat affected usage now to consider something fair which is beautiful, charming, or of exceptional quality. But these usages, derived from the Old English word *fæger*, were

once common. Consider Shakespeare's use of the term in Sonnet I: "From fairest creatures we desire increase,/ That thereby beauty's rose might never die."

But fairness was also used to denote a surface beauty concealing a darker nature, as in Chaucer's Middle English description of the bawdy, gap-toothed Wife of Bath, she of the five husbands:

> Bold was hir face, and fair, and reed of hewe.
> She was a worthy woman al hir lyve, Housbondes at chirche-dore she hadd five,
> Withouten other comnpanye in youthe.

In *Pilgrim's Progress*, John Bunyan used the term to note how a pleasing demeanor can hide indecisiveness or dishonesty. Bunyan wrote of the town of Fair-speech, a place where gracious words and feigned religious manners served as a front for citizens who avoided true piety. Fair-speech was the home of Lord Turn-about, Lord Time-server, Mr. Smooth-man, Mr. Facing-both-ways, Mr. Anything and the parson, Mr. Two-tongues.

In Act 1 of Romeo and Juliet, Shakespeare imparted multiple meanings to the word. In the first scene, Romeo is discussing the fair Juliet with Benvolio:

> Romeo: In sadness, cousin, I do love a woman
> Benvolio: I aim'd so near, when I supposed you loved.
> Romeo: A right good mark-man! And she's fair I love.
> Benvolio: A right fair mark, fair coz, is soonest hit.

And later in the same scene, Romeo says that fairness is more than a pleasing surface appearance, "Show me a mistress that is passing fair,/ What doth her beauty serve, but as a note/ Where I may read who pass'd that passing fair?

Fairness most commonly today connotes impartiality, an ability to judge as facts present themselves, but not to pre-judge, to be unbiased, even-handed, to afford no undue advantage, to be objective and disinterested. These elements reflect procedural concerns to administer dispassionately. But even when all these conditions are met, the cry of unfairness can still be heard.

In Shirley Jackson's famous short story *The Lottery*, the residents of an unnamed village participate each year in a mysterious ritual in which one resident is singled out for execution. The selection of the victim is done entirely at random by lottery. First the head of each family draws a slip of paper from a box, then the members of the unlucky family draw. When Tessie Hutchinson sees that her husband has drawn the marked slip for her family, she shouts, "You didn't give him time enough to take any paper he wanted. I saw you. *It wasn't fair*!" When it becomes apparent that she will be the victim from her family she repeats her claim. "I tell you, it wasn't fair. You didn't give him time enough to choose. *Everybody* say that."[7] There was nothing to indicate any bias or prejudgment in selecting Tessie as victim. She made the charge of unfairness because she was the one chosen – there was no moral differentiation between her and anyone else. No other villager seems to have shared her belief in the unfairness of the process, and she herself willingly submitted to the gruesome ritual until she was chosen. Her charge of unfairness was driven by the psychological trauma of facing death, by the way the outcome of the lottery drastically changed her relation to other villagers. She clung to fairness in a last-ditch effort to save herself by condemning the process by which she was chosen.

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[7] Shirley Jackson, "The Lottery," *The New Yorker*, 26 June 1948.

If one's position is the sole determinant of whether a distribution is fair, there is little hope for a meaningful definition of the term. Further, the skeptics would be right in believing that fairness is used today mainly to achieve immediate political advantage. Either side to a dispute could plausibly claim unfairness whenever they come up short. Once again, this points out the need to search out both the foundations of fairness and its content.

Psychologists have described how the impulse for fair treatment develops. For children, an impulse for fairness develops slowly, like other relational feelings such as empathy or altruism. It is a kind of heightened moral sensitivity evident earlier in gifted children, and may even be a sign of giftedness.[8] As an aspect of moral development, determining fairness is developing the ability to use reason in deciding what one ought to do. Lawrence Kohlberg's theory of moral development focused on the emergence of an understanding of fairness as a mark of the ability to reason abstractly: to recognize a moral decision is required in a particular case, to select principles to apply to that case and then to make a decision that improves the welfare of others.[9] A desire to improve the welfare of others seems key to the development of a sensitivity for fairness.[10] This sensitivity develops in stages according to Matthews, including developing fairness paradigms, using defining characteristics, placing cases in the appropriate paradigms, adjudicating conflicting moral claims, and using moral imagination.[11] There is also an emotional dimension to the refinement of a sensibility to fairness. It may be that emotional development is a prerequisite for personal identity, the ability to empathize

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[8] Dierdre V. Lovecky, "Identity Development in Gifted Children: Moral Sensitivity," *Roeper Review* 20 (1997): 90-95.
[9] Lawrence Kohlberg, *The Psychology of Moral Development* (New York: Harper and Row, 1984).
[10] Lawrence Blum, "Particularity and responsiveness," in *The Emergence of Morality in Young Children*, ed. Jerome Kagan and Sharon Lamb (Chicago: University of Chicago Press, 1987): 306-337.
[11] Gareth B. Matthews, *The Philosophy of Childhood* (Cambridge, Mass.: Harvard University Press, 1994).

with others and to act from internalized standards – the precursors of moral reasoning.[12]

The content of fairness develops as well. Preschoolers are likely to think that fairness means that everyone gets an equal share of whatever is being distributed, cookies for instance. Between the ages of 4 and 8, fairness may takes on other meanings in relationships, for instance taking turns (even if the turns are of unequal length) and ensuring that no one is left out of schoolyard games (even if everyone does not participate equally). During junior high, exclusivity begins to be seen as unfair even while children feel a strong desire to fit into cliques.[13] Each of these stages requires greater abstract reasoning ability, and each builds on preceding stages. Therefore, fairness appears to be a construct which becomes less focused on equal division of goods while never losing its relational aspect. Throughout adolescence, the fairness of an act comes to be seen within a broader context, making the evaluation of fairness more complex.

Theories of Fairness

I will examine several relevant normative theories in searching for a definition of fairness. Common usage of the term is not wholly satisfactory and leads us to want a more accurate account of the meaning of fairness in political contexts. In politics as in private life, fairness is more than a simple calculus whereby every interested party receives an equal share of public goods. As interpreted by citizens, fairness seems to have a relational dimension, that is, we partially determine the level of fairness we receive by comparing our treatment to the treatment others receive. But psychological research is

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[12] See Mary Dinsmore Salter Ainsworth, "Object Relations, Dependency and Attachment: A Theoretical Review of the Infant-Mother Relationship," *Child Development* 40 (1969): 969-1025, Jerome Kagan, *The Second Year* (Cambridge, Mass.: Harvard University Press, 1981), Jerome Kagan *The Nature of the Child* (New York: Basic Books, 1984), and Daniel N. Stern, *The Interpersonal World of the Infant: A View From Psychoanalysis and Developmental Psychology* (New York: Basic Books, 1985).

[13] Lovecky, "Moral Sensitivity."

insufficient to establish the political ramifications of these feelings; knowing what constitutes fair institutions and policies requires theory that explains the modes and understandings of politics.

Some scholarly literature about fairness does little to instruct our understanding of the term. For instance, Jennifer Hochschield discussed the elements of distributive justice in her book *What's Fair?: American Beliefs About Distributive Justice*, but she did not offer a precise definition of fairness itself. Most of her book is devoted to understanding why there has never been a strong socialist tendency in the U.S. But she did not explain what fairness means and neither the words "fair" nor "fairness" appear in her index.[14]

We might be tempted to turn to utilitarian accounts of political morality to understand fairness. Here, the definition of fairness would probably follow the form that fairness is the greatest amount of public goods for the greatest number of citizens, even if the welfare of some individuals has to be put in second place. If we were to use this approach as a clue to the meaning of fairness, we would look to efficiency and equality in the distribution of public goods. We would also understand fairness to be enhanced when the total amount of such goods are greatest. This would require quantification of public goods sufficiently precise to allow a measurement of the amount of the total available and who has how much. But utilitarian evaluations of fairness – including cost-benefit analyses, welfare economics and Pareto analyses – while commendable for quantitative precision, are limited in what they can measure. Some public goods defy measurement,

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[14] Jennifer L. Hochschield, *What's Fair: American Beliefs About Distributive Justice* (Cambridge, Mass.: Harvard University Press, 1981).

such as liberty or security. In addition, utilitarian calculations are not helpful in resolving political difficulties such as the Presidential recount because they cannot account for the fact that all cases are not alike, that some goods cannot be divided, and that sometimes strict equality can be unfair. Such is the interpretation of Alphonse Holtmann, who wrote, "Theoretical welfare economics and the Pareto principles are not helpful in allowing policy analysts to determine the ideal distribution of well-being in society."[15]

Utilitarian theory does not seem a promising prospect for bringing us closer to knowing what constitutes foundational beliefs regarding fairness. We should look elsewhere to find the roots of our views of fairness in politics. In doing so we immediately confront the influential theories of public morality contained in the writings of John Rawls.

Since the 1970s, Rawls' theory of justice as fairness has served as a powerful expression of a way to achieve greater fairness in modern social and political institutions. Rawls' analysis was so precise and compelling that it emerged as a definitive contemporary restatement of Kant's ideals regarding the grounding of morals. Rawls' theory of justice as fairness encapsulates many ideas about fair relations between people competing for shares of public goods. He equated fairness in political life and political institutions to fair procedures, a feeling of reciprocal relations between citizens and an equality of outcome that legitimates public policy.

In addition to Rawls, discussions of contemporary political morality are obliged to consider the influence of communitarianism. In establishing foundations for political

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[15] Alphonse Holtmann, "Beyond Efficiency: Economics and Distributional Analysis," in *Policy Analysis and Economics: Developments, Tensions, Prospects*, ed. David Weimer (Boston: Kluwer Academic Publishers, 1991): 47.

morality and fairness, communitarian theorists have had influence in and out of political science, and their ideas have had a bearing on public policy. Communitarians differ from Rawlsians in that they give greater presumptive weight to the influence of civic virtue and local attachments in justifying political morality.

Communitarians support balancing the rights of individuals with the needs of community, and they believe that a full understanding of fairness requires augmenting individual rationality with an awareness of the moral sentiments of community. Individuals are influenced by community and often find the sources of values and meaning in political life through the communities they belong to. At the same time, the Western tradition includes commitment to the freedom necessary to make independent judgments on moral questions. Moral autonomy is seen by many as a fundamental part of living well. But while the freedom to make judgments about fairness begins with individuals in well-ordered communities, it doesn't end there. Judgments about fairness are not made in a cultural vacuum. Often, the values that animate individuals and orient their moral compasses arise in communities. There are then two sources of the values that affect the way we see fairness. Communitarian writings present ways of thinking about the dual sources of the values supporting fairness – sources from community and sources from the self. The ratio these dual concerns should be mixed forms communitarianism's core and helps explain the role expectations play in determining fairness. Communitarians champion the notion that the values and virtues of citizenship guide our understanding of politics, and that political reform is most satisfying when it occurs within the context of shared values.

The discussions between Rawlsians and communitarians on the status of the individual in determining the foundations of political morality has inspired many books and articles and has seeped into mainstream debate of what fairness means and how principles for determining fairness are formed. But there is another theory gaining influence that is relevant to the contemporary discussion of fairness, especially as it relates to the implementation of policy.

Political judgment theory may offer additional insights into the way political decisions are made and the character of those who make such decisions. It interprets the activity of judgment as the enterprise of considering particular cases under the guidance of widely accepted principles of morality. These principles may be considered by different kinds of political actors. Legislators, judges, administrators and professionals all judge particular cases by considering the circumstances of each case under the guidance of broad principles. When they make such judgments about public policy, their judgments can be considered to be political in nature, and they may thereby benefit from the insights of political judgment theory.

Political theorists who advocate political judgment theory make room for Rawlsian rule morality and communitarian values, defining fairness, roughly, as judgments that conform to an objective, rational and consistent scheme of justice, a scheme to which free-thinking people in various communities can give their assent. They include in their deliberations the traditional and perhaps even unexamined preferences of communities, so long as those preferences conform to a framework of fairness -- a

framework which is the product of rational deliberation, objective review and has stood the test of time.

The Plan of This Dissertation

To examine the meaning of fairness requires analysis of all three of these theories. Each establishes a view of politics that emphasizes the importance of morality in political action. They all have been used as guides to understanding political morality as a means to legitimizing the actions of government as well as an end in itself. Their adherents support the project of good government. But the assumptions, definitions and application implied in these normative views lead to differing notions of what fairness means and the role fairness should play in political decision-making.

The goal of this dissertation is to understand the foundations and content of fairness in theory and practice. To do so will require two assumptions be made at the outset. First, I assume that fairness has a definite and relatively stable meaning. Here I follow the basic path taken by Hannah Pitkin in defining representation – proceeding from an analysis of common usage to relevant theories of politics. She always assumed that the conception being defined in her study was susceptible to scientific examination, that there was a socially construed relevance to the concept and that its meaning was relatively fixed.[16]

Of course the meaning of fairness has changed since the 17th century now that it no longer is used to express beauty. But some of the elements of older usages may still

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[16] Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley, Calif.: University of California Press, 1972): 8-11.

exert their influence. We may still see the simple elegance the term once evoked, but we should beware that it can also be used as a veil, concealing another nature or motive.

When I say that fairness has a definite and stable meaning I mean that I assume it has such a meaning today in political contexts. There is some evidence for this. When we say that an election is fair, for instance, there is normally little controversy to that assertion – if election laws are enforced equally we assert that the vote was fairly cast. Election problems arise, however, that cause an understanding of fairness to become problematic. As noted above, fairness is sometimes used to lend dignity to otherwise undignified partisan assertions of will. I will be careful to avoid deriving a definition of fairness by observing its use in masking some other intent. Therefore, in the analysis that follows I will try to uncover fairness in a more elemental form.

This method carries with it a danger of becoming too reductionist by saying, for instance, that a public policy or election is fair if a majority of people believe it is fair. I assume that some stable meaning of fairness, some standard, exists outside the context of a given political debate. By searching for that standard, I may be able to reconcile different interpretations among lawmakers, judges, administrators and ordinary citizens.

My second assumption is that theories of fairness are guides for solutions to problems encountered in political life. The reason for this assumption is that the writers consulted in this dissertation discuss fairness and political morality bearing in mind connections between theory and concrete politics. We will see that discussions of fairness sometimes assume an abstract character. But to the extent that theorists seek to build useful theory, they attempt to connect their theory to the real world.

I assume that it is possible, with great care, to bring to bear on the problem of fairness divergent sources, sources with incompatible worldviews. My intent is to permit authors to be read as they intended while still informing our interest in understanding fairness in concrete settings.

For instance, Michael Sandel has much to say about the formation of political values in communities, but his aim is largely theoretical. It would be unfair to critique his work as though it were a blueprint for reform. Even still, he is not writing about politics on Mars, so there is a real sense in which his work can be used to illuminate concrete disputes about fairness in public policy. If his theory connects so feebly to concrete politics that it cannot help us understand fairness, it is fair game for such a critique. I will apply such standards to all authors considered here.

A good deal of this dissertation is an evaluation of how theorists interpret political morality, not necessarily fairness. I believe it is reasonable to interpret fairness as a component of political morality, so that understanding what an author thinks about political morality will reveal what he would think about fairness, if asked. There is a risk here of becoming too expansive, of treating the subset (fairness) as though it fills up entirely the set (political morality). I have taken care to avoid such over-generalizing.

For instance, even though few communitarians address fairness directly, many specifically address what Rawls said constitutes fairness: procedural fairness, reciprocity and equality. By examining communitarian views on procedural fairness, reciprocity and equality, I minimize the risk of conflating their interpretations of fairness with their general interpretations of morality in politics. To take another example, in the chapter on

political judgment, I discuss the role of rationalized ends in making decisions about moral behavior on the grounds that we may safely infer that decisions about fairness would be made in the same way as other aspects of political morality. As mentioned earlier, a core goal of this dissertation is to understand how fairness is understood in concrete settings – what it means to be fair when real political issues are at stake. To that end, I will examine in Chapter 2 the way fairness is understood in one area of public policy – the policy on organ transplants.

This case presents an ideal way to understand fairness for several reasons. First, it is a problem of distribution in which there is little hope in the short term of increasing the supply. The shortage of organs cannot now be resolved; all that remains is to distribute the organs available in the fairest manner possible. Second, no matter which side of the debate we examine, we will see that fairness is a central concern. All parties believe fairness is a critical component of overall policy evaluation. Third, there are clear differences of opinion as to what constitutes fairness, and these differences are made more or less explicit. A good deal of the analysis will focus on statements about fairness, or the codification of fair outcomes in law and policy. Fourth, it is a poignant case of the crucial role fairness plays in legitimizing policy, both in terms of rational evaluations of fairness and the more elusive feelings common to those for whom fairness literally means life or death.

Chapter 3 marks a change from evaluating a specific policy to an evaluation of theory. I will examine there the quintessential theory on fairness, John Rawls' theory of justice as fairness. Throughout the rest of the dissertation I will adopt the basic

framework Rawls established as a critical standard. I will follow his construction of fairness as comprising procedural fairness, reciprocity and equality. And I will evaluate other theories in light of his.

In Chapter 4 I will take up the major competing theory to Rawls; communitarian theory. Because much of the communitarian project is concerned with elements of political justice lying outside the Rawlsian framework, this analysis is crucial to rounding out our understanding of fairness.

In Chapter 5 I will look at political judgment theory and its role as a mediator of competing paradigms in rationalizing political morality. This theory is important because it comprises a recent and growing paradigm, and because it does not rely on the assumptions of either Rawlsian or communitarian theory. Yet, it makes room for both. I will also show how principles of judgment theory intersect with the study of administrative ethics. At the end of Chapter 5, I will propose a way to understand how administrators can evaluate the fairness of public policy. A concluding chapter reviews what has been said about the various views of fairness, and assesses their meaning in relation to political life.

CHAPTER 2

Fairness in Organ Transplant Policy

The policy of organ transplantation illustrates perhaps better than any other policy our strong desire for fairness as well as the ambiguity of our ideas about fairness. On one hand we seem convinced that vital transplantable organs should be distributed in a way consistent with the principles of fair play and in accord with agreed-upon rules. At the same time we exhibit the distinctly American desire for local control over choices in the private realm, a desire founded on the ideal of self-reliance. Proponents of both these views of what constitutes fairness in organ allocation policy claim to advocate positions consistent with the nation's moral conscience.

We can also see here the influence of our respect for the judgment of experts and our faith in their impartiality. In the current system of organ allocation physicians make independent judgments acting as policy administrators who follow guidelines, but with the discretion to deviate from the guidelines when medically appropriate. Their judgments are often final. The validity of these judgments depends on their being

perceived as fair, not only in the particular case at hand, but also within acceptable boundaries of common conceptions of public morality.

Behind the public conflict over fairness and the anguish of patients on waiting lists is a theoretical conflict over the foundations of political morality. The core of this conflict is a dispute about how to forge rules for fair decision-making. While the public debate focuses on waiting times for particular patients, the theoretical debate focuses on the appropriate grounds on which to make broad claims about moral principles and legitimate ways to apply those principles in considering specific cases. Some go so far as to question whether universal standards for fairness in organ transplant policy are even possible. But while the theorists have a crucial role to play in framing this debate, the illumination of the meaning of fairness by ordinary citizens precedes their inquiries.

The fairness of organ allocation policy, while important to physicians, theorists and the public at large, takes on an entirely different and substantially more poignant meaning to those in need of organs. For them fairness is not merely a social referent for justice or an illustration of a theoretical conflict. It is a matter of life and death. Patients who are unfairly moved ahead on a list of recipients are only able to receive their organs by placing other patients in peril. This is because the iron law of scarcity is nowhere more binding than with the supply of human organs. Compounding this scarcity is the fact that the harsh limits on the number of organs available will not, in the short run, respond to technological breakthroughs or increases in the supply of donor organs. Thus the vulnerability, fear and hopes of recipients hinges less on funding for research and organ donor education programs than it does on the possibility of fair policy making and

implementation. If policies are not able to deliver a consistently fair distribution of organs in accord with broadly held social interpretations of fairness, such policies will be deemed a failure. Public ideas about what fairness means in organ transplant policy may not always be clearly articulated, but they are surely deeply felt.

The purpose of articulating those feelings here is not to propose a definition of fairness that comes nearest to completing the public or theoretical debate. I will not advocate a way of looking at fairness in organ transplant policy that serves to satisfice the needs of patients, policy makers and physicians. Rather, the purpose is to show the variety of ways in which fairness presents itself and the variety of theories that inform various practical viewpoints. Both the more established characteristics of the organ transplant system and the latest changes to that system stand on solidly developed moral ground for their competing programs. But the two approaches differ, and the assumptions their advocates make about fairness leads us to question whether the moral ground for these views of fairness are equally solid.

It is my task in this chapter to describe the present system of human organ transplantation policy and examine the underlying moral groundwork informing the various approaches to that policy. I will also describe contemporary theories of how to reform this system. We will see that decision makers are faced with an array of approaches to understanding principles of fairness in the context of organ allocation policy that are often contradictory. Such moral indeterminateness reflects our conflicting views about the ethics of organ transplantation and about the foundations of political morality.

A DESCRIPTION OF ORGAN ALLOCATION POLICY

Human organ transplants were relatively rare and often unsuccessful until the 1983 discovery by Sandoz Pharmaceuticals Corp. of the immunosuppressive drug cyclosporine.[1] This drug substantially reduced organ rejection, adding years to the lives of organ recipients and making transplantation a viable treatment for many diseases. So successful has been the development of clinical practice in this area that each year more Americans seek organ transplantations. Today more than 75,000 are waiting for organs of all types, more than triple the number waiting in 1990, even though the number of transplant operations has increased by 45%.[2] The supply of organs has not increased at nearly the same rate as demand, leading to what is widely regarded as a permanent shortage of organs. It is now a well-established fact that the demand for organs so far outstrips the supply that rationing is accepted as a continuing condition. For lawmakers and doctors the question of organ transplantation has become one of prioritization, literally with life and death consequences. This is starkly illustrated by the fact that in 2001, 15 people will die every day waiting for an organ.[3]

Many have attributed the regional nature of the organ allocation system for creating these disparities. In the current system patients within a given geographical area

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[1] Brigid McMenamin, "Why People Die Waiting For Organ Transplants," *Forbes*, 11 March 1996,140.
[2] "National Organ Transplant Waiting List Tops 75,000," *UNOS News Release*, United Network for Organ Sharing [online] (Richmond, Va., 9 March 2001) Accessed 13 April 2001. Available from World Wide Web <http://www.unos.org/frame_Default.asp?Category=Newsroom>.
[3] Ibid.

get first chance at viable organs for transplant. This system derives from three overlapping sets of rules: federal statutory requirements, federal regulations to implement the statutes and the policies of the United Network for Organ Sharing.[4] Although new performance measures adopted by the Department of Health and Human Services have the potential to change this system substantially, the performance measures have not yet led to changes in the basic structure of regional allocation.

The first element of the allocation system is the authorizing statutes. The primary statute regarding organ allocation is the *National Organ Transplant Act of 1984*.[5] The Act directed the Secretary of the Department of Health and Human Services to devise a structure for distributing organs for transplant which includes consideration of appropriate medical, legal, ethical and economic aspects of human organ procurement. At the center of the resulting plan as well as the language of the Act is the establishment of qualified organ procurement organizations (OPOs). These OPOs are private, nonprofit organizations responsible for procuring organs from donors and allocating to those qualified to receive them within a given service area. The service area was established as one comprising at least 2.5 million people, containing at least 50 donors per year unless the area comprises an entire state. The Act also called for the establishment of the Organ Procurement and Transplantation Network (OPTN) to assist the OPOs in the equitable

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[4] For a detailed description of these rules, see Erik S. Jaffe, et al., "Eliminating Artificial Barriers to the Equitable Distribution of Hearts for Transplantation," *The Journal of Corporation Law* 20 (1994): 109-138.
[5] The statutory structure of the NOTA is found in various sections of the United States Code, including the *National Organ Transplant Act*, *U.S. Statutes at Large* 98 (1984): 2339; *Organ Transplant Amendments Act of 1988*, *U.S. Statutes at Large* 100 (1988): 3116; *Health Omnibus Programs Extension of 1988*, *U.S. Statutes at Large* 100 (1988): 3048; *Transplant Amendments Act of 1990*, *U.S. Statutes at Large* 101 (1990): 3279.

allocation of organs to recipients. The purpose of the OPTN is to establish the policies which OPOs are bound to follow in allocating organs. A contractor, the United Network for Organ Sharing (UNOS), was selected to fulfill the functions of the OPTN. UNOS maintains a national list of those who need organs, develops the medical criteria for matching individuals to particular organs and develops the rules transplant centers must follow in the procurement and allocation of organs according to medical and equitable criteria.

The second element of the national system for organ transplantation is regulatory. Federal rules promulgated by HHS relating to these statutes are primarily restatements of the statutes themselves, noting the oversight responsibilities of HHS and the implementation responsibilities of the OPTN. They provide broad regulatory background for organ policy implementation, but leave undefined the precise medical criteria which should be used and the precise meaning of what constitutes a "fair" and "equitable" system of allocation.[6]

The third element of the allocation system is the policies written and enforced by UNOS. These policies are by far the most detailed and comprehensive statements of how organs are to be procured and to whom they should go. UNOS requires transplantable organs to be used in the region in which they were harvested and gives doctors discretion in making final allocation decisions. The UNOS policies will be discussed at length in the following section.

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[6] Jaffe, et al., "Eliminating Barriers," 112.

All three structural elements of the organ allocation system seek to promote the fairest distribution of organs possible according to three basic principles: 1) organs should be distributed within regions, 2) physician should be allowed to exercise professional discretion in making final allocation decisions, and 3) priority should be given to those in greatest need of an organ – the principle known as "sickest first". Each of these principles reflect particular views of what it means for organ allocation to be fair, and all three principles are disputed. I will consider them in order.

UNOS and Regional Allocation of Organs

Organs are allocated on a regional basis in 11 UNOS districts spread across the country. Before organs can be transported from one region to another, all recipients in the region where the organ was originally harvested must be ruled out as candidates. Partially to promote efficient use of organs and partially to accommodate local control, UNOS policy specifies that organs are to be allocated first locally, then regionally if no suitable recipients are found locally, then nationally if no suitable recipients are found in the region.[7] Local patients, those within 500 miles of the organ, are given priority consideration; then patients within 1,000 miles and finally, patients anywhere in the country. State-wide distribution is an additional distributional level, permitted by UNOS Policy 3.7.10, that allows "Variances" and "Inter-OPO Thoracic Sharing Agreements" to modify basic geographic distribution rules. In some cases, state-wide organ sharing

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[7] "Organ Distribution Policy," *UNOS Policy 3.7,* United Network for Organ Sharing [online] (Richmond, Va., 16 June 2000) Accessed 24 April 2001. Available from World Wide Web <http://www.unos.org/frame_Default.asp?Category=aboutpolicies>.

between two or more OPOs is the primary local distribution scheme, in other cases state-wide distribution intervenes between the local and regional levels in an effort to use as many organs as possible in the state in which they were harvested.[8]

The reason for this approach is that the quicker organs are moved from the donor to the recipient, the greater will be the chance for a successful transplant. The creation of a nationwide system of allocation may not allow the use of an organ close to the place where it was harvested, and this can reduce the chances of a successful transplant. According to UNOS, "It is not currently feasible to distribute organs using a single national Waiting List because they can last only a limited time without oxygenated blood and for other technical reasons (e.g., the necessity of crossmatching before kidney transplants). Doing so might distribute organs more equally across the nation, but it would result in unacceptable organ damage and wasted organs."[9]

The result of this regional system is undisputed – there is now a wide disparity in waiting times for organs. Consider, for instance, that Pennsylvania Governor Bob Casey waited 1 day for a liver, Mickey Mantle waited 2 days for his, David Crosby waited 18 days and Jim Nabors 24, while the national median waiting period for livers is 142 days.[10] The current arrangement has resulted from a lack of strong central control and disparate waiting times for organs across regions, as, for instance the fact that the waiting time for a kidney in Ft. Worth is a few weeks, but is nearly a year in Dallas.[11]

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[8] Jaffe, et al., "Eliminating Barriers," 114-5.
[9] "UNOS Rationale for Objectives of Equitable Organ Allocation," *Justification for Equitable Organ Allocation*, United Network for Organ Sharing [online] (Richmond, VA, 1994) Accessed 13 April 2001, Available from World Wide Web < http://www.unos.org/frame_Default.asp?Category=Newsroom>
[10] "Liver Styles of the Rich and Famous," *Time* 19 June 1995: 14.
[11] McMenamin, "Why People Die," 140.

The fact of differential waiting times is viewed by many to be proof that the system is unfair. Dr. Earl Fox, Acting Administrator of the Health Resources and Services Administration testified to Congress in 1998 that, "We believe there is solid evidence that the current system is unfair and that patients may be dying unnecessarily because they happen to live in the wrong place at the wrong time. [Former HHS] Secretary [Donna] Shalala believes that everyone in need of a transplant should have equal access to an organ, regardless of where they live or list."[12]

A fact sheet published by HRSA identified the potential impact of the regional policy for liver transplant patients. "'Local first' rules can mean that a less medically urgent patient receives a transplant while a more urgent patient who could receive the organ dies. In fact, in 1998, 71 percent of livers were transplanted to patients in the least urgent medical status categories, while in the same year 1,300 people died waiting for a liver."[13] While there is no specific correlation between the 1,300 people who died waiting for a liver and any single allocation decision, there does seem to be a perception by HRSA officials that the regional system is unfair.

Such charges of unfairness led the Clinton administration to reform the system of organ allocation. Clinton and Shalala wanted to end the state and regional bias of the system and replace it with a system truly national in scope, a system in which an organ harvested anywhere could be sent to any potential recipient in the U.S. The Final Rule,

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[12] Claude Earl Fox, *House Testimony: National Organ Transplantation Policy,* Health Resources and Services Administration [online] (Washington, D.C., 8 April 1998) Accessed 1 April 2001, Available from World Wide Web <http://www.hrsa.gov/Newsroom/speeches/foxOPTN.htm>.

[13] *Improving the Nation's Organ Transplantation System,* Health Resources and Services Administration [online] (Washington, D.C., 18 October 1999) Accessed 2 April 2001, Available from World Wide Web <http://www.hrsa.gov/osp/dot/Fact%20Sheet.pdf>.

published in the Federal Register in April 1998 outlined new procedures that would eliminate differential waiting times, vest more decision-making authority with the Secretary of Health and Human Services and standardize the application of medical criteria. Proponents of these new guidelines hope it will eliminate disparities caused by variations in waiting times and save lives by giving far more weight in the allocation decision to the severity of illness and much less to the chances for a successful transplant outcome.[14] The Final Rule went into effect in March 2000.

Because Congress did not grant HHS authority to manage the system of organ allocation directly, HHS is not permitted to establish procedures used to allocate organs. Therefore, the Final Rule outlines performance measures for HHS to use in evaluating UNOS procedures, consistent with HHS's oversight role. The Final Rule consists of three basic measurements for HHS to use in evaluating the organ allocation system. They are:

> -- **Minimum Listing Criteria** - The OPTN (Organ Procurement and Transplantation Network) is required to define objective and measurable medical criteria to be used by all transplant centers in determining whether a patient is appropriate to be listed for a transplant. In this way, patients with essentially the same medical need will be listed in the same way at all transplant centers.
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> -- **Status Categories** - The OPTN is required to determine objective medical criteria to be used nationwide in determining the medical status of those awaiting transplantation. This will provide a common measurement for use by all transplant centers in determining the urgency of an individual's medical condition, and it will facilitate OPTN efforts to direct organs to those with greatest medical need, in accordance with sound medical

[14] "Organ Procurement and Transplantation Network; Final Rule," Department of Health and Human Services Proposed Organ Allocation Guidelines, *Federal Register* 63, no. 63 (April 2, 1998): 16295-16338.

judgment.

> **– Equitable Allocation** - The OPTN is required to develop equitable allocation policies that provide organs to those with the greatest medical urgency, in accordance with sound medical judgment. This increases the likelihood of patients obtaining matching organs, and gives all patients equal chances to obtain organs compared to other patients of equal medical status, wherever they live or list.[15]

Being in place less than one year, the Final Rule performance measures have not yet been applied to UNOS performance. There is some question about how this will be done in the Bush administration, since the newly appointed HHS Secretary, Tommy Thompson, is on record opposing the Final Rule, primarily because he prefers the regional approach. While still governor of Wisconsin, Thompson sued to block implementation of the Final Rule, fearing harm to Wisconsin's highly successful organ donation program. According to Craig Irwin, president of the National Transplant Action Committee, a patient advocacy group, "[Thompson's] been very vocal as an opponent of the regulations and in trying to keep the organs in Wisconsin. We have every expectation ... that early in the administration he would nullify the regulations."[16] Thompson's primary objection to the Final Rule criteria is that it diminishes the likelihood that an organ harvested in Wisconsin will be transplanted to a recipient in Wisconsin. Since his state was more successful than many others in harvesting organs, a national allocation system could result in a net loss of available organs for Wisconsin

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[15] HHS, "Final Rule," 16296.

[16] Rachel Smolkin, "Thompson Vocal Foe of Transplant Reforms, Wisconsin Governor Opposed Changes for Organ Sharing," *Pittsburgh Post-Gazette* [online] (Pittsburgh, Pa., 30 December 2000) Accessed 3 April 2001. Available through Lexis-Nexis.

residents. By taking legal action against HHS and its Final Rule, Thompson was expressing a view that organ allocation policy is a community matter, a program for citizens to help each other, a way to turn by one family's tragedy to the benefit of another. In addition, incentives for organ donation are thought to correspond to the likelihood that the organs will be used locally. A regional system may therefore conform to an ideal of local autonomy and community control in determining questions of fairness.

The UNOS position on the outcome of regional allocation is ostensibly the same as that of the Clinton administration, "allocation policy should not disadvantage certain patients because of the part of the country in which they live." But UNOS steadfastly supports a more robust regional allocation as the best way to balance the quest for efficiency and fairness. Because wasted organs do not help any patients, reducing waste by reducing transportation time for harvested organs may improve overall survival rates for those on organ waiting lists. But the disparities in waiting times are troublesome enough that even UNOS calls for continuous monitoring of the regional allocation policy, especially to ensure that new procedures for extending the viability of harvested organs are accounted for in that policy.[17]

Medical Criteria and Physician Discretion

The second basic feature of the system is that it allows limited room for physician discretion in making final allocation decisions. The medical criteria provide a framework within which physicians can exercise discretion. The criteria for ranking patients in need

[17] UNOS, "Rationale for Objectives".

of organs are specific, scientific and impartial clinical measures of current health status and the likelihood of transplant success. UNOS guidelines call for physicians to apply the same criteria in all 11 districts. Each patient is given a status code that corresponds to the medical urgency of the case. For example, there are five codes for potential liver transplant patients. The least urgent code (7 Status) is for those liver transplant candidates whose cases are temporarily inactive because there is no medical urgency to their receiving a transplant. The next level (3 Status) is for patients requiring continuous medical care but who can be maintained indefinitely at home or near a transplant center. Patients in the 2B Status are in more critical need of a liver. These patients experience either variceal hemorrhaging that does not respond to attempts at endoscopic repair, or progressive deterioration of renal function. A patient listed in Status 2A is in the critical care unit of a hospital because of chronic liver failure and has a life expectancy of less than 7 days without a new liver. The most urgent status, 1 Status, is reserved for those patients who experience acute liver failure, have not been previously diagnosed with liver disease, and who also are expected to live less than 7 days. These patients are defined as having not had symptoms of liver disease as little as 8 weeks before liver failure. Their rapidly deteriorating condition places them at greatest risk of death without a new liver. To place a patient in any of these categories requires specific, standardized assessments based on a clinical analysis of a patient's condition.

In spite of the voluminous medical data that must be considered when assigning patients to categories, and in spite of UNOS guidelines for how to apply it, the data are not always applied the same way. Physicians sometimes consider psychosocial variables

such as "history of criminal behavior, current status as a felony prisoner, lack of a support person, active schizophrenia, a recent suicide attempt, current heavy alcohol use, dementia, mental retardation, current tobacco use, current addictive drug use, and medication noncompliance."[18] Further, physicians and Medicaid administrators sometimes take into account a patient's contribution to his or her debilitated condition and the likelihood that the patient is sufficiently predisposed to complete successfully the exhausting regimen required after surgery to ensure full chances for survival. In some cases, Medicaid funding for lung transplants is denied to former smokers, not because their chances of recovery are less, but because it is regarded as unfair to deny the same lung to a patient who never smoked, even though such criteria may have no medical foundation, and even though such criteria are not required by statute. This is, of course, an evaluation of a patient's character, at least in terms of self-discipline, and it involves careful judgment on the part of doctors and administrators.

As noted earlier, the Final Rule seeks to reduce physician discretion by requiring greater uniformity in applying medical criteria. Democratic Wisconsin Senator Russ Feingold expressed concerns about the more limited discretion physicians would have under these rules. He objected to the amount of oversight the HHS secretary has under the Final Rule, and noted that such oversight may harm the rate of organ donation in Wisconsin. He asks "simply that these decisions be made chiefly by doctors employing medical criteria, rather than by the government, and that we keep our eye on the goal of

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[18] Robert F. Weir, "The Issue of Fairness in the Allocation of Organs," *The Journal of Corporation Law*, 20 (1994): 106.

increased organ donation nationwide."[19]

Reliance on the Final Rule and the uniformity it seeks to implement expresses a preference for rule-based decision-making. The preferences that organs in most cases should go to the patients who are the sickest and who have been waiting the longest regardless of where they live, requires very consistently applied objective criteria. As codified in the Final Rule, this approach would allocate organs first to the sickest patients and those on the list the longest unless there was a dispute, which would be resolved by the Secretary of Health and Human Services. Physicians would sometimes be instructed from Washington which patients were next to receive an organ. In dispute cases physicians would be able to offer advisory opinions on changes in the medical status of the patient, but the final discretion would be lodged at HHS. The goal of these procedures is to enhance the equality, and hence the fairness, of organ allocation policy. Here, fairness is given priority and the desire to protect the least advantaged (sickest) is elevated above regional or community claims. The role of physicians' judgment would be curbed, and more of an emphasis would be placed on absolute need.

But by giving the priority to distributional fairness throughout the system through centralized interpretation of criteria, the Final Rule may ironically reduce the fairness for each patient by producing a rigid decision-making framework. According to UNOS,

> It is unreasonable to expect that every patient will have the same opportunity to receive a transplant, because circumstances are different for individual patients and for certain groups of patients

[19] Russ Feingold, "Organ Transplants: Who Makes the Call," *Washington Post* [online] (Washington, D.C., 2 May 2000) Accessed 3 April 2001, Available through Lexis-Nexis.

> with special conditions. For example, patients with panel reactive antibody (PRA) levels of 99 (meaning that the patient's immune system will reject kidneys from approximately 99% of all donors) will not have the same opportunities to receive kidney transplants as patients with PRAs of zero. Allocation policy can do little to equalize opportunities for kidney transplants between these two patient groups."[20]

By striving for systemic fairness and uniformity in the application of medical criteria, some patients may be unfairly lumped into a group they do not belong in. This reduces the chance of having their case considered fairly with all particularities included in the final decision. In this sense, reducing physician discretion may make the system less fair by over-generalizing medial conditions in assigning individual patients to categories. The quest to put fairness as a priority may reduce the likelihood that any individual patient will receive fair consideration of their particular circumstances.

The priority for fairness is found throughout all three parts of the Final Rule, including the desire to "equalize waiting times," to "provide patients awaiting transplants with equal access to organs," and to "provide organs to the sickest patients first." But how do the advocates of the Final Rule conceive fairness? The regional system produces unequal waiting times, but it may enhance organ donation and may reduce organ wastage. Physician discretion may produce disparate allocation decisions across the organ allocation system, but discretion may enhance the likelihood that a particular patient has his or her case fairly considered. Therefore it is argued that regional allocation and discretion are more fair, and it is also argued that a national system with less physician

[20] UNOS, "Rationale for Objectives".

discretion is more fair. The conflicting understanding of what fairness means fuels disagreements with regard to these two elements of organ allocation policy. Similar ambiguities regarding the meaning of fairness can be found in the third element, the policy of "sickest first." Does fairness mean that the sickest patients should receive priority, even if they have a higher mortality rate than patients with a less acute need for an organ?

Sickest First

The Final Rule would ensure that the sickest patients and those who had been on the waiting list the longest would receive priority for organ transplants. The Clinton administration intended to give priority to the sickest patients out of a desire to ensure the fairness of the organ allocation system, because "organs should be equitably allocated to all patients, giving priority to those patients in most urgent medical need of transplantation, in accordance with sound medical judgment."[21] Equity means fairness in the Final Rule, a point underscored when "an editorial change was suggested to delete from proposed § 121.3(a)(6)(i)(B) the words "fair and" from the phrase "fair and equitable allocation of human donor organs." The Department agrees that the proposed language is redundant."[22]

HHS did not believe that a preference for the sickest patients would jeopardize the chances that other patients would receive an organ since "the available evidence shows that, for most patients, higher medical urgency does not reduce the likelihood of post-

[21] HHS, "Final Rule,"16299.
[22] Ibid., 16308.

transplant survival to the extent that less ill patients should receive higher priority. Although current OPTN policies vary by organ, the predominant thrust of the OPTN policies is also to give priority to patients with greater medical need."[23]

But in the public comment period that preceded adoption of the Final Rule, patients waiting for livers expressed objections to the policy of giving priority to the sickest patients. "Patients and their advocates asserted that there was no significant medical argument favoring preference for the "acute" group" ... over the "chronic" group because patients with chronic liver failure "were also in intensive care units and had equally short life expectancies."[24] As mentioned earlier, patients with acute liver failure qualify for a higher priority status than those with chronic failure.

There is some reason to accept the skepticism that greets policies designed to give priority to the sickest patients. Because the sickest patients exhibit deteriorated medical indices relative to others on the waiting list, they are often not ideal candidates – which is to say that sicker patients are less able to survive long with their new organ. In fact, UNOS estimates that the Final Rule will result in 761 additional repeat transplants each year since the sickest patients are often those who have already received one organ. This may contribute to an overall drop in liver transplant survival rates from 75% to 68%. HHS estimates are that, conversely, the proposal will save 200 additional lives each year.[25]

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[23] Ibid., 16304.
[24] Ibid., 16303.
[25] Sheryl Stolberg, "Patients' Lives on the Line in Battle Over Transplants," *The New York Times* 25 March 1998.

Mark Anderson pointed out that the problem of retransplants will come up more frequently if the system begins to show a strong bias to the sickest patients. The increased chances of these patients to require a second or even third transplant raises fairness questions.

> Considerations of fairness require that repeat transplantations for the same person not be allowed...So long as there are not enough organs to go around, fundamental fairness requires that each person be given only one opportunity at an organ transplant. This principle is particularly true for heart, liver, and lung transplants, when the only alternative to transplantation is death. For some to have second or third chances before others have had even one simply cannot be justified.[26]

Anderson is justifying his argument on utilitarian grounds considering the efficiency of the organ transplantation system as a whole. This raises the question of how to ensure the greatest number of people benefit from the limited number of organs available. This may mean that some patients who might benefit now would have to wait longer for an organ, or even die if Anderson's position of prohibiting multiple transplants were adopted. But the inescapable fact of a limited supply of organs requires that the policy of sickest first be examined closely in light of the overall policy context.

In addition to the problem of retransplants is the problem of multiple transplants. Multiple transplants to the same patient are permitted now, but may become more common if the sickest first policy is fully implemented. The sickest patients are more likely to need more than one organ transplant than less gravely ill patients. Giving them

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[26] Mark F. Anderson, "The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?" *Health Matrix: Journal of Law and Medicine* 5 (1995): 305.

priority compounds the potential for unfairness by putting two vital organs at greater risk of failure than one, as with Pennsylvania Governor Casey. This may be seen as unfairly assigning organs to fewer patients, permitting some a chance at a full life while denying the same benefits to others. Anderson objected to the practice of multiple transplants as being unfair when he wrote, "when a heart and liver become available from one donor for transplant, they should be used to save two lives (one needing only a heart, the other only a liver) and not just one. Accordingly, transplant operations like that which saved Governor Casey's life should no longer be performed."[27]

But, there are other reasons, on fairness grounds, to recommend placing the priority with the sickest patients. The policy of sickest first helps curb discrimination by keeping variables other than medical ones from creeping into the decision matrix. David Orentlicher argued that if the sickest patients do not receive organs first, the system will result in "unfair discrimination against sicker patients or patients with more disabling conditions."[28] Orentlicher's "desctructured disability standard" for making such decisions would include a calculation of a patient's disability relative to other patients and to "employ some type of equal opportunity approach, such as a lottery system." A lottery is more fair because it reduces the chance that "sociopolitical" factors come into play and ensures that decision makers operate with something approximating a "veil of ignorance."[29]

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[27] Ibid., 303.
[28] David Orentlicher, "Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick," *Harvard Civil Rights-Civil Liberties Law Review* 31 (1996): 53.
[29] Ibid., 73.

Giving priority to the sickest first may also prevent the emergence of a race-based or wealth-based bias in organ allocation policy. According to Fred Cate, there already seems to be a hint of racial inequity in organ distribution.

> A Caucasian on the kidney waiting list has a one-in-six chance of transplantation within one year of being listed. An African-American has a one-in-thirteen chance. On average, African-Americans wait twice as long as Causasians. While African-Americans constitute twelve percent of the population in the United States, they account for approximately thirty percent of patients on the national kidney waiting list. The organ distribution system does not appear to be fair.[30]

UNOS has addressed the race question, explaining that

> A person's race *per se* is not a factor in the present allocation system. However, it has become clear in the U.S., where the organ donor and organ recipient populations are predominantly white, that Waiting List patients of other races have significantly longer average waiting times before being transplanted than do whites. ... Several biological factors are known to contribute to the problem. For example, certain blood types (types O and B) are more common among blacks than among whites. ... It is more difficult to provide kidney transplants for black patients with type O or B blood because more than 80% of kidney donors are white and 12% are black. Another serious problem for many black renal patients is that of antigen sensitization. Many black renal Waiting List patients are highly sensitized, and it is very difficult to find a compatible kidney for a highly sensitized patient, whether the patient is black or white.[31]

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[30] Fred H. Cate, "Human Organ Transplantation: The Role of Law," *The Journal of Corporation Law* 20 (1994): 88.

[31] UNOS, "Rationale for Objectives".

Thus, there may be nothing inherently racist about the outcome of the organ allocation system. By adopting a strong preference that the sickest patients receive priority, the criteria performance measures outlined in the Final Rule may risk compounding the shortage of organs. Giving priority to the sickest patients may cause physicians to be more aggressive in taking a risk of organ rejection, a risk that is higher for African-American patients, in order to meet Final Rule criteria. In addition to being inefficient, this approach may not enhance the overall fairness of organ allocation. Adjusting allocation policy to correct race disparities may result in no greater survival rates for African-Americans while reducing the total number of transplantable organs available.

In addition to race, wealth appears to be a factor in how quickly patients receive organs, or if they receive organs at all. Medicaid now covers most kidney transplants, and Medicaid, Medicare and private health insurance cover the costs of most other transplants. Still, more than 60 million Americans are not covered should they need an organ transplant. Of course, these 60 million are eligible to donate their organs even if they are not eligible to receive one,[32] another potential inequity built into the system. Being unable to receive a life-saving organ transplant for lack of money or insurance coverage can be viewed as an especially punitive extension of income and wealth disparity.

For the 60 million uninsured, their chances for an organ transplant may hinge on Medicaid funding rules in their state. To fully assess the fairness of organ allocation

[32] Cate, "Role of Law," 88.

policy, it is necessary to understand how Medicaid funding affects overall organ allocation.

Medicaid Funding for Organ Transplantation

A significant factor affecting the outcome of organ transplant policy is the question of who pays for the operations of those without the means to pay themselves. Funding rules directly affect access to procedures for many patients because of the enormous costs of transplant operations, even those who do not otherwise qualify for public assistance.[33] Medicaid rules give states latitude in deciding which organ transplants to fund, as is the case for all medical procedures funded by state Medicaid programs. But federal statutes do not require states to fund any transplants. Some courts have ruled that states are required to fund transplants in certain cases.

The fairness of organ allocation policy cannot be considered independently of the policy for providing financial assistance to patients. Patients without independent means to pay for operations, or without health insurance, would certainly be denied transplants. This would widely be viewed as unfair. In order to have a chance at fairness, a system for making funds available for these operations is a must. For most patients without the money or the insurance to pay for a transplant operation, Medicaid is their best hope.

Medicaid rules for paying for organ transplants, or any medical procedures, are essentially state policies. The enabling legislation for the Medicaid program is contained

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[33] The cost for organ transplants varies by organ. The typical kidney transplant costs $87,000 for the procedure itself and all first year follow-on care; then $12,000 per year after that. UNOS, "Rationale for Objectives".

in Title XIX of the Social Security Act, and is administered at the federal level by the Health Care Financing Administration under the Department of Health and Human Services. States are permitted but not required to participate in the federal Medicaid program, and in fact all states do, although their level of participation varies. By volunteering to participate in Medicaid, states are bound to follow the guidelines established in Title XIX. Title XIX assigns the federal government the responsibility to set broad policy -- states are charged with compliance and with using federal funds to supplement state money in administering the plan. Medicaid has grown to become the second largest health care plan in the country, providing coverage to more than 30 million people. While federal spending on Medicaid has grown by more than 10,000 percent since 1966, state spending has grown even more, from $590 million in 1966 to more than $72 billion in 1995.[34]

Eligibility for Medicaid funding is broken down into two categories, coverage for patients who are "categorically needy" and patients who are "medically needy." Patients classified as categorically needy are low-income persons, especially women and children, and those who are receiving cash assistance from programs such as Aid to Families with Dependent Children and Supplemental Security Income. The blind and severely disabled also qualify as categorically needy. Patients who are "medically needy" are those whose financial resources are too great to qualify for AFDC or SSI, but who do not have

[34] C. David Flower, "State Discretion in Funding Organ Transplants Under the Medicaid Program: Interpretive Guidelines in Determining the Scope of Mandated Coverage," *Minnesota Law Review*, 79 (1995): 1236-7.

sufficient resources to pay for needed medical procedures. Under most circumstances, these patients are required to reduce their assets to eligibility levels in order to qualify for Medicaid funding . This is known as spending down.

Title XIX not only lays out eligibility criteria, but also spells out the services that are covered by the Medicaid program. The description of these services is somewhat vague. States are required to cover all those who are categorically needy, but the statue only specifies general categories of care, such as "inpatient hospital services." Beyond the general provisions, states have wide latitude in the restrictions they may place on funding optional services provided to the categorically needy and to place even greater restrictions on what they will fund for the medically needy, so long as the categorically needy receive services at least as extensive as the medically needy. The federal law also mandates that states ensure a basic minimum level of care for eligible patients. But even then, states have the discretion to define what constitutes a minimum level of care, and are not required to pay for services the federal government itself does not fund, or which the HCFA has determined are "experimental."[35]

Rules governing Medicaid funding for organ transplants are similarly vague. No provision was made in Title XIX for funding transplants, but the U.S. Supreme Court ruled that states are not required to fund every procedure the Medicaid Act permits, including inpatient hospital services.[36] Congress later required states to develop standards for covering transplant costs if they wanted to fund transplants, but stopped short of requiring states to fund transplants. Significantly, Congress did require that if

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[35] Flower, "State Discretion," 1239-43.
[36] *Harris v. McRae*, 448 U.S. 297 (1980).

states decide to fund a certain type of transplant operation, all patients in similar circumstances must be treated alike. In other words, patients are to be treated fairly by being treated equally. No provision was made to define what constituted "similar situations," leaving this decision up to the states.

State Discretion in Medicaid Funding for Transplants

As might be expected, state approaches to organ transplant funding vary. Most provide coverage for the more common transplants (liver, kidney, heart), although some only provide this coverage for the categorically needy and not the medically needy.[37] Some states fund all transplants, some none, and others are selective in choosing which they will fund.[38] Five U.S. Circuit Courts of Appeals have ruled on the various state provisions for Medicaid funding of organ transplants, focusing on the question of whether states have a positive duty to provide funding for life-saving transplants, or whether they have sufficient discretion to limit funding for such operations. There has been little consistency to these rulings and "judicial opinion is unsettled in general on how best to deal with scope of coverage issues involving innovative medical technologies in the cooperative federalism context of the Medicaid program."[39] At present, federal funding rules are not likely to be changed in favor of greater federal control over transplant funding or significantly reducing state discretion. [40]

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[37] Flower, "State Discretion,"1245-6.
[38] David L. Weigert, "Tragic Choices: State Discretion over Organ Transplant Funding for Medicaid Recipients," *Northwestern University Law Review*, 89 (1994): 275.
[39] Flower, "State Discretion," 1246.
[40] Weigert, "Funding for Medicaid Recipients," 294.

But the debate over whether states should have this discretion takes on additional urgency given the enormous costs of medical care and the funding choices that must be made. Because costs are high and rising, states do not have the funds they would like for the coverage they would like to provide, even after receiving federal Medicaid funds. If states decide to fund organ transplants, they cannot expect to receive additional federal money because Congress has not made such coverage mandatory. So, the decision to provide Medicaid funding for organ transplants often comes at the expense of other more basic services. The opportunity cost of funding transplants is an essential consideration even before the question of who should receive funding for an organ transplant arises.

States are sometimes forced to choose which patients will be denied transplants in order to fund other more basic medical services. One example is Oregon, which in 1987 "cut Medicaid funds for 30 organ transplants in order to extend coverage to 5,700 poor women and children."[41] When states choose to extend Medicaid funding to organ transplants, they are forced to offset the benefits accruing to a few with service reductions for many others. Tradeoffs like this are made in every state, although they are usually not so obvious. But the tradeoffs are real. Making such decisions places state Medicaid administrators in the position of making rationing decisions even if the consequences do not immediately present themselves.

Guido Calabresi and Philip Bobbitt have argued in favor of this kind of "invisible rationing" because it protects society from acknowledging that certain choices carry with them unacceptable moral consequences no matter what decision is finally reached. Such

[41] Ibid., 269 n, 3.

choices cannot be resolved on rational moral grounds, requiring a certain blindness to the consequences of a particular judgments.[42] To the extent that Medicaid organ transplant funding decisions are made without regard to the welfare of those who are denied care in favor of transplant recipients, the illusion that a tragic choice has been avoided is maintained. This places a heavy burden on the administrators who maintain the "noble lie," to the citizens of their state and perhaps to themselves, that it is unnecessary to discuss providing scarce health care funds to one patient instead of another. But it prevents the public debate on the fairness of organ transplant funding from engaging the full range of consequences.

Because Medicaid funding of organ transplants varies by state, the likelihood of low-income patients receiving an organ varies depending on where they live. Some argue that this scheme is unfair since some will not benefit from transplant technology even if they have substantially similar medical and financial circumstances as those who do benefit. But this argument is based on the premise that fairness is a national question. It ignores the possibility that each state's unique circumstances could make a national perspective less relevant than a state-by-state evaluation. It is not a presumptive argument of federalism that fairness can only be achieved on a national level. Permitting states to determine to what extent organ transplants will be funded may actually improve the underlying fairness of the allocation decision. There are several reasons for this.

First, states vary widely in the underlying economic circumstances and Medicaid funding resources. David Weigert noted that those circumstances include per-capita

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[42] Guido Calabresi and Philip Bobbitt, *Tragic Choices* (New York: Norton, 1978): 18-19.

income, the number of Medicaid recipients, and the percent of Medicaid costs covered by federal matching funds. In addition, he reported that Medicaid funding is higher in states with more liberal electorates, more physicians per capita, more intense political competition and greater delegation of authority to local governments.[43] A one-size-fits all prescriptive solution to funding organ transplants would require some states to make unacceptable tradeoffs in the services that could be provided to others needing health care assistance. This would limit state autonomy and the discretion to provide more services than the national average. But is discretion linked to fairness? It could be argued that state discretion increases liberty but not necessarily fairness since some patients would still be treated differently than others. But fairness contains a relational aspect; it corresponds partially to the expectation of treatment and the kind of treatment others receive. Even if states differ, the fact that outcome parity and procedural equality prevails in a given state could establish the fairness of a funding scheme for residents of that state. If those residents move to another state, their expectations could be adapted to the new conditions. Further, patients who need an organ may be able to move to a state whose funding policy more closely matches their needs. Fairness is not necessarily achieved on the national level only.

The second reason that state discretion may increase the fairness of transplant funding is that transplant procedures do not all cost the same or have the same prospects for success. The intervention of state authorities in funding decisions permits a more thorough consideration of each case to ensure scarce funds are well spent. Recall that

[43] Weigert, "Funding for Medicaid Recipients," 304-5.

federal guidelines on Medicaid funding in Title XIX and HCFA rules are broad, states are expected to flesh them out. Some types of transplants are experimental or so new that their results cannot be confidently compared to their costs. The decision to dedicate scarce Medicaid funds to a small number of gravely ill patients needing a risky procedure could mean dropping many other needy people in need of more basic services. Fairness may dictate that close scrutiny be applied to evaluating different types of operations, a scrutiny the federal authorities have not provided.

The third reason state discretion can be seen as improving the fairness of Medicaid funding decisions is such a scheme may be said to strengthen civic community. By taking responsibility for deciding how to distribute scarce Medicaid dollars, states make crucial choices reflecting shared values where the effect of their votes and preferences have a more direct bearing on their own welfare. But how does fostering a greater sense of civic community create greater fairness?

The idea that government itself is improved through greater local control has been extensively discussed by Robert Putnam. Putnam observed that when Italy decided to create regional governments in 1970 and invest them with authority previously reserved for the national government, a greater sense of civic attachment followed, at least in some districts, and this led to more effective government. He wrote that "the performance of a regional government is somehow very closely related to the civic character of social and political life within the region."[44] If performance is related to the character of social and political life, it is arguable that fairness could be, too, especially since fairness is a central

[44] Robert D. Putnam. *Making Democracy Work* (Princeton, N.J.: Princeton University Press, 1993): 99.

aspect of public policy. Voters could create their own expectations about what constitutes fair policy and influence their passage into law. Because the people of a state can more directly influence state programs than federal ones, it is more likely that their grievances about fairness will be heard at the state than the federal level. And because participation increases civic attachment, it may also increase the reciprocity citizens feel toward each other. As Weigert noted:

> Public spiritedness is a product of participation in deliberation over the public good. If the citizens are actively engaged in the public debate they will have more of a stake in the community. The natural sentiment of benevolence, which lies at the heart of public spiritedness, is stronger as the distance diminishes between the individual and the objects of benevolence. An individual is most likely to sacrifice her private interests for the good of her local community than for the good of the nation as a whole. Hence, granting state discretion over transplant funding is more likely to lead to just outcomes.[45]

The Oregon Plan

The discretion to define fairness within the context of Medicaid funding, and specifically within the context of organ transplant funding motivated Oregon voters to create a bold Medicaid funding plan. There may be no better illustration of the dynamics of public participation in defining fairness than in the debate that produced this funding plan. The plan not only established a scheme for giving priority to the poor and uninsured, it included a statement of community values and priorities for funding specific

[45] Weigert, "Funding for Medicaid Recipients," 308–9.

procedures, including a health care rationing plan justified by prevailing community values.

The impetus for this plan was the previously mentioned decision to defund optional organ transplants (except kidneys and corneas). While this decision itself was barely noticed by most state residents, the subsequent death of 7-year-old Coby Howard received extensive coverage. Coby Howard, who otherwise qualified for Medicaid, was denied a potentially life-saving bone marrow transplant because funding for such operations was deleted by lawmakers in the 1987 legislation. The resulting public debate led to "The Oregon Medicaid Priority-Setting Project."[46]

This project was the result of a grass-roots movement to prioritize Oregon Medicaid funding policies by deciding what kinds of medical care should be funded and which should not. Through numerous town hall meetings, public debates and legislative deliberations, Oregon residents established the principles they would apply to health care rationing decisions. Among the principles were protecting the "dignity of individuals, prevention of disease, justice in the distribution of health care services, cost control in health care and fairness in resource allocation and rationing policies."[47] The debate was subsequently broadened to consider questions such as why the citizens of Oregon value a particular medical procedure over another and on what grounds they could reach consensus for operationalizing their core values about public funding for health care. Ultimately, legislation was passed which provided a substantial package of health care for

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[46] Kevin P. Quinn, "Viewing Health Care as a Common Good: Looking Beyond Political Liberalism." *Southern California Law Review*. 73 (2000): 327-8.
[47] Ibid., 328.

families with incomes at 100% or less of the federal policy level, offset by a sharp curtailment of expensive exotic lifesaving medical procedures, including most organ transplants. Subsequent objections by the Department of Health and Human Services required the Oregon plan to add back in transplant funding for alcoholics in need of livers and life support for premature babies weighing less than 18 ounces.[48]

The Oregon plan represents a well organized, self-consciously communitarian approach to defining fairness within the context of organ transplant policy and health care funding. By organizing to define the sense of the community on such matters as the state's role in promoting health maintenance, the extent to which individuals are responsible for their own health and their own health care funding, and addressing questions about the relative merits of longevity versus quality of life, the citizens of Oregon have resolved questions many believe impossible to resolve. Many observers believe that citizens act on the basis of narrow self interest and find communal expression of fairness unlikely given the increasing diversity of the American public. But in Oregon, the citizens articulated a compelling definition of the principles of fairness. Those principles where then applied to concrete action through a coherent health care rationing policy. What Oregonians discovered is that they "share a living tradition of values about health care that can help define some package of health services as constituting a common good." What's more, they discovered that they could define a universal principle of fairness and then use that principle to justify particular action because "they first articulated collective health care values supported by publicly accessible reasons, and

[48] Ibid., 350.

only then permitted state officials to define a basic health care package based on those values."[49]

[49] Michael J. Garland and Romana Hasnain, *Health Care in Common: Setting Priorities in Oregon*, (Hastings-on-Hudson, N.Y.: Institute of Society, Ethics and the Life Sciences , 1990): 16-17.

RANDOM SELECTION, FAIR PROCEDURE AND MORAL INDIFFERENCE

The policy on distribution of transplantable human organs illuminates conflicts over the meaning of fairness that are seemingly insoluble. The basic disagreements over fairness in this policy revolve around questions of public morality: Can fair results be produced without centralized decision making? Do regional allocation systems produce equitable outcomes? Does physician discretion improve fairness? Are Medicaid funding rules fair? Can citizens agree on principles of fairness? We have seen that resolving these questions requires seeing fairness within the framework of ethical theory, hearkening to moral principles and interpretations of the good. Much of contemporary political theory presumes that there is little hope of reaching consensus on these questions.

But in fact there may be a way to achieve agreement on the meaning of fairness, as we have seen in the Oregon example. Oregonians were capable of crafting a prioritized list of values corresponding to common beliefs about the fairest way to use limited resources and about who will be denied life-saving medical care. This is a step toward achieving basic agreement on a definition of the good, at least in terms of funding organ transplants for the poor. But no matter how one answers the question of what is fair in organ allocation, almost all observers agree that fairness is the goal.

It is an urgent goal. The validity of organ transplant policy may hinge on the ethical standards used to justify critical medical decisions; decisions that cut to the heart

of social justice and present lawmakers with limited, often undesirable alternatives. As policy makers search for a fair way to allocate the available organs among those in need of them, they are forced to wrestle with a definition of fairness in conflict.

One opinion on specific ways to enhance fairness is held in common -- prioritization of patients is best done using precise scientific evaluations of medial indicators. Unfortunately, clinical factors do not readily suggest principles of morality and do not inspire confidence that like cases will be treated alike. Such schemes usually produce large classes of patients with conditions so similar that no precise differentiation or ranking for determining urgency of care is possible. Medical criteria alone offer no viable decision rule, as much as we might desire the certainty and objectivity of a scientific evaluation. Physicians can offer little philosophical clarity to the decision matrix.

> These resources [organs] are a public trust and should not be the objects of or mechanism by which control over rationing rules are derived and maintained. Who then should make the rules? We need to examine the moral philosophy underlying rationing policy and, whether the transplant immunologist an/or clinician have a special claim to make policy beyond the genetic issue of ABO blood-group compatibility, the lab-test issue of a positive lymphocyte crossmatch, and the medical issue of excluding those few with absolute contraindications to transplantation. A more balanced decision-making process should not be seen as a threat to cherished professional autonomy. Rather, the recognition that the making of rationing policy is not a medical act and should be played out differently should relieve the burden of responsibility from those who have little current justification for assuming it.[50]

[50] Ronald D Guttman, "Cadaver Kidneys: The Rules of Rationing," *The Lancet* 348 (1996): 456.

Because the medical criteria alone do not give a complete picture of the disease or the chances for successful transplantation, organ allocation judgments today sometimes include character and contextual concerns. These judgments have the advantage of including many relevant criteria, not just those related to the severity of the illness and time spent on the waiting list. But the risks of subjective decision-making are great, leading many observers, including HHS, to be keenly interested in the ethical criteria used to make such judgments.

The Use of Lottery in Organ Allocation

It is important also to address the question of whether an ethical criterion should be applied at all, or whether a lottery or some other form of randomization could guarantee the ethical purity of the allocation decision.

> When we get caught in unavoidable situations of limited resources that cannot sustain all of our individual lives, the principle of justice becomes paramount. In terms of distributive justice, the fairest way of rationing or distributing limited resources, according to this view, is on the basis of equality. This practice could be carried out by drawing lots, participating in a lottery, or having some kind of first-come, first-served arrangement, such as a waiting list or a queue for all persons in need of particular solid organs.[51]

Such an approach would be comfortable with the desire to eliminate personal and communal beliefs from important questions of distributing social goods. The use of some

[51] Weir, "Fairness in Allocation," 95.

random scheme of organ allocation would ensure a level playing field, without fear that powerful interests would conspire to allocate themselves organs at the expense of others who are less powerful. Many contemporary political theorists would recommend such an approach. For example, John Rawls' theory of justice as fairness is based on the premise that the introduction of personal influence, even the knowledge of one's abilities and place in society, is enough to skew the structure of decision-making. Presumably, a lottery for allocating organs would eliminate personal influence. No fairly administered drawing of straws could admit the influence of advantage. But can such a seemingly impersonal scheme be justified as fair?

An early attempt to address the fairness of lotteries as decision rubrics in life and death decisions appeared in the case of *U.S. v. Holmes* (1842).[52] The case involved the fate of the passengers on the American ship *William Brown* which hit an iceberg off Newfoundland and sank. One of two lifeboats also sank, and the other was left overcrowded and foundering in the frigid, choppy waters. It was at this point, with rescue nowhere in sight, that the crew was faced with a dreadful decision: how to decide who should be sacrificed so that others might live.

The crew adopted two criteria: "not to part man and wife, and not to throw over any woman." They subsequently threw 14 men overboard. Two sisters jumped rather than be separated from their brother. After the survivors were rescued and returned to Philadelphia, the crew disappeared except for Holmes, who was arrested, tried and convicted of manslaughter. Even though Holmes was only acting on orders from the

[52] *U.S. v. Holmes*, 26 F. Cas. 360 (E.D. Pa. 1842).

mate, the court found that his culpability was tied to the criteria used in deciding who was to die. Only by casting lots, said the court, could Holmes' actions have been justified since no other criterion is "so consistent both to humanity and to justice."[53] This method would have removed any shadow of prejudice from the decision, and would have given all an equal chance of survival. Even if the selection had meant the deaths of women, children or members of the crew with the knowledge needed to improve chances of survival, the court demanded strict equality of opportunity. This is a foreshadowing of the theory of Rawls -- fairness for the *Holmes* court corresponded to a certain impersonal atmosphere, a feeling of distancing oneself from the people affected by one's decisions, a willful ignorance of character and circumstance. Since selection by lottery is entirely objective, it may have the additional benefit of preserving the dignity of those condemned to death. The crew decided who was not worthy of living, a decision that added to the humiliation of sacrifice by attaching it to an implication of relative unworthiness for those tossed into the sea.

It is interesting to note that the crew did not adopt any scheme of random selection in their desperate hour. The fear of death would have been present in every mind on that lifeboat, as would the necessity of lightening the craft of its human cargo. They had just witnessed the sinking of the other lifeboat for failing to take this necessary step. In such a context, a lottery would have had the effect of clearing the crew of its responsibility. And the passengers would have at least had the satisfaction of knowing their chance of survival was equal to others, that their fate rested with God. The dignity of the crew and

[53] Weir, 1994, p. 92.

the passengers would have been preserved and the resulting decision would have been unimpeachably fair. Yet the crew did not draw lots for choosing who would die, substituting instead their own judgment in place of chance and its morally cleansing effect. It could be argued that the crew adopted the decision rule that best guaranteed their own survival. Still, their instinct to make a judgment is instructive, regardless of the condemnation this judgment received later in a safe, warm Philadelphia courtroom.

James Childress advocated the *Holmes* standard be applied to organ transplant policy. While he admitted that the circumstances in *Holmes* were not strictly analogous to transplant policy, the crew's decision of who to throw overboard can be compared to doctors' decisions of how to allocate "Scarce Life-Saving Medical Resources" (SLMR). For Childress, both situations involve the interests of human dignity and equality, and dictate random selection. The best solution, both for the crew of the *William Brown* and for transplant physicians today, is for some to voluntarily waive their right to be saved, much like the sisters who jumped into the North Atlantic to join their brother. But failing such a supreme demonstration of moral reciprocity, Childress argued that in deciding who should receive vital medical resources "the rational choice ... would be random selection or chance since this alone provides equality of opportunity."[54]

Chance is also, according to Childress, the fairest way of determining who should be placed on the list of potential organ recipients and who should be left off. Of course, objective medical criteria are important. But they only serve a first-level screening function. They merely establish who could be helped by a transplant on the basis of

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[54] James Childress, "Who Shall Live When Not All Can Live?" *Soundings* 53 (1970): 350.

clinical analysis. But Childress assumed that this screening would result in many patients being placed on recipient lists, leaving the question of allocation between them still unanswered.

Choosing by lottery fits naturally with the elements of chance found throughout the progress of disease, diagnosis and treatment. Because it is rare to reach the critical stage that an organ transplant is necessary, patients in need of organs are statistical anomalies to begin with. The failure of lesser treatments is also unpredictable and therefore difficult to rationalize. In this sense, the use of lottery is seen by some as a fitting way to resolve the final question facing these patients -- a lottery is in accord with the unfortunate but random turn their life narrative has taken. Those holding this view, Childress among them, can point to at least several factors to justify it.

To begin with, disease itself is in some ways the result of chance. There is an element of luck, bad luck, in contracting diseases that necessitate SLMR allocations. In many cases, pathologists are unable to determine why one person's kidney fails while another's does not, even when heredity and lifestyle are held constant. From the patient's point of view, it is impossible to answer with any certainty the "why me?" question. If the course of disease can be seen as the result of random factors, the randomized choice of which patients will receive SLMRs makes an intuitive connection, at least for those who are most directly affected.

Second, Childress argued that the timing of the disease is of great importance, and also entirely subject to the forces of fate or chance. If a new patient is medically qualified for kidney dialysis, for instance, but there are no dialysis machines available, the timing

of the disease becomes more related to the care received than the medical criteria used to select that person for dialysis in the first place. Childress writes that, "few would ... consider removing a person from a kidney machine on the grounds that a person better qualified *medically* had just applied."[55] Kidney dialysis is not an elective procedure and its need cannot be timed to coincide with the availability of the proper equipment. The randomness of the onset of disease shows another way in which chance plays a decisive role in the treatment of disease.

Third, chance provides the ultimate objectivity for physicians seeking to eliminate personal factors from their decision-making. Doctors routinely try to ignore individual circumstances as best they can when making decisions throughout the diagnosis and treatment phases of disease. Conventional rubrics for building patient trust call for doctors to make decisions independently of their patients' social worth. For instance, physicians may schedule surgery on a first-come, first-served basis, they may prescribe therapy without considering ability to pay and they may give priority to the most gravely ill without regard to social position.

For these reasons, the use of lottery is justified by the belief that the objectivity of physicians and the dignity of patients is best preserved by choosing randomly in organ allocation decisions. Following again the *Holmes* opinion, Childress argued that human dignity is maximized when chance governs SLMR allocation decisions because it guarantees patients an absolute equality of opportunity for the care they need. By this approach, physicians can use randomization to build trust with patients. Trust is

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[55] Ibid., 351.

"inextricably bound to respect for human dignity," because it means people are viewed not as a means to some (social) end, but as an ends in themselves. Random selection of patients for organs is the link between dignity and trust for many physicians. In this view, selecting patients for organ transplants according to the results of a lottery eliminates the personal factors subjectively weighed by physicians. To judge patients as people with pasts and potentialities is to reduce them to social entities having little value outside the context of their community. Lottery promises every patient the dignity of equal and therefore fair opportunity to the liver, kidney or heart they need. Patients are better able to trust medical decisions made without regard to personal factors, and are better prepared to accept the disappointment of not being selected.

But this is surely a strange way to view human dignity. The argument that people cannot be viewed as people when their dignity is at stake seems absurd. And greater impersonality on the part of physicians hardly seems a prescription for improving patient trust. Patients want to feel that their doctor knows them has their own best interests in mind at every step. Impartial medicine is ineffective medicine if it ignores patients' longing for human connection with those they put their trust in.

There is a further difficulty in the logic of Childress' argument. He dismisses the use of social utility in subjective judgments, then makes significant exceptions for using these very criteria in important cases. He argued that selection according to social usefulness is dangerously biased. By incorporating knowledge of patients' social position into their decisions, physicians might be tempted to decide who should get an organ based on the social contribution they might make later, not in order to tailor the treatment to the

patient or to offer the human touch. Childress' point was that physicians would use their knowledge of patients to play social engineer, to make decisions that would benefit society at the expense of individuals. He thereby expressed the widely-held view that making judgments about people's worth is unwise or even unfair. But, he also asserted that occasionally such judgments are necessary.

If, for instance, the president of the United States was in urgent need of a kidney during a national emergency, he or she should be moved to the top of the organ recipient list on the basis of their social utility. Childress believed the value of the president's life was be so obvious that an exception could be made without jeopardizing the underlying system. In such a circumstance the man or woman involved would be "practically indispensable" for society.

> We depart from chance in this instance not because we want to take advantage of this person's potential contribution to the improvement of our society, but because his immediate loss would possibly (even probably) be disastrous.[56]

Nicholas Rescher suggested that formulas for assessing an individual's value to society should not be used only in exceptional cases like the president, but in all cases. Rescher proposed a procedure for selecting patients for "exotic (medical) lifesaving therapy (ELT)" according to five criteria organized broadly into two categories, clinical

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[56] Ibid., 353.

factors and social utility factors. In allocating organs, Rescher would give equal weight to each of the two categories.

Rescher recommended three phases for making organ allocation decisions. The first phase would be to evaluate medical indicators for transplant suitability, thereby selecting the pool of potential ELT recipients. This is a mere screening of patients. Rescher assumed that medical screening will produce a large pool of substantially similar cases far too numerous for the available organs. The second phase would reduce that pool by giving each patient a score equal to a combination of their objective medical evaluations and a more subjective evaluation of their social utility.[57] This would combine the objective and subjective factors into a single scaled value, and would eliminate some from consideration. Still, Rescher assumed that many patients would receive substantially identical scores and comprise a group too large for the number of transplantable organs available. Some further reduction in the pool of potential recipients would still be needed.

The final phase of Rescher's procedure is designed to reduce the pool even further using a lottery to make the final selections for those achieving the greatest scores after the first two procedures. The lottery would be necessary because no set of criteria could reduce the pool enough. Even after applying all the criteria, Rescher assumed that the number of potential ELT recipients would still be too large for the available resources. There would be no rational way to make any further distinctions between patients, leading

[57] Nicholas Rescher, "The Allocation of Exotic Medical Lifesaving Therapy," *Ethics* 79 (1969): 182-3.

him to conclude that choice by lottery is preferred. He identified three advantages to this approach.

First, even though no system of choosing is optimal, lottery is better than a rigid decision rule that has no morally superior justification. There will always be patients who need and deserve the ELT but will not get it. The use of a mechanically-applied rule makes no sense at all in cases of life and death because it omits the dignity of the patients.

Second, those patients not selected will be more likely to accept their fate knowing that the luck of the draw and not some bureaucratic rule application was the final criterion.

> The circumstances of life have conditioned us to accept the workings of chance and to tolerate the element of luck (good or bad): human life is an inherently contingent process. Nobody, after all, has absolute right to ELT -- but most of us would feel that we have "every bit as much right" to it as anyone else in significantly similar circumstances. The introduction of the element of chance assures a like handling of like cases over the widest possible area that seems reasonable in the circumstances.[58]

Rescher argued that each patient is, after all, in need of ELT because of the "role of chance in singling out certain persons as victims for the affliction at issue."[59]

Third, the injection of chance as the final selection criterion relieves the physician of the burden (and, it must be added, the legal liability) of making such choices. This use of chance then, in addition to offering the advantages just mentioned, makes non-selection more palatable for those who must choose who lives and who dies.

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[58] Ibid., 184.
[59] Ibid.

Arguments for random selection of patients elevates the importance of fairness to an extraordinary level. It places fairness -- objective, random and equal selection -- above concerns for human individuality and above the human longing for acknowledgment of uniqueness. These arguments assume that each patient meets roughly the same medical criteria for selection, is not exceptional (such as the president), has the same chances for survival, and is in every other way identically entitled to an organ. Of course, such conditions would rarely if ever occur within a single physician's span of control. Such conditions may not occur under any circumstances. Each person's precise medical condition is unique even if clinical measures cannot readily quantify the differences. But in addition to the possibility of measurable medical differences, can we identify relevant moral differences?

Moral Differentiation Among Potential Organ Recipients

The preference for random selection assumes away meaningful distinctions between people, medical and moral. While this may be merely a theoretical device necessary for moving forward the philosophical argument in favor of random selection, it is also the crucial assumption that makes the argument plausible at all. For if fine but measurable medical distinctions were possible, they would presumably take precedence over the interests of fairness. No one would argue, for instance, that a patient determined to be at a slightly, nearly imperceptibly, but nonetheless measurably higher risk for rejecting an organ should receive it anyway simply because that patient was chosen at random. Since medical criteria can often identify differences between patients, to say that

the majority of patients are equally entitled to an organ involves choosing to give relatively greater weight to fairness than medical concerns. This dilutes the objectivity random selection hopes to impart. It injects a preference for fairness into what is billed as an objective rubric for rational decision-making.

In addition to the problems of medical differentiation, moral differentiation is a factor in organ allocation policy. So far the problem of organ allocation has been presented as one of reducing the pool of medically identical patients to a smaller pool corresponding to the number of organs available. The choice-by-lottery argument assumes that the larger pool is a group of morally undifferentiated patients without relevant life-stories or valuations that can be factored into the final allocation decision. But this assumption is difficult to sustain in real world organ allocation decision-making. Every patient has a unique moral status, and society may have a valid interest in the final selection. Such interests may be unrelated to the relevant medical conditions.

For instance, a young mother of three is not in the same moral position as an elderly bachelor with no children. Even if medical authorities do not value her life over his, three children do. In this case, it would be plausible to argue that the life of the woman should be given greater weight on a moral scale than the bachelor. She might have a greater claim to an organ than he has. Is it in the interests of fairness in such a case to choose randomly between these two? It may well be appropriate to rank them on a scale of moral worth. To rank them we must make some decision about the validity of the claim each has to an organ. We may decide, for instance, that the young mother has a more valid claim. But the validity of the claim may not be enough, because the young

mother does not need a claim – she needs an organ. To clarify the relative moral position of these two people, we are lead to differentiate between the fairness of the claim to an organ and the fairness of the distribution of organs.

Because of the shortage of organs, fairness of claim in many cases implies only that potential recipients have an equal chance for an organ. It does not also entitle them equally to the organ itself because there aren't enough organs to go around. To have an equal claim means that those who need an organ each have the same chance for an organ relative to other potential recipients. For instance, assume that a single organ is to be distributed by lottery to either the young mother mentioned above or the elderly bachelor. If the young mother does not draw the organ, the interests of fairness have still been met if we assume fairness only entitles her to a claim on the organ. By participating in a fair random drawing, her entitlement is fairly met. If this seems morally unsatisfactory, we might desire to divide up the good being distributed. But the organ cannot be divided -- it must go wholly to one or to the other. By using a lottery we have made a choice about the value of fairness over against the moral value of the lives of two patients relative to each other. We have decided that the interests of fairness trump moral valuations and are confined to the fair claim that a recipient can have to an organ after all relevant medical criteria have either been eliminated or assumed away. Again, this weakens the claim that random selection imparts greater objectivity to the final distribution.

It might further be argued that some scheme of weighting should be added to the lottery in order to shore up the young mother's relatively greater moral standing and greater moral claim. For instance, she could receive two of three chances at the organ,

giving her double the opportunity for an organ relative to the elderly bachelor. But again, this assumes that only the claim to the organ is relevant to satisfy fairness. If the bachelor wins the lottery anyway, her stronger moral standing has in the end done her no good.

So if random selection is to be used as the method for determining who gets an organ, it is because a previous decision has been made that the claim to an organ, not the actual organ itself, is the crucial element in the calculation of fairness. This of course implies that the social value of individual patients is less relevant than the fairness of the claim is.

Fairness of claim corresponds to a procedural question of whether or not people are treated equally up to but not including the point of actual allocation. In the case of organ allocation it is a fact that the allocation itself is not equal and cannot be equal. We may argue that the least that can be done is to allow for equal opportunity in selecting who will get the few organs available. This desire makes fairness our moral fall back position: we know that no distribution will be fair to all and therefore seek the solution that at least satisfies procedural fairness. Even if satisfyingly fair distributions are not possible, we may console ourselves that the process is fair. But this again blurs the moral distinctions between people by elevating procedural fairness above the agonizing search for the single best allocation.

The idea that fair procedure is better than a fair outcome is the chief justification of the random selection argument. John Broome refined the random selection argument by addressing the question of choosing organ recipients by lottery even when acknowledging moral differences between them. He wrote that, "the problem, then, in

justifying random selection is to explain how it can be justified even when all [moral] considerations are not in balance."[60] He acknowledged that there is not likely to be an exact balance between all potential recipients regarding their moral standing or their social utility because "it will never in practice happen that all the considerations in favor of one candidate will exactly balance those in favor of another."[61] If there were a perfect balance, at least a perfect theoretical balance, we would be completely indifferent to the final choice. But human judgment is too refined an instinct and too prevalent in human activity to permit such an evaluation. Even the crewmembers of the *William Brown* resorted to judgment in deciding whom to sacrifice and whom to save. The innate human ability to differentiate between people, even if that differentiation is vague and unrefined, nevertheless makes complete moral equality between organ recipients impossible. And if each patient is unique morally, how can Broome sustain the argument for random selection, which is itself an absolutely random procedure devoid of judgment?

To begin with, Broome argued that random choice is a relatively expedient procedure, minimizing the resources expended in making a complex decision, and reducing the emotional burden on those who must make it. But he finds this justification alone to be insufficient. The best argument for random selection, in his view, is that it is fair. If it is cheap, it is because it is first fair and then because it requires few resources, otherwise it could not even be considered. If it reduces the emotional burden on decision makers, it is the fairness of the procedure that allows them to bear more easily the consequences of their allocation decision. It is indeed the procedural fairness of random

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[60] John Broome, "Selecting People Randomly," *Ethics* 95 (1984): 40.
[61] Ibid.

selection that supplies its best justification. Broome offered three arguments for justifying random selection as procedurally fair.

First, Broome argued that fairness of any procedure is relative. Its achievement implies procedural impartiality to allow each person with an equal claim to a good receive an equal chance to receive that good. But fairness is limited to the claim itself and limited to the particular context within which the good is to be distributed.

> When a good is to be distributed, a duty is owed to each candidate to treat him fairly. Fairness gives a candidate a certain sort of claim to the good, which must be taken into account. We need to be clear about the nature of such a fairness claim. To say a candidate has a fairness claim does not imply he has any general right to the good. . . Fairness is only a relative matter, a matter of how one candidate is treated relative to others. A fairness claim exists only in a particular context where a good is to be distributed, and its only significance is in relation to the fairness claims of the other candidates.[62]

Second, Broome argued that random selection reduces the conflict between the fairness and the general good. Implicit in my earlier comments about moral differentiation is that society has an interest in promoting morally superior claims whenever possible for the sake of the general good. But these moral claims can easily come into direct conflict with the fairness of organ allocation. Broome pointed out that random selection guarantees equal opportunity even if it cannot increase the absolute number of people who are satisfied with the final allocation. For instance, it may advance the general good of society for the young mother mentioned earlier to receive the organ.

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[62] Ibid., 43.

But even if the young mother were not to receive the organ by lottery, the fact that a lottery was used lends an absolutely equal opportunity, and therefore absolute fairness to the procedure. Promoting a lottery in the interests of fairness "can help to reduce the conflict between fairness and the general good, making it possible to increase one without too much damage to the other."[63]

Finally, Broome argued that random selection can be justified as fair when the moral differences between people are small. When their moral standing is exactly equal, we are indifferent to the final distribution. When there are great differences, we permit subjective selection because it is easy to see how such selection best advances the general good. But when the differences between candidates for a good are below some minimum, the only fair way to make a distribution is by lottery. Only in this way can equal treatment between individuals be achieved when not all can be perfectly satisfied. "What fairness seems to require is that peoples' treatment should be in proportion to their claims." But since not everyone can get an organ and because organs cannot be split, proportionality of treatment is impossible. "The next fairest thing would be to give each person a chance proportional to his claim. To give them both an equal chance is a little less fair than that." [64]

Broome is clearly establishing the priority of relativity as a key component of fairness. He advocated a balance between fairness and the general good and argued that moral claims are relevant only when the moral differences between cases is large. When moral differences are small, the fairness one person receives can only be determined by

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[63] Ibid., 48.
[64] Ibid.

knowing how fairly another person has been treated. Because the equality of the final distribution cannot be measured in any meaningful way (many deserving recipients will get no organ no matter what we do), there is little meaningful way to compare the fairness of their treatment. But because we can easily assess procedural equality, we can make comparisons between people and therefore achieve fairness. By this reasoning fairness is comparative and procedural, not substantive.

This argument is highly appropriate for the debate about organ transplant policy because it addresses the relevant conditions physicians face in making organ allocation decisions. Broome would have physicians compare the chances each patient has to an organ, even if the use of the organs were not maximized. In such a scheme, the dictates of fairness may become more important the general well-being of society. If the requirements of fairness result in harm to the general good, it is incumbent upon decision makers to decide how highly to value fairness relative to other considerations, or, how to balance fairness with the general good. Broome is quick to point out that choosing to elevate the importance of fairness by random selection does not advance the cause of objectivity or imply a refusal to judge between people. Selecting randomly "is not a way to avoid playing God."[65] By choosing randomly, we may enhance fairness as far as is possible in a given context, but we cannot claim the resulting decision is morally superior to any other in which equal consideration was given to each person. We turn the focus to procedure and reduce the philosophical conflict organ allocation policy generates.

[65] Ibid., 52.

CONCLUSION

Too few organs are available for all those who need them and we desire a fair way to allocate them. Our first priority is to establish the relevant medical criteria for choosing the patients who would benefit from an organ and then to ranking them according their relative need of the organ. But there is no good way to achieve this ranking using medical criteria alone. Once a pool of recipients has been established, the usefulness of medical technology in helping us make decisions diminishes. Physicians leave us with in the difficult position of making a moral judgment about the worth of people, a choice with life and death consequences. It is a moral dilemma that we find very difficult to resolve given our reluctance to pronounce moral judgments and our strong desire for neutrality and objectively rational decision-making. Physicians are not usually ethicists, philosophers, legislators, judges or clergy – they are often not equipped to give us the clues we need to make these choices.

But even ethicists are unable to produce a satisfyingly fair organ allocation policy. The issues involved are complex, begging for reasoned and widely acceptable solutions. Because of the many competing interests and interpretations of fairness, there is not likely to be a solution to the moral dilemma of organ allocation everyone would agree with.

Our current policy is to leave to the task of selecting appropriate criteria to a contractor, UNOS, selected by Congress to allocate organs regionally according to need. But the UNOS system has created unequal waiting times and reduced chances at an organ

for poor and minority patients. Such unfair outcomes have lead the HHS to propose new rules which would end the regional system and create in its place one national waiting list administered by the HHS secretary. This system, it is argued, would improve the fairness of the allocation system.

But other difficulties would still exist. Most donors expect their organs to be used locally, not wanting them sent anywhere across the country. They may be less willing to donate if they think their organs may be used outside their communities. By eliminating regional allocation, HHS administrators may unwittingly reduce the supply of organs even further by reducing the propensity to donate. In addition, because each region, and arguably each state, has different circumstances, it can be viewed as unfair to remove decision-making authority to Washington. Local control over important ethical decisions is widely viewed as fair when local differences make local solutions reasonable. This new system might improve fairness in some ways, but reduce it in others.

Medicaid rules for funding organ transplants aim at enhancing the efficiency of funds, not the fairness of organ allocation. Some states fund more procedures than others. This makes for further inequalities of care depending on which state a potential recipient lives in – a situation considered by many to be unfair. However, if scarce Medicaid funds are diverted to finance organ transplants, they are not available to provide more basic medical services for those who would otherwise qualify. This, too is seen as unfair.

Some ethicists argue for random allocation of organs on the grounds that if the final allocation of organs cannot be fair, at least the procedure used to make the allocation

decision can be fair. This approach brushes over the moral differentiation between patients any life and death choice presumes. Randomization assumes moral differences are either minor or not there at all. In the real world, patients are not morally equivalent. Each has unique circumstances, a unique history and life prospects. To ignore these differences through the use of lottery could be considered unfair, even if the procedure of random allocation is fair.

It seems that no proposal examined so far has provided a satisfactory solution to the question of fair allocation organs. The Oregon case provides a rare example of a deliberate decision to establish appropriate moral rules for organ allocation decisions based on community values. The citizens of that state were able to establish, through democratic dialogue, the moral principles that would guide the implementation of what they believed to be fair policy. The precise solution in Oregon is imperfect and unlikely to work everywhere, but the example set by the citizens there is noteworthy. It proves that the struggle to understand fairness in the context of concrete policy is a struggle not undertaken in vain.

In the final chapter I will return to the question of fairness in organ allocation policy. There I will propose how a model of fair administrative decision-making may clarify the theoretical and practical considerations involved in implementing fair policy. But before moving to that step, it is important to examine the theory of fairness more carefully, especially contemporary theories of political morality. In the next three chapters I will examine the major theories that may shed light on the organ allocation dilemma, and on the meaning of fairness across the policy spectrum.

CHAPTER 3

Rawls on Fairness: The Tension Between Universalism and Practicality

In this chapter I will explore the view of fairness put forward by John Rawls, one of the most influential thinkers in contemporary political philosophy. Rawls' main theory, called justice as fairness, links the development of well ordered societies to the priority those societies place on fairness. The unmatched intellectual power Rawls employed in developing and defending his theory has brought clarity to our understanding of fairness and its relationship to schemes of justice, institutional design and practical politics. Rawls' 1971 book *A Theory of Justice* was an almost instant classic in political theory for its comprehensive discussion of fairness in American politics and culture. He presented there a view of fairness which was so compelling it became a point of reference for many who wished to assess our progress in enlightened self government.

Now almost thirty years after the publication of *A Theory of Justice*, we still find ourselves discussing Rawls' view of fairness with vigor. We have begun to discuss fairness not as if we were a people striving for a perfected vision of justice, but as John

Rawls would have us discuss it -- as a people who have discovered within themselves a propensity to form just institutions and interact in just ways.

A Theory of Justice. remains important because it advanced innovative views while remaining true to Western intellectual tradition. It established in contemporary political philosophy a place for fairness, but did so within the paradigm of liberalism,[1] suggesting how contemporary ideas about fairness have grown out of mainstream Western thought. In *A Theory of Justice*, fairness was not a synonym for justice and was not discussed merely as an extension of fundamental liberal principles. It was a unique statement on justice because it stressed that justice originates in fairness and that views of justice can be defended only if they are fair. Rawls advanced the notion that to know what is just one must first know what is fair.

But interest in Rawls did not end with this book, even though his later work has taken on a different character. His work remains important because in refining his description of contemporary definitions of fairness, Rawls uncovered a tension between two desires of special interest today.

The two desires are these: we yearn for our ideas of fairness to be universal and at the same time practical. The desire for universally acceptable ideas of fairness motivated Rawls to construct his theory assuming that people in their political lives are rational actors, that they use reason and strive for objectivity when deciding how to divide social

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[1] In this and subsequent references to liberalism, I refer to the "classical liberalism" as generally shared by the 17th and 18th century founders of that tradition. I view liberal regimes as those founded on a respect for liberty, freedom of conscience and respect for fundamental human rights such as the freedoms of religion, speech and assembly. By political liberalism I mean the political credo in American politics which stands generally opposed to "conservatism."

goods between themselves. It led him to a rule morality consisting of two simple principles of justice. He believed that these principles provided sufficient reasons to justify building new institutions in which fair practices prevail. It was in building these institutions -- making his ideas of fairness practical -- which led Rawls to sketch the outline of a political regime in which rationally constructed institutions could fairly distribute social goods such as education, wealth and influence. This theory of justice as fairness was believed by many as a way to establish in practice a theory of universal value which could assure just political outcomes, reduce social and political strife, and achieve a fuller realization of the promise of democracy.

But Rawls' theory of justice as fairness achieved uneven results in reconciling universality and practicality. By his own account he was less successful in satisfying the desire for universality and more successful in projecting a satisfying image of fair policy.

I wish to suggest that one of the key reasons for these uneven results is that the two desires are difficult to satisfy together while remaining true to the liberal tradition. It may be more accurate to say that the difficulty lies in forming universal moral principles according to the particular interpretation of the liberal tradition Rawls held. His view stressed moral consensus achieved through universally acceptable principles of reason, a notion deeply harmonious with one interpretation of classical liberalism. He wanted to construct a clearly rational moral system so that its practices would be attractive to any rational person, provided that person could sufficiently suppress the influences of culture and history. But a preference for universality is not the only way to interpret liberalism. Other interpretations stress individuality, emphasizing that consensus on moral questions

must take a back seat to individual reason and man's ability to "make use of his understanding without direction from another," in the words of Kant.[2]

Ultimately, faced with the "fact of reasonable pluralism,"[3] Rawls found himself unable to stick with his project for constructing universally valid foundations for fair institutions, and he became more interested in justifying these institutions whether or not they could be defended as universally rational. He chose to defend practical results over universal agreement to those results. His greater achievement in upholding a satisfying account of desired political outcomes comes from a conscious move he made over time to emphasize these results at the expense of universality.[4] His theory eventually de-emphasized strictly neutral universal principles of justice as he began to move confidently toward his own particular vision of the contemporary liberal-democratic state. Many cheered him as he did so. But other observers became uneasy with the theory. They began to see its foundations as presuming too great a loyalty to one particular understanding of liberalism -- almost as if Rawls assumed the principles he selected comprised liberalism itself. The value Rawls placed on justifying a particular vision for social and political reform was purchased at the price of wide acceptability.

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[2] Immanuel Kant, "What is Enlightenment?" in *Foundations of the Metaphysics of Morals and What is Enlightenment?* 2nd ed., trans. Lewis White Beck (Upper Saddle River, N.J.: Prentice Hall, 1995): 83.
[3] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): xix. Subsequent references to this work will be noted as *PL*. References to Rawls' *A Theory of Justice* will be noted *TOJ*.
[4] "In the course of the seventies, Rawls weakened the strong universalist claim to justification for his theory of justice. This has somewhat blurred the different meanings of his appeal to our best normative intuitions: on the one hand, in the context of the theory's *justification* before philosophical experts and, on the other hand, in the context of the public defense of, and the political *advocacy* for, the theory before citizens of an actual community." Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: The MIT Press, 1998): 59.

Regardless of the changes in the theory of justice, however, one element has remained constant. Rawls has never abandoned the notion that fairness lies at the heart of just political institutions and that by nature people yearn, above all else, to be treated fairly. He maintained in his early work that a theory of justice can be defended only if it is fair. He believed that people also want public policies first to be fair, and he assumed that the desire for fair treatment is so strong that it forms the basis for the rational choices people make about political alternatives. For Rawls, fairness forms a vital part of human psychology. In his later work, Rawls still maintained that fairness was central, and that when citizens reflect on the political reforms they make, they inevitably assess the degree of fairness the reforms bring about.

This view has met with approval as few, if any, of Rawls' critics question the assertion that fairness forms the core of our impulse to make rational choices about politics. It is just this assumption, however, which I wish to examine, addressing several questions which are not well accounted for elsewhere. To what degree does Rawls' theory of justice as fairness depend on one particular interpretation of liberalism? Is the priority for fairness in public policy neutral with regard to ideology? Is the Rawlsian view widely held and is it reflective of American political thought? If justice as fairness reflects a certain political viewpoint or is not always central to political reasoning, it may not offer a reliable foundation for political reform. Pursuing fairness may thus not lead us expeditiously to just public policy.

In this chapter I will try to show that Rawls' preference for fair outcomes led to a contingent theory which provides an incomplete view of contemporary beliefs about

justice. I will begin by describing how Rawls asserted a particular definition of fairness to justify his vision of justice. Next, I will show how this justification hindered his desire to make his vision universally valid. Finally, I will explore the accuracy of Rawls' theory in describing the way Americans think about fairness.

THE MEANING OF FAIRNESS IN JUSTICE AS FAIRNESS

The main idea of Rawls' theory of justice as fairness is that people who live together cooperatively in just societies choose principles of justice which give priority to liberty and fairness as organizing criteria for social and political institutions. Rawls believed these principles enjoy nearly universal acceptance across cultural and even generational boundaries. In describing the agreement which leads to universal principles of justice, the theory joins the contractarian tradition found in Locke, Rousseau and Kant, but carries this tradition to "a higher level of abstraction." (*TOJ*, p. 11) Rawls' began with the deliberations of the "original position," a thought experiment in which rational actors, seeking to develop principles of justice, bargain relentlessly for their own good, yet end up creating a society in which no one benefits at the expense of others. The bargaining produces the principles of justice as fairness. These principles assert the priority of liberty, basic equality of opportunity and balanced distribution of social goods. Taken together, the meaning of the principles of justice as fairness is reflexive -- justice follows from fairness.

Rawls' theory of justice as fairness depends on a special definition of fairness which I will examine in detail. Rawls believed fairness, when rightly conceived, ensured the universality of a particular view of justice, and its usefulness in practical politics. The definition has three parts. First, Rawls asserted that political fairness must begin with procedural fairness, with the way principles are justified and policies enacted. Second, he suggested that fairness implies an expectation of reciprocity between citizens; that

citizens can expect others to perform with equal energy their role in constructing and maintaining a well-ordered society. And third, Rawls emphasized that fairness implies a preference for equality in the distribution of social goods.

Procedural Fairness

Rawls imagined an original position of agreement roughly corresponding to the state of nature described by early modern philosophers. In Rawls' original position representatives select, on behalf of the rest of mankind, the rules of justice which will govern all subsequent interaction. There is debate, argument and counterargument, until all representatives are satisfied that no improvement in the rules can be made. Since they want maximum personal gain from the rules, they seek to improve them until they can get no more benefit for themselves. They debate until each bargainer is satisfied. The products of these debates are the rules of justice. They are fair rules because earnest conflict between the bargainers nullifies the intent of any individual or group to dominate and in so doing gain a larger share of social goods for themselves.

The procedures used in the original position establish the universal nature of the selected principles of justice. Individual characters can't affect the outcome because any rational person in the original position, subjected to the conditions it imposes, comes to the same conclusions. No matter how many times the experiment is replicated, Rawls believed the same principles of justice would be chosen and the conclusions reached would therefore appeal to everyone. He assumed that all representatives in the original position knew how important their decisions were, and knew how much they could

benefit if the rules were tilted in their favor. But each representative, knowing that all the other representatives were thinking just the same thing, believed it to be more rational to play the game fairly. They would know that the legitimacy of their final decisions could only be secured by an impartial process designed to prevent the agents from tipping the scales in their own favor. Rawls' device for securing this crucial impartiality was the "veil of ignorance."

Deliberating behind a veil of ignorance meant the free and rational representatives who met to select the principles of justice were assumed to have had only a very limited understanding about themselves and their place in society.

> Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I even assume that the parties do not know their conceptions of the good or their special psychological propensities. (*TOJ*, p. 12)

The bargaining session in this original position, following Kant, was not intended as a literal event, (*TOJ*, p. 12) but served as a device for understanding the discovery of principles of justice using reason alone, free of tradition, authority or prejudice, where "the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces." (*TOJ*, p. 120) Being free of the influence of world views, and being instead the product of rational reflection and debate, the rules were to engender a pure understanding of justice.

The purpose of the veil of ignorance was to obtain universality through procedural fairness by making agreement possible among individuals seeking their own gain.[5] This is a striking characteristic of Rawls' moral theory. He sought to distance himself from other theories based on utilitarian principles, teleology or desert by constructing one based instead on the self interested deliberations of the agents themselves as free and rational utility maximizers. These rational actors would seek to improve their chances for holding the maximum quantity of social goods possible no matter what advantages they found themselves with once the veil of ignorance was lifted. And Rawls believed that their ignorance of their own advantages would compel them to assume the worst; to assume that they would have a good chance of being among the least advantaged once the veil was lifted. Because they would seek to maximize their own welfare, they would naturally desire first to ensure the least advantaged were well provided for, setting some rather high minimum threshold of justice and distributional benefits. The human impulse for security is extraordinarily strong, and this impulse would motivate representatives in the original position. They would desire protection from absolute deprivation rather than protection for any abundance they might turn out to have. They would seek to maximize the minimum amount of social goods anyone could expect.[6]

Some may think that Rawls paints a rather unflattering paints of human nature. But because the procedures establish the proper conditions for rational construction of

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[5] "The veil of ignorance makes possible a unanimous choice of a particular conception of justice. Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated." Rawls, *TOJ*, 140.

[6] For a discussion of the maximin principle, see Rawls, *TOJ*, 150-61.

universal moral principles, the final principles selected are legitimate and validate Rawls' notion of human tendencies. The principles are the products of fair procedure given the limits of those who select them.[7]

Rawls believed the procedures of the original position are similar to the ones we prefer in rational political decision making. Therefore, when pure procedural justice takes priority both in constructing principles of fairness and in political action, the resulting policy outcomes can be substantiated as rational and impartial; dependable in the widest sense possible.[8]

From this main idea, the representatives in the original position would inevitably derive the following general conception of justice.

> All social values -- liberty and opportunity, income and wealth, and the bases of self-respect -- are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. (*TOJ*, p. 62)

[7] "The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage." Rawls, *TOJ*, 136.

[8] "Pure procedural justice obtains when there is no independent criterion for the result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." Rawls, *TOJ*, 86

Rawls believed the representatives would use this basic proposition to construct two simple principles of justice.[9] He then defended these principles by asserting that they were as universal as could be expected of any normative theory today. Because the agents chosen to negotiate principles of justice in the original position were assumed to be rational actors seeking maximum benefits for themselves, and because they were assumed to operate without knowledge of their own advantages, they would logically always choose the same two principles.

Thus, Rawls asserted that his moral theory was necessary -- there are no conditions under which the two principles of justice would not be chosen. The confidence Rawls placed in this outcome began with the procedural fairness of the deliberations which led to the choice of the two principles. "The correctness of the distribution [of advantages] is founded on the justice of the scheme of cooperation from which it arises and on answering the claims of individuals engaged in it." (*TOJ*, p. 88)

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9 "*First Principle*

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
>
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

Reciprocity

Once these principles are in place, it remains to apply them in concrete cases. A good test of the theory is whether the principles of justice can guide decision makers to achieve fair results. Procedural fairness alone cannot protect individuals from one another because the circumstances of their future interaction cannot be controlled after a policy has been enacted. Rawls assumed that individuals would recognize the debt they owe to each other and voluntarily restrict their own behavior in order to advance the general good and achieve in full measure the benefits of the agreed upon principles of justice. This is the second part of Rawls' understanding of fairness -- the principle of reciprocity.

In essence, Rawls held that the principles of justice describe the fair share individuals can expect from institutions assuming each member of society carries out his or her obligations. Reciprocity, or the effort each can expect others to contribute, occurs under two conditions. First, distributions must be made within just institutions and second, individuals must recognize and act on the obligations they have to each other.

The first condition of reciprocity is that the voluntary restriction of liberty and the willing obligations it implies must occur within just institutions, or at least within institutions that are reasonably just. (*TOJ*, p. 343) Rawls here merely prescribed the locus of fair interchange between individuals as they make claims on each other. This is important if reciprocity has a chance of validity, because unjust institutions may place unequal restrictions on the liberty of some or they may unequally distribute obligations. If voluntary restriction of liberty in return for the benefits of social cooperation is to be

valid, people must have a reasonable expectation of stable exchanges protected within just institutions.

As to the second condition for fairness, obligations arise through a crucial voluntary social act -- the voluntary acceptance of the benefits of social cooperation along with the necessary restrictions on liberty the acceptance of those benefits entails. Individuals are obliged to accept a reduction in their personal liberty as a sort of payment for accepting the advantages of living in a world composed of fair social interaction. And in foregoing a portion of their liberty they are entitled to expect others to forego some liberty too. "Those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission." (*TOJ*, p. 112)

In this way, obligations arise between all members of society. Social benefits are viewed as having been voluntarily received so long as individuals remain within their society. Of course, some benefits of social cooperation come in modern states without much positive action on the part of any individual, such as collective defense and economic efficiency. It does not seem to matter for Rawls whether individuals so obligated desire these particular benefits, nor that they would have specifically chosen them had they had the choice. Even so, if they are better off after the sacrifice of others they are obliged, according to the dictates of reciprocity, to give up a portion of their own liberty.

The expectation of reciprocity is that others act in a certain way arises from the social contract. (*TOJ*, p. 115) In other words, by consenting to the basic terms of the

social contract and accepting its corresponding restrictions on liberty, individuals may expect, according to the dictates of fairness, that others who have benefited from the social contract similarly acquiesce to restrictions of their liberty.

> We do not gain from the cooperative labors of others without doing our fair share. The two principles of justice define what is a fair share in the case of institutions belonging to the basic structure. So if these arrangements are just, each person receives a fair share when all (including himself) do their part. (*TOJ*, p. 112)

The framework of the interaction remains important, since fair institutions must provide the backdrop for fair cooperation, but procedures are no longer the only means of assuring fairness after the deliberations in the original position end. We are predisposed to voluntary feelings of obligation in Rawls' view, and he depended on these feelings to support the universality of fairness when specific policies are recommended and implemented. He explained that some impulse to fairness is inherent in human nature, springing from "purity of heart," by which everyone can "arrive together at regulative principles that can be affirmed by everyone as he lives by them, each by his own standpoint." (*TOJ*, p. 587). To remain universal after the original position, justice as fairness depends on each person acting on their impulse to fairness. While fairness in the imaginary world of the original position comes from fair procedures; fairness in practical settings appears mainly to involve reciprocity.

Rawls' theory of fairness seems, then, seems to depend on more than procedural impartiality. It is the way people interact, especially after the original position, that

justifies the distribution of public goods according to the principles of justice. Self interest provides the incentives for hard bargaining in the original position, but self control characterizes social interaction afterward.

When viewed this way, the fairness of the original position is justified differently than the fairness of practical politics. In the original position, Rawls noted that deliberations are fair because the representatives are similarly situated. None has an advantage. It is fair because of a "symmetry of everyone's relations to each other." (*TOJ*, p. 12) There is, however, no reciprocity in the original position because the representatives owe each other nothing and take no voluntary actions toward each other. They are merely participants in a bargaining situation and they immediately begin the process of protecting their interests. As rational actors, they can be expected to do nothing else.

When the scene changes from the idealized deliberation of the original position to the daily implementation of fairness, reciprocity characterizes human relations. At this point, individuals must slightly modify their characteristics as rational actors and relegate their search for maximum utility to a lower priority. They must exhibit good will because of their obligation to others who have themselves exhibited good will. But can people always exhibit good will when dividing up social goods? While they may possess moral sensibilities they may not always act in accordance with them, sometimes forsaking social peace for a slightly larger slice of the pie.

Rawls' theory of fairness asks citizens to act in accordance with moral sensibilities, and to act on an extensive acquiescence of self will to promote good will.

We may not readily suppose that such acquiescence will be widespread. Rawls himself did not readily suppose so. Was he suggesting that a type of social cooperation which approximates the fairness of the original position's "symmetry of relations" may need to be coerced?

Even though he didn't advocate coercion, Rawls nonetheless recognized that feelings of reciprocity may not follow automatically. Of course, this implies no sympathy for compulsion to acquiesce. The ideal political institution for Rawls is always constitutional democracy, but bounded constitutional democracy, because a majority can enact laws detrimental to the liberty of others and democracy "is at best regulated rivalry," (*TOJ*, p. 226) bringing out the worst tendencies in those with a penchant to dominate. Such dominance, even if condoned by the majority, cannot be permitted. Now, all legal systems are in some way coercive, as Rawls acknowledges,[10] but in fair institutions, regulation of opinion is not a function of collective decision making and cannot be left to chance. It means instead prior restraint. Any faction or group in a constitutional democracy, even groups pursuing Rawlsian justice, cannot be permitted to diminish the liberty of thought enjoyed by other citizens. Intolerant groups may seek to do just that and therefore cannot be tolerated in a fair society. Their goals may spell the unraveling of reciprocal expectations, threatening Rawls' logical edifice of fairness.

The threat to fairness comes not from external sources but from within, from rational citizens living in basically fair institutions. The very same rational actors who

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[10] "A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation." Rawls, *TOJ*, 235

seek personal gain in the idealized original position may continue to seek personal gain when no longer adopting a veil of ignorance. Their quest for maximum utility may cause them to seek unfair shares of social goods for themselves in the practice of politics. Succeeding generations are likely to continue to seek unfair shares.

As long as this tendency to seek unfair advantage persists, the universality of justice as fairness is threatened. The members who receive less will object even if procedures for dividing social goods are fair and reciprocal relations characterize social interaction. But if the final division of social goods were seen as empirically fair, citizens might establish a perpetual allegiance to justice as fairness. Rawls therefore believed that citizens concerned with our progress as an enlightened society will want to evaluate continuously the progress reciprocating citizens make in achieving fair outcomes, and for this evaluation they need something more. This is the third part of his definition of fairness -- a preference for equality.

Equality

Equality is seemingly too simple an adjunct to the definition of fair outcomes to use in evaluating the effects of fair procedures and reciprocity. But Rawls embraced equality by asserting that if fairness means anything at all, it means a preference for equality; and the more nearly fairness approaches equality, the more desirable it is. Rawls believed that the two principles of justice "express an egalitarian conception." (*TOJ*, 100) This notion not only offers a standard for judging progress in reforming institutions, it also establishes the expectation of fair outcomes.

References to equality are found throughout *A Theory of Justice*. As noted earlier, Rawls' general conception of justice is that, "all social values are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage." Built on this general conception, his first principle of justice holds that citizens may expect the" greatest equal liberty" that can be enjoyed by all. (124) He believes this principle also protects equal liberty of conscience, (205-11), equal political participation (221-8), and equal treatment under the rule of law. (235-43) The second principle of justice extends the equality of liberty to social and economic benefits, whose inequalities "are to be arranged so that they are . . . to the greatest benefit of the least advantaged." (302). This is the difference principle, which establishes that any inequalities in the distribution of social goods can only be allowed if they improve the lot of those who are least advantaged.

It is useful to notice how Rawls treats equality differently in the two principles. By the first principle he calls for equal liberty that may not be lessened in any way -- by the second he acknowledges that inequalities in social goods are bound to occur, but that the effect of these inequalities on liberty must be limited. Rawls was here asserting that inequalities in social goods (wealth and power) present threats to equal liberty because some people may hold greater quantities in spite of procedural fairness and reciprocity, and thus may be able to restrict the liberty of others.[11]

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[11] "Our historical experience, as Rawls acknowledges (224), is that inequalities in wealth and accompanying inequalities in powers tend to produce inequalities in liberty." Norman Daniels, "Equal Liberty and Unequal Worth of Liberty," *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* ed. Norman Daniels (Stanford, Calif.: Stanford University Press, 1989): 256.

Therefore the worth of liberty differs for people depending on the quantity of social goods they have, even if equal liberty is guaranteed for all. For the relatively privileged, liberty means relatively unfettered expression of will. For the relatively less privileged, liberty can be restricted in practice due to lack of money or class standing. Rawls here made a distinction between liberty and the worth of liberty. Liberty itself is an absolute quality. But for individuals, liberty has a greater worth to those with social goods than it does for those without because those who are less advantaged are not able easily to exercise their liberty.

> Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. (*TOJ*, p.204)

Unequal possession of social goods may inhibit our efforts to exercise liberty equally, and so the possession of them may have to be limited. But this implication overturns a core belief of classical liberalism, namely that since private property enhances the odds that liberty will be enjoyed, private property must be protected. For instance, owning private property ensures greater influence in the political process, enhanced opportunities for free expression, freer access to education, etc., making protection of social goods such as private property and access to education tantamount to protection of

liberty itself. Locke made an argument like this with regard to private property, and Mill did with regard to education.

The difference between Locke and Mill on one hand and Rawls on the other is that Rawls showed a tendency to equalize the distribution of wealth and power rather than preserve their free acquisition. For example, he proposed four branches of government to regulate acquisition and distribution of wealth. (*TOJ*, p. 274-84) Whereas classical liberalism advances a strong free market advocacy, Rawls sought greater regulation so that no person or group could gain too much. For Rawls, possession of social goods were not the sources of liberty, but rather the primary threats to it. And though classical liberals such as Locke would not have condoned unlimited acquisition, Rawls sought to restrict acquisition in quantities presumably lower than classical liberals would have permitted. Social goods are seen not as the sources but as the fruits of liberty in fair institutions; they can and should be distributed equally to equalize the worth of liberty for all. The fair exercise of liberty to acquire must never be allowed to inhibit the liberty of equal citizenship for others.

As mentioned above, this is not the only approach to possession of social goods which has been advocated in liberalism. But because Rawls exhibited a preference for equality of outcomes, he was led to restrict the ability to acquire -- a solution for the problem of unequal liberty characteristic of the political left in modern constitutional democracies.

This contingent view grows from Rawls' idea of fairness in which procedural fairness and reciprocity by themselves are insufficient safeguards to equal liberty. Thus

Rawls' special understanding of fairness led him to prefer certain outcomes, justified in ways which will not be accepted by all, even as it presents a thoughtful description of a well ordered, but politically liberal society. So strong is Rawls preference for equality that he is prepared to restrict, to a greater extent than classical liberals, acquisition of private property. Fairness in Rawls' theory is grounded on a preference for equality that offsets these restrictions on liberty. In defending this preference, Rawls departs from some central tenets of liberty as expressed in classical liberalism in order to ensure fair outcomes are guaranteed. He limits the appeal of the foundations for his theory of justice as fairness even as he ensured it will provide the desired protection for equal liberty.

ACCEPTABLE RATIONALITY: PUTTING FAIRNESS INTO PRACTICE

The tension between universality and practicality is initially resolved in Rawls' work by following the social contract's reliance on fair procedures[12] that legitimizes both the construction of principles of fairness and their application. However, as he imagined the theory put into practice, the limits of pure procedural fairness became apparent. Rawls adjusted -- making allowances for human nature and our sometimes too frail sense of fairness, impelling us to reciprocity and finally proposing equality of outcome -- justifying restrictions on intolerant groups and limits to free acquisition of social goods.

As a result of his three-part definition of fairness (procedural impartiality, reciprocity and equality), Rawls theory is often seen as an expression of preference for a certain kind of political structure and certain political outcomes. H.L.A. Hart noted that the course of Rawls' argument in *A Theory of Justice* seemed to harbor a latent personal interest in promoting a preference for civic liberty against acquisition of social goods.[13] R.M. Hare said that Rawls advocated "a kind of subjectivism, in the narrowest and most old-fashioned sense," and that his argument displayed an intuitionist character, constituting a "disguised subjectivism."[14] Michael Sandel called Rawls a "welfare state

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[12] "In grounding the two highest principles of justice, Rawls follows the social-contract model. He proposes a procedure that can be understood as explicating the point of view for an impartial judgment of morally substantive questions of political justice." Habermas, *Facts and Norms*, 57

[13] H.L.A. Hart, "Rawls on Liberty and its Priority." *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* ed. Norman Daniels (Stanford, Calif.: Stanford University Press, 1989): 252.

[14] R.M. Hare, "Rawls' Theory of Justice," *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* ed. Norman Daniels (Stanford, Calif.: Stanford University Press, 1989): 82-3.

liberal."[15] Onora O'Neill said that Rawls vindicated justice as fairness on the basis of political preferences, endorsing a "particularism with liberal content."[16] Some of the reasons for these assessments have already been given. But Rawls went further when he modified his theory of justice as fairness in his 1992 book *Political Liberalism*. This book was a defense of a liberal political structure which Rawls believed would secure in practice many of the goals he visualized. He, too, acknowledged the preferences his theory had come to express aimed at practical outcomes instead of universality.

The thrust of the theory became not to explain universally acceptable principles of justice, but leaned more toward achieving certain fair results. Rawls himself now believes the theory of justice as fairness is more substantive than procedural, and as a result is in fact no longer universal.

> Justice as fairness is substantive . . . in the sense that it springs from and belongs to the tradition of liberal thought and the larger community of political culture of democratic societies. It fails then to be properly formal and truly universal. (PL, p. 432)

Still, it would be inaccurate to conclude that Rawls abandoned completely the universal justification of his theory of fairness. He wanted it to be possible for any

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[15] Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge: Cambridge University Press, 1998): 66.
[16] Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*. (Cambridge: Cambridge University Press, 1998): 46.

reasonable person to adopt his view of fairness, even if that person did not share Rawls' particular political beliefs.[17] The theory of justice as fairness may imply inherent preferences, but that is not the same thing as requiring adherents to hold the similar beliefs. Rawls limited the scope of his ambition to make the theory universal, but he did not abandon the attempt.

If reasonable people could accept the justification for the theory, even if they didn't believe it or agree with all of it, his essential project of describing a widely-acceptable view of fairness would be achieved. Rawls consequently took on two new tasks in realizing this goal: (1) justifying restrictions on comprehensive doctrines that tend to undermine that view of fairness most likely to win wide acceptance, while (2) emphasizing reasonableness as a standard for selecting the view most likely to achieve the widest agreement possible on the principles and priority of fairness.

Restricting Comprehensive Doctrines

Rawls described American culture in *Political Liberalism* as a fabric woven of different comprehensive doctrines instead of a single strand of commonly held ideas. Some of these comprehensive doctrines (such as free faith, philosophical autonomy and pluralism, PL p. 145) are compatible and can exist side-by-side with little conflict. This is not only because they are mainstream beliefs, but also because they fit comfortably

[17] "Accepting the idea of public reason and its principle of legitimacy does not mean, then, accepting a particular liberal conception of justice down to the last details of the principles defining its content. We may differ about these principles and still agree in accepting a conception's more general features." Rawls, *PL*, 226.

with the style of American politics. Such comprehensive doctrines form an overlapping consensus on what constitutes reasonable practices in culture and politics.

> Such a consensus consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself. (*PL*, p. 15)

Many strands of the fabric of American culture can be accounted for in this overlapping consensus and produce broad agreement. But other comprehensive doctrines are not easily woven in because they are minority opinions, more extreme and less satisfactory in a liberal regime. Examples would include participatory democracy, religious fundamentalism and radical skepticism.[18] These are the kinds of comprehensive doctrines which tend to be justified on grounds unavailable to all reasonable citizen. The citizens who do adhere to them frequently desire to influence political affairs on the basis of these comprehensive doctrines because they believe the underlying justifications are "true." But there are many comprehensive doctrines making such claims, and none of them are true for all citizens. Comprehensive doctrines thus tend to be exclusive of other views.

The fabric of overlapping consensus is weakened by exclusive comprehensive doctrines. Rawls wanted not to bar these views, but to segment them -- it being better to confine internally rational comprehensive doctrines to the realm of private faith. Public

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[18] Andrew R. Murphy, "Rawls and a Shrinking Liberty of Conscience," *The Review of Politics* 60 (1998): 253.

political debate should proceed according to conceptions of justice which reflect public reasonableness according to political values.

> Since there is no reasonable religious, philosophical, or moral doctrine affirmed by all citizens, the conception of justice affirmed in a well-ordered democratic society must be a conception limited to what I shall call "the domain of the political" and its values. (PL, p. 38)

The kind of reasoning which limits itself to political values Rawls called public reason. Public reason encompasses all those appropriate principles which are widely accessible. Andrew Murphy pointed out that Rawls' idea of public reason comprises the guidelines for imposing limits on the conduct of public argument.

> Since reasonable pluralism is a fact, and an overlapping consensus supporting a freestanding conception of justice exists or nearly exists between those with differing comprehensive doctrines, and since legitimate political power is consensual, citizens must justify political power solely by reference to political values and widely accessible forms of reasoning.[19]

Full freedom of conscience is enjoyed by citizens whose adherence to restrictions of conscience in the public realm makes their private freedom possible. Rawls believed liberty can best be protected when political debate is based on appropriate views while inappropriate views are excluded. The appropriate views are those which are shared, certainly those which are comfortable with and support fair institutions and policies. It is

[19] Ibid., 252-3.

not a certain set of policies which Rawls would exclude from discussion in the public realm, but certain ways of justifying policies. In a famous and perplexing passage, Rawls illustrates this idea with the example of the abortion debate. It deserves an extended quotation.

> Suppose . . . that we consider the question [of abortion in mature adult women] in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. (There are, of course, other important political values besides these.) Now I believe any reasonable balance of these values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the political value of the equality of women is overriding . . . Other political values, if tallied in, would not, I think, affect this conclusion. A reasonable balance may allow her such a right beyond this, at least in certain circumstances. . . [A]ny comprehensive doctrine that leads to a balance of political values excluding her that duly qualified right in the first trimester is to that extent unreasonable . . . Thus assuming that this question is either a constitutional essential or a matter of basic justice, we would go against the ideal of public reason if we voted from a comprehensive doctrine that denied this right. (PL, p. 243-4f)

Some comprehensive doctrines are not persuasive to everyone. To include these doctrines in public policy debates would violate the principles of fairness. For example, the reasons religious believers have for opposing abortion can only be fully embraced by people of similar faith. What about those outside the faith? When the reasons for policy decisions about abortion are published, references to religious doctrines will be unacceptable to them. They are unlikely even to understand the debate because they are

outside the belief system which views the abortion question in religious terms. They are unfamiliar with the history and principles of religious belief systems. The procedure of political discourse under such conditions would therefore be flawed -- impartiality and equal participation would not be possible because all could not participate fairly.[20]

The use of public reason permits reciprocity between citizens which is not possible if comprehensive doctrines are included in the debate. Only one method of justifying policy can be used in public, fully expressive of political rather than comprehensive values. Public reason is this method. It is reasoning which limits itself to the political.

In the case of the abortion debate, public reason excludes religious doctrines concerning the question of the beginning of life since these doctrines extend beyond political values to comprehensive values. Excluding them happily avoids interminable disagreement in public debate in favor of political peace and offers the chance that most citizens will accept the policies and the reasons for them. So long as those holding the view that human life begins at conception can leave their views aside temporarily, Rawls is right that a very broad agreement is likely. But if they do not leave this view aside, then it seems that Rawls himself would have to concede that his contention that abortion is a right proceeding from constitutional protection of privacy has itself the characteristics

[20] "In justice as fairness, then, the guidelines of public reason and the principles of justice have essentially the same grounds. They are companion parts of one agreement. There is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as that person's, or that association's, comprehensive doctrine directs. When equally represented, no citizen could grant to another person or association that political authority. Any such authority is, therefore, without grounds in public reason, and reasonable comprehensive doctrines recognize this." Rawls, *PL*, 225-6.

of a comprehensive doctrine. The abortion example therefore presents a difficult challenge to the universality of public reason.

On Rawlsian grounds the difficulty is this -- if the fetus is a living person, it is less advantaged than the mother and deserves, by the difference principle, greater protection of the state. No political values Rawls specifies -- "the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens" -- leaves out the possibility that the fetus can be seen as a person in the legal sense. This view is simply the one Rawls prefers, as when he says,

> Now *I believe* any reasonable balance of these values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that *at this early stage of pregnancy the political value of the equality of women is overriding* . . . Other political values, if tallied in, would not, *I think*, affect this conclusion. (PL, p. 243, emphasis added)

Rawls does not permit conflicting views on this point to inform the deliberations of elected representatives, nor to inform the votes of citizens. Choosing to leave out the notion that the fetus in the first trimester is a living person in the moral sense can be seen as belonging to a certain comprehensive doctrine. Competing doctrines should not be permitted to enter the debate because "the principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic

institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether." (PL, p. 195)

In this way Rawls permits one kind of comprehensive doctrine and sets aside others. This is done to protect the fairness of the political process. Every citizen can reasonably expect to recognize as valid the reasons for establishing a given policy as long as the fundamental viewpoints of comprehensive doctrines are left out of all stages of justifying a policy, including its debate in legislatures and the vote by citizens for candidates promising to implement it. It is therefore equally available for everyone's rational understanding. In this sense, then, the reason for excluding certain comprehensive doctrines from public debate is that in so doing, we may offer many citizens a fair chance to participate in politics and recognize as legitimate the institutions and practices of government. At the same time, those whose conscience might drive them to arrive at political decisions justified by other comprehensive doctrines may not recognize the same legitimacy.

The strong preference Rawls has for his special definition of fairness, then, further weakens the universality of justice as fairness. This is because the theory has a tendency to restrict liberty of conscience.

> In essence Rawls seems to insist upon "liberal" comprehensive doctrines or no comprehensive doctrines at all. If one can refer meaningfully to the philosophical and theological bases of one's political views neither in the privacy of the voting booth nor in the public square, it is difficult to see how Rawls' system is compatible with a historically informed understanding of liberty of conscience. If this represents, not merely the completion but

the extension of such liberty, it is a truly unorthodox notion of extension.[21]

Justifying Consensus and Stability

We have seen how Rawls' commitment to a special understanding of fairness caused him to impel reciprocity between citizens, to regulate holdings of social goods, to give up on producing a truly universal theory and to favor certain elements of certain comprehensive doctrines while excluding others. At each step, the theory of justice as fairness began to assume a role beyond justifying rationally constructed institutions dedicated to fair practices.

It is no longer merely a description of a well-ordered society, and it seems to conflict with some tenets of liberalism. Because of the amendments Rawls made to his theory, it is instead a description of a liberal constitutional regime. This description, however, hearkens only to parts of classical liberalism. What is included in Rawls' description is the laudable goal of political consensus among rational, or at least reasonable citizens. But because the consensus is justified by the overriding priority of fairness, he suppresses the ability of individuals to discuss political questions among themselves based on whatever comprehensive doctrines they please. Individuality of thought is subordinated in order to justify Rawls' view of the best regime.

In advocating this conception, Rawls has loosened the interlocking nature of the arguments which characterized justice as fairness. The internal strength of the original argument lay in its tight rationality and objectivity, squarely in the style of classical

[21] Murphy, "Liberty of Conscience," 274.

liberalism. It carried great presumptive weight against critics from any quarter. But presumptions are now required of those who would be its champions. Going-in adherence to certain political ideals renders the theory one among others because its inward rationality is weaker. So Rawls has appealed to arguments outside the theory, to the concrete results it can achieve, in order to assert its usefulness. By doing this he has weakened the theory's notable internal cohesion. Justice as fairness is no longer self-authenticating.

This is not to say the theory is invalid. Even if the adjustments to the theory of justice as fairness forced Rawls to look outward to justify it, it can still be defended on the grounds that it occupies a prominent place in American political consciousness. If we are to use justice as fairness as a standard to measure our progress in enlightened self government, we are lead to examine the consensus of opinion as to whether it is widely accepted in its present form. This requires a judgment concerning the cultural significance attached to justice as fairness. Reformers should determine whether it has sufficient adherents to warrant its adoption in judging our reform efforts.

It may seem trivial to use this standard to judge a moral theory of such gravity. But in a sense every moral theorist seeks to attain a certain popularity for his theory. At the very least, most moral theorists recommend that others would be better off by embracing their theory because it offers advantages. There are exceptions. Plato, for instance, was pessimistic that ordinary citizens could ever be convinced that philosophers

should rule. Nonetheless, even Plato adhered to the notion that some agreement throughout the city, a sort of normative consensus, was preferable to no consensus at all.[22]

Consensus is desirable. It can unify politics; galvanize citizens to act on crucial matters, but it has not been able -- in the ancient polis or enlightened liberal democracies -- to confer legitimacy. However, consensus does confer legitimacy in the Rawlsian ideal. Just how strongly does Rawls' theory of justice as fairness depend on consensus for the legitimacy which was once a product of its universality?

Habermas believed the theory now depends heavily on consensus. The theory of justice as fairness as presented in *Political Liberalism* is treated so that it "finds the well-considered measure of acceptance necessary for a reformist improvement of existing institutions in light of the theory."[23] Other theorists such as Chandran Kukathas, Philip Pettit and Joseph Raz have asserted that Rawls now justifies overlapping consensus of certain practical political views more strongly than the moral core the theory was once designed to illuminate.[24] But we are left to wonder whether consensus is sufficient to justify the theory of justice as fairness in its present form.

Larry Krasnoff believes it is. His view begins with Rawls' observation, undisputed everywhere, that "modern, pluralistic societies will almost certainly not be

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[22] Larry Krasnoff, "Consensus, Stability, and Normativity in Rawls's Political Liberalism," *The Journal of Philosophy* 95 (1998): 271-4.
[23] Habermas, *Facts and Norms*, 60.
[24] See Chandran Kukathas and Phillip Pettit, *Rawls: A Theory of Justice and Its Critics* (Stanford, Calif.: Stanford University Press, 1990); and Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence," *Philosophy and Public Affairs* 19 (1990): 3-46.

able to achieve a normative consensus on the ultimate aims of life, on the values that are the concern of traditional religious doctrines."[25] Crucial to understanding the importance of consensus in contemporary politics is Rawls' further observation that we should view diversity of opinion "not as a failure of rationality, but as a consequence of rationality in its diverse exercises."[26] Thus the reason modern democratic societies experience such difficulty with political argument about core issues is the success of democracy itself. Lack of common grounds on which to achieve consensus has now emerged as a central problem.

We lack consensus because freedom of thought breeds pluralism. To view certain comprehensive doctrines of pluralistic society as rational while viewing others as not rational is ultimately destructive and divisive. It is certainly unfair to be exclusive in this way. The acceptance of the core rationality of all comprehensive doctrines, rational at least to those who hold them, moves us in a new direction. We must now believe, as Krasnoff says Rawls did, that neither reconciliation nor rejection is possible because there are no rational grounds either to merge values or to question the rationality of comprehensive doctrines. "We must be able to look at other comprehensive doctrines and to say: had we some other experience and thus some other way of looking at the world, we might be able to affirm [other] doctrines as our own, without bias or self-deception."[27]

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[25] Krasnoff, "Consensus," 276.
[26] Ibid., 277.
[27] Ibid., 278-9.

Consensus as legitimacy accepts the rationality of competing world views without surrendering political discourse to their incommensurable principles. As mentioned earlier, Rawls established that the proper place for judging rationality in liberal societies is limited to private belief systems, while on the other hand politics calls for a public belief system where "we treat the idea of the reasonable as a freestanding source of political justification."[28] He linked reasonableness to consensus as follows:

> Knowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well-being. The disposition to be reasonable is neither derived from nor opposed to the rational but it is incompatible with egoism, as it is related to the disposition to act morally." (PL, p. 49f)

Reasonableness is primarily concerned with political consensus. To the extent that the goal of political consensus is order, reasonable citizens will come to regard the relations among themselves as the measure of morality of the regime. Where Machiavelli often saw morality and stability as conflicting and involving tradeoffs, Rawls sees stability as itself moral. The peace of a regime comprised of enlightened, rational, self-justifying citizens depends on a view of the political as a sort of least common denominator in relations between citizens. Rawls seems to have believed that the

[28] Ibid., 282.

liberalism which fosters the development of individual rationality does not translate into public rationality, but instead to public reasonableness and consensus.

The reasonable consensus is vital in politics because competing world views cannot be sufficiently harmonized to give public political acts the character of fairness. "The rational is a distinct idea from the reasonable and applies to a single, unified agent (either an individual or a corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly its own." (PL, p. 50) The intent of Rawls in asserting the moral content of reasonableness in political deliberations is clearly designed to assert its moral superiority over rationality as the necessary adjunct to justice since "merely rational agents lack a sense of justice." (PL, p. 52) In order to assure the fairness of political debate and policy outcomes, reasonableness and the consensus it makes possible becomes the standard for determining whether societies are well ordered.

An objection may naturally arise here concerning the content of this overlapping consensus. What precisely are citizens agreeing to? Rawls asserted that they agree to the products of the work of philosophers over the ages because they have settled some issues. A catalogue of these achievements could begin with religious toleration and abolition of slavery (PL, p. 8). These aims are the products of lengthy philosophical debate and hard-won victories of rational argument and are reliable since "some matters presumably have been settled by philosophical analysis of the moral point of view and the procedure of democratic legitimization." (PL, p. 426) These matters form the core around which consensus is achieved. But given the importance Rawls now attaches to the substance of fairness, it is surprising he did not try to fill in this list of settled questions more fully.

Since fairness cannot stand on its own without being justified by fair outcomes (PL, p. 425), an examination of what specific outcomes are agreed to be fair would lead us much closer to a complete understanding of fairness.

But as valuable to theory formation as such an examination would be, it is hard to imagine how to defend any but the most obvious elements of settled philosophical analysis, such as those given above. Consensus on other principles, like the equalization of income, progressive income tax rates, equality in public school funding and fair campaign financing, seems unlikely. All these foundational principles are hotly contested, comprising the platforms of our competing political parties. These issues are not settled. One wonders then, just how much of the overlapping consensus Rawls describes actually is capable of eliciting agreement across political and social boundaries. If there are policies that are widely agreed to be fair, it seems there would be very few of them. As Rawls himself maintains, a pluralistic society finds consensus difficult because of the free exercise of reason.

The overlapping consensus achieved in a pluralistic, liberal democratic regime is not likely to be a list of settled principles. It is more likely to come from the same impulse which leads us to reciprocal action and protection of the least advantaged. Perhaps, in the end, it is our moral sensibilities which not only offer us the hope of consensus, but reveal the content of overlapping consensus regarding fairness.

THE IMPORTANCE OF RAWLSIAN FAIRNESS

Rawls envisioned a particular type of political regime comprised of fair institutions justified by reasonable arguments exclusive of privately held comprehensive world views. These institutions were to protect not only the policies they produce by also the reasons for them. By fostering an overlapping consensus on why a certain course is followed in public affairs, the institutions of a well-ordered society ultimately achieve a degree of stability. This stability is nearly universal, although it is justified in a different way than the original theory of justice as fairness. But just as this amended theory of justice as fairness speaks in a new way of institutional style and function, it speaks in a new way also about the people who inhabit fair institutions.

The individuals who live in well-ordered societies can no longer assume that rational arguments arrived at from the hypothetical original position provide sufficient grounds for fair institutions. The rationality of any viewpoint is now limited to the private realm. Private rationality has been replaced by public reasonableness, yet Rawls claims it will still enjoy the nearly universal acceptance of rationally-justified justice as fairness. Consensus is now the criterion for evaluating its legitimacy.[29] The way we can know whether it actually enjoys such acceptance is to look around us -- to evaluate

[29] In a sense, Rawls now seems to advocate an extension of the original position to most aspects of political life. While engaged in public debate, citizens are to pretend not to know their own conceptions of the good or their positions in society. This intentional blacking out of personal beliefs places citizens, while engaged in public debate, in the best position to decide fairly. The veil of ignorance is now expected to limit the inexhaustible acquisitiveness of human nature lest the desire to acquire unfair shares of public goods override moral sensibilities.

whether the theory has gained influence and whether the account of human nature Rawls defends is reasonable.

But how are we to measure the extent of Rawlsian fairness? Is it primarily a justification of certain idealistic conceptions of justice, or is it instead a description of the human nature in liberal societies? Another way to phrase the question would be as follows -- is justice as fairness a project in political theory or an attempt to refine our understanding of moral psychology?

Fairness In Contemporary Political Theory

The question about whether the theory of justice as fairness is a political theory has been answered in several ways. "For Allan Bloom, [justice as fairness] theorized and legitimized current moral and political prejudices; failed to appreciate the crucial distinction between opinion and knowledge or appearance and reality . . . and was not really a work of political philosophy."[30] For others, the theory focused so sharply on "fundamental ideas that are implicit in the public political culture,"[31] that it is specifically a philosophical critique of contemporary American political values, socialization and beliefs.

As mentioned in the previous section, it is not neutral regarding political viewpoints or even regarding comprehensive doctrines. While we go about the task of evaluating the significance of Rawlsian fairness as a foundational assumption in

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[30] Bhikhu Parekh, "Theorising Political Theory," *Political Theory* 27 (1990): 399.
[30] Samuel Scheffler, "The Appeal of Political Liberalism," *Ethics* 105 (1994): 398.
[31] Ibid., 15.

American politics, we must remember that our results will only apply in liberal regimes like ours.

> In renouncing any universalistic ambitions, Rawls may now seem to have gone too far in the other direction and to have produced a version of liberalism that is so historically specific and so dependent on a prior history of liberal institutions as to be of little relevance in those situations where the justification of liberalism matters most; that is, where liberalism is confronted by, and must engage with, societies whose traditions and practices are not liberal.[32]

If Rawls' theory focused on justifying certain political outcomes, of "giving the beleaguered American liberalism a new philosophical basis and respectability,"[33] can we depend on it to be a reliable gauge of what constitutes mainstream thinking about fairness today? The content of political liberalism (such as the commitment to fairness) originates in "the public political culture of democratic societies . . . in which liberal values are already well entrenched."[34] It is these underlying liberal values which give shape and purpose to institutions -- they are the ultimate guarantors of the continuing allegiance to liberal regimes. We are right to wonder if only those holding similar views can fully take part in liberal regimes which place a priority on fairness.

But such fears are unfounded. For instance, scholarly critiques of the theory have for the most part accepted its central tenet that fairness is a core human desire. To be sure, commentators from the right like David Schaefer reject Rawls' theory as further

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[32] Ibid., 21.
[33] Bhikhu, "Theorising Political Theory," 399.
[34] Scheffler, "Appeal of Political Liberalism," 20.

support for what is believed to be an already too expansive system of social welfare.[35] Others like George Klosko and Thomas Pagge writing from the left fully embrace the Rawlsian project and search for ways to expand its influence in politics.[36] But generally, critiques of Rawlsian fairness do not take issue with fairness itself or with the priority Rawls assigns to it. In so doing, they grant an extraordinary weight to the presumption that overlapping consensus around the notion of justice as fairness is not only possible by likely.

Perhaps the work even describes contemporary political values as much as it prescribes novel solutions to problems of moral valuation in politics. There may well be a strong ambivalence in American political thought in which we strive for universally acceptable views of fairness which are also immediately applicable in democratic decision making. We seem unable to have ideas about fairness that are both universal and practical, or if we do, we don't have them for long. It may be that Rawls' conflicting views have alerted us to this duality and moved us to adopt his methods and conclusions.

While Rawls himself may not be a household name, the theory of justice as fairness has influenced academics and journalists alike. The importance of the theory for professional scholars is now almost beyond question, a point well proved by the quantity of scholarly literature devoted to its explication and the acclaim heaped on it. What scholars often acclaim is the far-reaching influence Rawls' theory has had throughout our

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[35] David Lewis Schaefer, *Justice or Tyranny?: A Critique of John Rawls's* A Theory of Justice (Port Washington, N.Y.: Kennikat Press, 1979).
[36] George Klosko, "Political Constructivism in Rawls' *Political Liberalism*," *American Political Science Review* 91 (1997): 635-46. See also Thomas W Pagge, *Realizing Rawls* (Ithaca, N.Y.: Cornell University Press, 1989).

culture. For example, economist Edward Zajac said, "*A Theory of Justice* is perhaps *the* most cited work in the social sciences within recent memory; it has stimulated new research in economic justice and political philosophy and has gotten scholars in disparate disciplines to talk to each other."[37] Jesse Furman called Rawls "the most prominent and celebrated modern liberal thinker,"[38] and further asserted that "Rawls' liberal political philosophy is the theory most closely aligned with the way we live and view ourselves in America today; his ideals reflect and inform those ideals that American institutions attempt to fulfill."[39] Alan Ryan found that "Mr. Rawls' ideas have crept into the law of the land."[40] Michael Sandel wrote that, "For us in late twentieth century America, [Rawls' liberal vision] is our vision, the theory most thoroughly embodied in the practices and institutions most central to our public life."[41]

The influence of the theory has also been noticed by writers who work outside the academy. Norman Daniels declared that "No one would have dared predict the broad critical acclaim, even fame, John *Rawls' A Theory of Justice* was to receive in the nonacademic press upon its publication in 1971."[42] He cited the praise it received in such mainstream publications as *The Economist*, the *Spectator*, *Nation*, *New Republic*, *Washington Post* and *the New York Times Book Review*, among others, as evidence of its sweeping importance.

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[37] Edward E. Zajac, *Political Economy of Fairness* (Cambridge, Mass.: The MIT Press, 1995): 88.
[38] Jesse Furman, "Political Liberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice," *Yale Law Journal* 106 (1997): 1198.
[39] Ibid., 2000.
[40] Alan Ryan, "How Liberalism, Politics Come to Terms," *Washington Times* 16 May 1993.
[41] Michael Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12 (1984): 82.
[42] Norman Daniels, ed., *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice"* (Stanford, Calif.: Stanford University Press, 1989): xxxi.

Numerous scholars have attempted to demonstrate the accuracy of Rawls' theory by using experimental methods to detect the presence of the principles of justice as fairness. This effort is crucial for verifying whether justice as fairness has had an impact on contemporary thought about fairness, but the results of these studies are mixed. Frolich and Oppenheimer, for instance, reported that only 1.23% of the subjects in an experimental setting preferred a Rawlsian conception of justice over three alternatives.[43] The subjects in Marwell and Ames' study exhibited something like a Rawlsian preference for public rather than personal gain, expressing a belief that an individuals' "fair" contribution to public goods is more than 57% of their total private holdings.[44] But this experiment did not put participants' own holdings at risk. Eavey and Miller attempted to test the Rawlsian "maximin principle," or the idea that representatives in the original position will seek the greatest benefits for the least advantaged. Although their results indicate some preferences for "fair" outcomes for the least advantaged, the researchers are not prepared to say their results constitute proof of the same.[45] Miller and Oppenheimer looked at coalition formation and found that alternatives which allowed all members to receive a reduced (but certain) payoff were preferred, but were not able to discern whether participants preferred the "fairness" of the distribution or the "certainty" of the outcome.[46] Brickman found that subjects preferred unequal distributions when such

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[43] Norman Frolich and Joe Oppenheimer, *Choosing Justice: An Experimental Approach to Ethical Theory* (Berkeley, Calif.: University of California Press, 1992): 60.
[44] Gerald Marwell and Ruth E. Ames, "Experiments on the Provision of Public Goods. I. Resources, Interest, Group Size, and the Free-Rider Problem," *American Journal of Sociology* 84 (1979): 1349.
[45] Cheryl L. Eavey and Gary J. Miller, "Fairness in Majority Rule Games with a Core" 570-586, p. 583
[46] Gary J Miller and Joe A. Oppenheimer, "Universalism in Experimental Committees," *American Political Science Review* 76 (1982): 572.

distributions favored the least advantaged, but the research design depended on participant knowledge of their own position relative to others.[47] It is unclear whether any of these experimental results show underlying support for a Rawlsian notion of justice or are a construct of the confined, low-stakes setting typical of such experiments. In addition, all these studies relied on young participants, either high school or college students, who exhibit presumably less well-considered judgments about complicated subjects like social justice and utility maximization. The question of whether participants need to be aware of such concepts to act in accordance with real-world principles of justice was not discussed in these studies.

The Psychology of Fairness

A rich body of work is emerging in social psychology which attempts to correct many of the limitations of the policy-based experiments mentioned above. For example, *equity theory* states that people judge outcomes to be fair when the ratio of inputs to outputs is similar for everyone.[48] Another important aspect of distributive justice is examined in *relative deprivation theory*, which holds that fair outcomes are those which meet preexisting expectations.[49] *Procedural fairness* and *distributional justice* have been

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[47] Phillip Brickman, "Preference for Inequality," *Sociometry* 40 (1977): 308.
[48] J.Stacy Adams, "Inequity in Social Exchange," *Advances in Experimental Social Psychology*, ed. Leonard Berkowitz and Elaine Walster (New York: Academic Press, 1976): 267-99; and Elaine Walster, et al., *Equity: Theory and Research* (Boston: Allyn and Bacon, 1978).
[49] F. Crosby, "A Model of Egoistical Relative Deprivation," *Psychological Review* 53 (1976):340-51.

shown to be concepts between which people can distinguish,[50] but which can be used together in assessing the fairness in various contexts.

Van den Bos, Wilke, Lind and Vermut[51] found, for example, that people judge fairness by the outcomes they receive unless they receive substantially more or less than anticipated. Then procedural assessments are taken into account to determine whether those outcomes are justified. The same researchers (minus Lind)[52] also found that the order in which people receive information about either distributional justice or procedural fairness determines which of the two is more persuasive. When experiment participants were informed first about the procedures used to generate outcomes, those procedural issues were more persuasive than the actual outcomes. When outcome information came first, the outcomes were viewed as more persuasive in making a final judgment about fairness. Both seem to indicate a latent preference for procedural fairness and equal outcomes -- core elements of Rawls' definition of fairness.

A most interesting set of experiments conducted on detainees in county jails[53] showed that perceptions of fairness correspond to status within groups and the level of direct personal contact people have with those in authority. In particular, this *group-value model* assumes that "people evaluate the fairness of the procedures of an authority

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[50] Jerald Greenberg, "Organizational Justice: Yesterday, Today, and Tomorrow," *Journal of Management* 16 (1990): 399-432; T.R. Tyler and A. Caine, "The Influence of Outcomes and Procedures on Satisfaction with Formal Leaders," *Journal of Personality and Social Psychology* 41 (1981): 642-55.
[51] Kees Van den Bos, et al., "Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments," *Journal of Personality and Social Psychology* 74 (1998): 1493-1503.
[52] Kees Van den Boos, et al., "Procedural and Distributive Justice: What Is Fair Depends More on What Comes First Than on What Comes Next," *Journal of Personality and Social Psychology* 72 (1997): 95-104.
[53] Riël Vermut, et al., "Fairness Evaluations of Encounters with Police Officers and Correctional Officers," *Journal of Applied Social Psychology* 28 (1998): 1107-1124.

not so much because the authority offers them some control over the decision, but because fair behavior toward them by authorities gives them clues about their status position in the group."[54] In these experiments, people who were arrested and held in county jail viewed the actions of police officers and correctional officers as signals of their status among other detainees -- those who received fair treatment viewed themselves as higher in the social order (among other detainees) than those who were treated unfairly.

What this literature indicates is not only that fairness evaluations correspond to certain underlying psychological factors but that people evaluate fairness within particular social settings. People judge the fairness they receive at least partly by their expectations of the way they should be treated. Their observations of the way others are treated may form a substantial portion of these expectations regarding fair treatment, and may therefore contribute to their moral sensibility. If the social group one belongs to routinely receives a certain kind of treatment, one is likely to view any other type of treatment as unfair. Expectations regarding fairness cannot be said to be exclusively the result of abstract thought experiments and do not correspond to the assumptions of objectivity and rationality found in the original position. Instead, expectations are social constructs, developed by acculturation to patterns of justice in institutional settings and with regard to observed distributional outcomes. The sources of these social expectations are not well accounted for in Rawls' account of the moral sensibilities.

In Rawls' view, the psychological development which engenders our moral sensibilities reinforces a capacity for justice; but at the same time it exposes the theory of

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[54] Vermut, et al., "Procedural Justice," 1121.

justice as fairness to the charge that it is quite incomplete. The three principles of this moral psychology (what Rawls called psychological laws) are summarized as follows:

First Law: Children come to love their parents by observing the care and attention they pay to the child's own good.

Second Law: As children grow to maturity in a society comprised of institutions known by all to be just, and in which others carry out their social obligations, children begin to transfer these feelings of love, trust and friendliness to others outside their family.

Third Law: As the capacity for fellow feeling is more fully recognized, and as the benefits of just institutions becomes clearer, the sense of justice comes to its full development, along with a corresponding sense of social obligation. (*TOJ*, p. 490-1)

One of the inferences Rawls draws from these three principles is that moral sensibility arises from our awareness that as we observe others acting for our own good, we feel compelled to act for their good (assuming underlying institutions are known to be fair). This is the "deep psychological fact" which reinforces Rawls' notion of reciprocity as the core of fairness. Rawls claimed that such a description of human psychological development is universal because alternatives are unthinkable.

> If we answered love with hate, or came to dislike those who acted fairly toward us, or were averse to activities that furthered our good, a community would soon dissolve. Beings with a different psychology either have never existed or must soon have disappeared in the course of evolution. A capacity for a sense of justice built up by responses in kind would appear to be a condition of human sociability. (*TOJ*, p. 495)

But human sociability is an uncertain capacity. We frequently answer love with hate and scorn those who act fairly. The response to good treatment is sometimes sloth, sometimes ingratitude, sometimes resentment. We are not wise to rely on the rational powers of citizens to respond rightly to the treatment they receive and their knowledge of the institutional context in which they receive it. It's not quite that automatic. Indeed, we may view the history of moral philosophy as a centuries-long effort to induce these feelings in spite of our baser tendencies. Reciprocity -- love for fellow man -- is something we have to be persuaded to, cajoled to, reasoned to, even seduced to. Rawls' view presumes too strong a correlation between social theory and the human capacities to observe and reason. If we have within ourselves the moral sensibility to act fairly toward others, it is a sensibility which also grows in homes and communities where the lessons of life are taught and right living is cherished.

There is good reason to expect that the psychological desire for fair treatment ends soon after that treatment is received. Where others are concerned, our impulse to provide reciprocal fair treatment can be negligible. For example, the rights-bearing individuals characteristic of contemporary liberal democracies assert their own expectations for fair treatment regardless of the treatment others provide, even sometimes at the expense of others. They give little weight to reciprocity as they seek greater protection for their own rights. Our assessment of Rawls' quest for the conditions of fair institutions requires us to assess more than the culture of existing institutions or the background fairness which might be established in the original position of ignorance. It brings us to assess the communities where expectations for fairness are formed. Achieving consensus on the

fairness of concrete policies, as difficult as is it sometimes is, will depend on a full knowledge of the beliefs which bind us together -- a full knowledge of what marks us as a people collectively pursuing the promise of democracy.

CONCLUSION

Because the theory of justice as fairness was originally to be a universal theory (a three-part construction of procedural fairness, reciprocity and equal outcomes) the influences of comprehensive doctrines (religious, political and moral) were suppressed in its construction. Rawls' assumed that principles which proceed from social, religious or historically-informed world views are not objective and therefore fail to achieve universality. He asserted instead a view of fairness which emphasized universal agreement around rational and objective principles, producing in the original position agreement about the supremacy of fairness. This view conforms to liberalism's emphasis on rationality and positivism, but gives less weight to liberalism's other emphasis on full liberty of conscience and individual rationality. The principles of procedural fairness, reciprocity and equal outcomes alone cannot sustain themselves in practical settings. Rational, objective principles by themselves do not sufficiently uphold Rawls' idealization of the well-ordered society because they cannot guarantee that fairness always prevails. Ensuring a stable regime to defend fairness required Rawls to defend a narrowed justification of both fairness and the regime.

Thus emerged the dilemma between the universal and the practical. To resolve the dilemma, Rawls abandoned the stark rationality of the theory in its original form in favor of reasonableness and consensus-building. This bolstered his project of justifying political liberalism, but forced him to make choices between world views, allowing some to influence public debate while omitting others. He ultimately accepted those that

uphold a relative preference for fairness as a principle of liberal government. Rawls excluded other doctrines because they gave weaker support for the centrality of fairness in the continuing effort to realize the advantages of enlightened self-government.

It seems then that fairness is not contextually neutral. By placing fairness at the center of political debate -- by constructing principles of justice and public policy around a preference for fairness -- Rawls made himself a partisan of liberal politics and put himself at odds with those unable to share his position. This is not to say, however, that the theory of fairness is not widely held, in fact it may be widespread. There is sufficient evidence in social and political psychology to suggest that we wish for fair outcomes for ourselves. We also yearn to be treated fairly in dealings with the state and in our social groups. As Rawls has provided a plausible theoretical foundation for such yearnings, and as empirical evidence of its influence exists, we may accept fairness as a basic principle of political action.

Organ allocation policy seems to be a particularly poignant example of our yearning for fairness. Rawls has influenced our thinking on this topic by focusing our attention on the problem of justice as a scheme of fair interaction. Because of the exceedingly limited supply of organs, legitimate outcomes depend on a refined sense of the fairest way to make allocation choices, a sense sharpened by considering the three components of Rawlsian fairness. Fair procedure is important and is embodied in the specific medical criteria required by UNOS. The reciprocal relations between physicians and patients, and among the pool of potential recipients helps determine the nature of fair allocations. And an overall sense of equal treatment is also important, even if equal

outcomes are not possible. In addition, it is the difference principle that we see reflected in the Clinton administration's decision to call for a stronger emphasis on "sickest first" allocation rules. For all these reasons, the impact of Rawls in this area of public policy has been profound and is a testament to the persuasive power of his argument.

If fairness is a basic principle, it is one that calls for the nurture and flourishing of institutions that may limit our liberty to do such things as cast votes on the basis of private religious or philosophical belief. It calls for institutions which restrict rather sharply the "formation of unreasonable market power," and "preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property." (*TOJ*, p. 276-7) These restrictions, manifestations of Rawlsian fairness, are particularly prominent in liberal regimes. To the extent that institutions in liberal regimes rest on the preference for fairness, fairness furnishes the content of liberal politics. As we have seen, fairness is introversive, not neutral. The yearning for fairness therefore would seem to originate somewhere other than impartial reflection on collective action. It would seem to arise from acculturation into the assumptions of contemporary liberal politics.

Culture and expectations determine one's view of fairness, and can by extension also inform one's understanding of what constitutes fairness in institutions. Further, the "purity of heart" which permits us to arrive at a shared sense of justice reflects values and character -- the substance of a human life. This being the case, Rawls' rational constructivism offers too thin a description of politics-as-it-really-is to permit a full understanding of fairness. To understand fairness requires the same kind of insight into

cultural variables commonly offered by communitarians. Indeed, if it is our "moral sensibilities" which lead us to define justice in terms of fairness, and if it is the "larger community of political culture of democratic societies" from which the substance of justice as fairness springs, it is there that the full meaning of fairness lies.

CHAPTER 4

Communitarians and the Virtues of Fairness

Contemporary definition of fairness seems to arise both from expectations of personal gain as well as the realization that our common life helps determine what fair treatment consists of. The expectations individuals have about fair treatment may begin with rational self-interest, as Rawls pointed out, but expectations are not determined solely by rational utility. People also compare their treatment to what they observe. If others receive considerations of fairness, they may expect the same considerations for themselves. Such expectations are not simply desires to enhance self-interest, but come from observations and comparisons within a common base of experience.

The multiple sources of fairness, sources from the self and the sources from community, present us with the problem of determining in what proportion the two mix and how individualism and community may affect each other. If it is true that fairness is determined partly by individual calculations of rational self-interest and partly by

observation of how fairness is manifested in social life, a complete understanding of fairness would involve knowing how to balance the two.

The Rawlsian theory of justice as fairness is heavily weighted toward the assumptions of individualism. It is, in this sense, an unbalanced theory. In fact, the effect of community is ideally eliminated altogether when rational individuals choose principles of justice ignorant of their advantages, abilities and place in society. This indicates that for Rawls the individual is the primary source of fairness. However, he may have realized that individual rationality alone does not support or sustain fair dealing when he wrote, "If those individuals engaged in a system of social cooperation regularly act with evident intention to uphold its just (or fair) rules, bonds of friendship and mutual trust tend to develop among them, thereby holding them ever more securely to the scheme."[1] Rawls evidently believes that the ties binding us to schemes of fair interaction are at least partly reinforced by communities of friendship and mutual trust. A full understanding of schemes of fair interaction then would unite the calculations of individual utility with an awareness of some community of belonging and belief.

Enhancing awareness of community in understanding political morality is an important part of the communitarian movement. This is also true with respect to fairness. Some communitarians have supported the notion that a full understanding of fairness requires that individual rationality be augmented with an awareness of the sentiments of community. This balancing of individualism and community life may supply a fuller understanding of expectations Rawls' theory of fairness lacks.

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[1] Rawls, *TOJ*, 470.

Because they point out the deficiencies of Rawls' theory, communitarians have been described as critics of the Rawlsian project, and many of them take a critical stance toward Rawls. But communitarian writers seek as often to synthesize Rawls' views with a dedication to communal forms of meaning, even as they critique the feasibility of justice as fairness. They frequently enhance the theory of justice as fairness with the knowledge that expectations for fair treatment cannot be conceived outside the context of community.

Because their views on core Rawlsian notions such as the original position are not uniformly critical, it is difficult to pinpoint just how communitarians understand the role of community in establishing the meaning of fairness. It is also difficult to explain just how their theory implies limits to individual moral judgment. That these points are not uniformly developed in communitarian writings does not reveal a basic hostility to individualism. But just when do the interests of community override concerns of individuals? And would communitarians define fairness differently than Rawls?

In this chapter I will argue that communitarians of all stripes -- liberal, conservative and libertarian -- are united by two beliefs. The first is their commitment to revitalizing a vibrant defense of local ties and affections. The second is a rejection of the excessive individualism they see in contemporary ideas about establishing principles of justice. They believe that the unfettered individualism of modern culture poses a threat to the communities that nurture individuals and impart meaning to our social and political life. At the same time they do not hold the community as a complete source of knowledge about justice, either. They seek above all some balance between the two.

Bellah , et al explained the balancing of the concerns of individuals and communities this way:

> The question is whether an individualism in which the self has become the main form of reality can really be sustained. What is at issue is not simply whether self-contained individuals might withdraw from the public sphere to pursue purely private ends, but whether such individuals are capable of sustaining either a public *or* a private life. If this is the danger, perhaps only the civic and biblical forms of individualism – forms that see the individual in relation to a larger whole, a community and a tradition – are capable of sustaining genuine individuality and nurturing both public and private life.[2]

This reminds us that individuals who isolate themselves from the communities they live in underestimate the important role community plays in their own moral outlook, and therefore risk adopting an incomplete view of their own individuality. The search for common sources of moral knowledge may be, ironically, just what makes strong individual moral assessments possible. The values and beliefs that comprise our common moral inheritance can best be challenged if the legitimacy of social criticism itself remains intact. In supporting such legitimacy, communitarians hope to make vibrant communities the home of vibrant, questioning individuals

Of course, citizens are not merely recipients of tradition without the curiosity to question or the intellect to examine moral questions. Human reason supplies the impetus for fresh reexamination of concepts as they are confronted by changing circumstances. For instance, the unfairness of racism inherent in some communities can, with difficulty,

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[2] Robert N. Bellah et al., *Habits of the Heart* (Berkeley, Calif: University of California Press, 1985): 143.

be exorcised by a rational examination of prejudice. Whole societies seem to be able to move together from previously held beliefs to new beliefs when influenced by rational reflection about morality. When such transformations happen, it is because individual reason supplies the impetus for reexamining political virtue, but this reasoning is augmented by a communal sensibility. The effort to understand this communal sensibility animates contemporary communitarianism.

In this chapter, I will describe how communitarians balance the concerns of individuals with the expectations that arise within communities. I will then examine how communitarians interpret fairness and its components, namely procedural fairness, reciprocity and equality.[3] I will also explore the limits of individual obligation to such views, and whether these limits may pose a problem for discovering a consensus on the meaning of fairness. The central question of this chapter is this: Are there community standards of political morality sufficiently universal to support a widely accepted definition of fairness which could also foster agreement on matters of practical politics?

[3] I will adopt the Rawlsian interpretation of the elements which comprise fairness as discussed in the last chapter. While this is not the only possible interpretation of the components of fairness, it is a useful starting point for evaluating competing views for three reasons. First, it is broadly accepted. Although there are other interpretations of the meaning of fairness, I am aware of no literature which directly challenges the Rawlsian definition of fairness. Second, it provides a fixed point of reference for making comparisons between views which are not founded on the same assumptions and proceed by different methods. Third, Rawls' position as the premier contemporary philosopher on the topic of fairness lends his work a presumption of fitness as a criterion.

WHAT IS COMMUNITARIANISM?

Contemporary communitarianism is founded on the belief that a complete understanding of individual views of political morality is not possible without also understanding the values resident in communities. Communitarians stress the significance of "social forces, of community, of social bonds."[4] The dominant theme of communitarianism is that "individual rights need to be balanced with social responsibilities, and that autonomous selves do not exist in isolation, but are shaped by the values and culture of communities."[5] It is a search for the influence of shared culture along with the individualism inherent in liberal societies. Amitai Etzioni described the essential communitarian project this way, "Communitarians have been concerned from the onset with the balance between social forces and the person, between community and autonomy, between the common good and liberty, between individual rights and social responsibilities."[6]

In a narrow sense, it might be said that communitarianism is a critique of the more extreme aspects of contemporary liberalism. Communitarians often react to what they believe are the more excessive expressions of liberal individualism, especially the peculiarly modern individualism that is "abstract, unhistorical, hyperindividualist, resting

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[4] Amitai Etzioni, "A Matter of Rights and Responsibilities," ed. *The Essential Communitarian Reader* (Lanham, Md.: Rowman and Littlefield Publishers, Inc., 1998): x.
[5] *Communitarians,* Civic Practices Network [online] (Waltham, Mass.: Center for Human Resources, Heller School for Advanced Studies in Social Welfare, Brandeis University). Accessed 12 February 2001 Available from World Wide Web:
<http://www.cpn.org/cpn/sections/tools/models/communitarianism.html>.
[6] Etzioni, "Rights and Responsibilties," x.

on an unsustainable metaphysic of the self, indifferent to virtue, and blind to the kinds of human goods that are enjoyed only in the company of our fellow human beings."[7] But this critique is not intended to be taken as a complete rejection of liberalism. In fact, the hallmark of contemporary communitarianism, according to Philip Selznick, is to combine the concern for community with liberalism. He noted that communitarians "combine a spirit of liberation and a quest for social justice, with responsible participation in effective communities," a position that is "not antiliberal if liberalism means a strong commitment to political freedom, social justice, constitutional rights, the rule of law, full citizenship, and special concern for the poor and oppressed."[8]

While the values of community occupy a central place in communitarian thought, individualism is still cherished. "Communitarians recognize that a healthy society must have a correct balance between individual autonomy and social cohesion."[9] In fact, the communitarian movement emphasizes the blending of the two, of finding a place for individual ideas about morality within the traditions. It is the "home of coherence, connection and narrative capacity."[10] So strong is this impulse to combine views on politics that the movement seeks to rise above the politics of left and right, so that "the

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[7] William Galston, "Political Theory in the 1980s: Perplexity amidst Diversity," *Political Science: The State of the Discipline II* ed. Ada W. Finifter (Washington, D.C.: The American Science Association, 1993): 30.

[8] Philip Selznick, "Foundations of Communitarian Liberalism," in *The Essential Communitarian Reader*, ed. Amatai Etzioni (Lanham, Md.: Rowman & Littlefield, 1998): 3.

[9] Norton Garfinkle, *About Communitarianism: A Message From the Institute Chariman* [online] (Washington, D.C.: Institute for Communitarian Policy Studies, George Washington University) Accessed 12 February 2001. Available from World Wide Web: <http://www.gwu.edu/~icps/index.html>.

[10] Michael Walzer, "The Communitarian Critique of Liberalism," *Political Theory* 18 (1990) quoted in Bernd Schlicher, "Etzioni's New Theory: A Synthesis of Liberal and Communitarian Views," *The Journal of Socio-Economics* [online] 28 (1999) Accessed 12 February 2001, Accession no. A59521699, Available from InfoTrac.

term communitarian and communitarian concepts have been added to that of both liberals and conservatives as a recognized third way of thinking."[11]

Thinking like a communitarian, then, would seem to include holding two proposition in balance: the first, that community is the source of value formation, and the second, that individualism must be limited in a way that does no violence to moral autonomy. This latter proposition, drawing boundaries for the self, is a necessary part of their project, and a tricky one. It requires that communitarians explain what they mean by the "social bonds" that tie more or less autonomous individuals together through the common experience of community.

Communitarians believe individuality does not arise in a vacuum, but is instead nurtured in the soil of shared experience. But what is the content of our shared experience? For without answering this question, it will be impossible to account fully for our understanding of fairness. Bella, et al, evidently believe that the first clues to the content of shared experience come from seeing individuals "in relation to a larger whole, a community and a tradition."

The communitarianism I refer to here is a view that includes a strong commitment to the realities of governing and the realities of civic life. Michael Sandel asserted that the lives of real political actors and even common citizens are more complex, less remote and less simplistic than Rawlsian liberalism assumes. Their ideas about public action are infused with attitudes about which ends public action should strive for.[12] Michael Walzer

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[11] Amitai Etzioni, "Introduction" in *The Essential Communitarian Reader*, ed. Amatai Etzioni (Lanham, Md.: Rowman & Littlefield, 1998): x.
[12] Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1998).

asserted that in successful democracies the just distribution of social goods varies depending on the good in question. Each good has its own socially-construed character and meaning, and some are regarded as more important than others.[13] Alasdair MacIntyre wrote that evaluations of morality can be found in the practices of politics and professional activity.[14] Charles Taylor asserted that liberalism's preference for liberty and self determination are not objectively rational principles as Rawls asserts, but are peculiar to Western culture, and people today expect them because of their culture has long held an attachment to them.[15] This concern for uniting thinking about politics with the practice of politics unites these authors in a common project of understanding how the morality of political action is justified. [16]

Two threads tie these views together: a deep respect for the effect of community in forming shared values of political morality and a critique of excessive individualism. Fairness and the virtues it implies comprise part of the shared values of communities. Communitarians therefore value fairness, but not primarily for its intrinsic characteristics.

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[13] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[14] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988).

[15] Charles Taylor, "Atomism," in *Powers, Possessions, and Freedom: Essays in Honour of C.B. Macpherson*, ed. Alkis Kontos (Toronto: University of Toronto Press,): 39-61.

[16] Norman Daniels attributed the beginning of the contemporary communitarian movement to four authors and their writings on community and individualism in the early 1980s. The four authors were Alasdair MacIntyre, Michael Sandel, Charles Taylor and Michael Walzer. Their primary statements on the subject appeared respectively in 1981, 1982, 1982 and 1983. Norman Daniels, ed., *Reading Rawls: Critical Studies on Rawls'* 'A Theory of Justice.', (Stanford, Calif.: Stanford University Press, 1989): xvii. William Galston also marked the early 1980s as the beginning of the "communitarian critique of liberalism," especially as it developed in the work of the same four authors. William Galston, "Perplexity amidst Diversity," 30. According to Ronald Beiner, the "controversy over the deficiencies...of contemporary liberalism" began with the work these four authors and their work published in the early 1980s. Ronald Beiner, *What's the Matter With Liberalism?* (Berkeley, Calif.: University of California Press, 1992): 15.

Instead they see antecedent values, such as a belief that individuals should keep their promises, expressed in a preference for fairness. The responsibility of citizens to participate in political life, mindful of their own traditions, but acting with tolerance and respect of other traditions, makes political discourse more civil and more satisfying. Communitarians acknowledge the importance of the elements of fairness: procedural fairness, reciprocity and equality. But for each of these, communitarians ascribe a more fundamental characteristic, finding each to be expressive of civic virtue.

Communitarians use a wide lens when surveying American society for the values that establish the meaning of fairness. They describe a comprehensive picture of the role played by procedural fairness, reciprocity and equality that span multiple accounts of political morality. They view excessive proceduralism as an impediment to justice rather than an aid; and reciprocity and equality were seen as having deeper social and political significance than the thin surface function ascribed to them by Rawls. The importance of these elements cannot be overstated, because they form, along with other virtues of civic life, the core of American political beliefs. Communitarians see commonality in these beliefs everywhere -- shared assumptions that operate in spite of community differences – even if that commonality is general in nature. Fairness comprises part of the overall fabric of political morality for communitarians. Communitarian writers see fairness as part of the body of beliefs about what it means for a political act to be moral. They describe the principle elements of fairness as more substantial, and more beloved, than the principles Rawls' described with his thin theory of the good. They observe that citizens form attachments to beliefs woven into the fair practices of everyday life. These

principles are broad statements of right and wrong embedded in comprehensive doctrines. They impart meaning to daily life -- and to political life. To embrace them is to face moral uncertainty armed with ideals proven to be reliable guides. Such inherited principles are the substance of satisfaction and contentment. It does not matter whether the principles are those which shape the New Englander's moralism or the southerner's religious traditionalism or the individualism of the Midwest. [17] Communitarians extended Daniel Elazar's taxonomy of political culture by exposing its philosophical underpinnings and advocating its protection. By calling attention to the principles of political culture, communitarians call us to appreciate and encourage a robust political morality, including an account of appropriate fair behavior among citizens.

[17] Daniel J. Elazar, *American Federalism: A View From the States*, 2d ed. (New York: Crowell, 1972): 84-126.

COMMUNITY AND FAIRNESS

Even though many communitarian writers neglect specific discussion of fairness, there are two broad themes in communitarian writings. The first is that fairness draws its force from antecedent moral principles. The second is that even though fairness is an important component of just societies, it may sometimes be prudent to limit concerns for fairness in order to achieve broader justice in political action.

Some communitarian writers have discussed Rawls' elements of fairness -- procedural fairness, reciprocity and equality – from within a community-centered framework. They view fairness within the context of community-defined values, upholding those interpretations of fairness that are crucial to the survival of civic virtue. I will discuss the two broad themes in the communitarian understanding of fairness, then examine communitarian writings on the Rawlsian elements of fairness.

The Antecedent Principles of Fairness

As with political morality broadly, a complete understanding the sources of fairness depends on striking a balance between individual moral autonomy and communal belief. For many communitarians, the source of political fairness is culture and the moral values and beliefs arising in community. These beliefs are said to inspire strong adherence to principles, stronger than rationalism alone is capable of inspiring. This is not to discount the possibility of reform or the importance of fairness in checking abuses

of power, but is intended to moderate an unwise over-reliance on individual rationality in uncovering the meaning of fairness.

Michael Sandel believed that striking a balance between individualism and communal belief could be the basis of political reform, that it could be a mechanism for detecting and correcting threats to democracy. He argued that such a balance would more fully explain "the political forms and social conditions that promote the meaningful exercise" of self-government, where political forms correspond to civic republicanism. But his definition of the "meaningful exercise" of self-government omits a specific reference to fairness because the virtue of republican civic engagement does not require specific calculations of fairness.

Other definitions of meaningful self-government, especially those that value a more extended individualism, do require specific protections for fairness. Such valuations seek to justify, "principles of justice that treat persons fairly as they pursue their various interests and ends."[18] It is only a bit of a simplification to say that according to this view, meaningful self-government is coequal with the protection of fairness, that fairness is central to schemes of justice and has value as an end in itself.

For Sandel, fairness is important mainly because of what it can do for the character of citizens, because it has the potential to enhance the formation of civic virtue. Debates about distributive justice illustrate his point. He noted that contemporary discussions of economic policy center on the problem of balancing prosperity and

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[18] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1996): 27.

fairness.[19] In this debate it is assumed that we can pursue policies to foster free competition and hence concentration of wealth, or regulate competition for the sake of minimizing economic disparities, but not both. Sandel would argue that the proper purpose for public discussions about economic policies is not limited to helping us choose between prosperity and fairness. The proper purpose for this debate is to foster civic virtue. This does not mean that fairness itself is irrelevant, but Sandel gives its effects more weight than he gives fairness alone. He leaves room for fairness in political discourse, but primarily because it may help uphold civic virtue, because it has "civic consequences."

Sandel argued that fair distributions can sustain civic virtue by preventing polarization of citizens into rich and poor, the former being "distracted by luxury and prone to ambition, are unwilling to obey," the latter who, "shackled by necessity and prone to envy, are ill suited to rule." Again, he contrasted his view of fair distribution of social goods with other views of fairness that hold that "absent fair social and economic conditions, persons cannot truly be free to choose and pursue their own values and ends."[20] For Sandel, fairness is important not because it fosters such choices but because it fosters a certain type of citizen -- a citizen confident of the underlying justice of social and economic policy, and so encouraged to participate in politics and become a better citizen.

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[19] Sandel, *Limits of Justice*, 124.
[20] Sandel, *Democracy's Discontent*, 330.

Sandel's view of fairness also focused on the contractual arrangements that Rawls said bring about and sustain commitment to fairness. Sandel repeated the now familiar Rawlsian theory -- participants negotiating in the original position agree on principles of justice that maximize the minimum amount of social goods that every member of society can expect. When this stage is reached, the participants agree to be contractually bound by the result. This means that each member of society agrees to live by the principles reached and to accept reciprocal obligations to sustain a well-ordered society. This contract produces general principles of justice without reference to teleological or perfectionist claims. But the point Sandel wished to stress was that the contractual nature of the principles of justice is the decisive element in their legitimization.

He asserted that the legitimacy of the agreement in Rawls' original position depends almost wholly on the fact of agreement itself and not because the principles of justice were really universal on their own. Instead, rational choice and the resulting contractual agreement were the instruments through which Rawls justified his principles of justice. With regard specifically to the principle of justice as fairness, however, Sandel wondered, "...why does this [the fact of agreement] give us reason to believe that these principles are just? ... It is not immediately clear how the original position confers moral status on the results of an exercise in rational choice, not obvious what the justificatory force of the argument from the original position consists in."[21]

One problem with the original position is that it establishes contract as the only mechanism for justifying principles of justice. Because the deliberations of the original

[21] Sandel, *Limits of Justice*, 104.

position are said to lead inevitably to fairness as the single criterion for justice, these deliberations are not only the means but also the justification for fairness. Voluntary acceptance of fairness as an organizing principle of political institutions does not come naturally to citizens, even in the Rawlsian view. The implication is that human beings do not cherish fair relations naturally. Without a contract compelling fair behavior, human nature is to ignore fairness in the rush to secure maximum personal gain. Sandel protests -- it is not only the contractual nature of the original position that sanctions fairness, but also certain antecedent moral principles and attachments to the good these principles represent. We cherish fairness because we cherish the virtues that give it meaning.

Now, Rawls' justification for the priority of fairness falls under the rubric of the priority of the right over the good. The good, he argued, is epistemologically inferior to the right. The good is the result of mere preference and not reason. This reinforces the oft-repeated position that when views of the good clash with views of the right, priority belongs to the right. "The priority of the right over the good provides a meta-ethical background to the familiar liberal notion that the preferences and convictions of the majority, however intensely held, cannot defeat a legitimate claim of individual rights."[22] This is to imply that the priority of the right, its epistemological superiority, is based on a preexisting (but not specifically justified) preference for rational methods.

Sandel argued that the belief of the relative superiority of the right over the good is itself a kind of preference.

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[22] Ibid., 155.

> The priority of the right might finally be viewed in terms of its antecedent derivation, and the need for some ultimately 'unchosen' background as a precondition of choice in conceptions of the good. If the principles of justice were themselves up for grabs, then 'the freedom of choice that justice as fairness assures to individuals and groups within the framework of justice' (TOJ, 447) would no longer be assured. Something must remain beyond choice (and so constrain it) if choice itself is to be secured. This is the epistemological priority that deonotological ethics carries over into a moral priority.[23]

If such preferences must remain 'unchosen' and beyond debate, then some community of belief is required to adhere to the Rawlsian understanding of fairness just as is required to adhere to any other understanding. In fact, Sandel believed antecedent preferences were decisive elements in justifying Rawlsian theory. If such preferences determine interpretations of fairness, the communitarian interpretation may be just as rational as Rawls' interpretation. This means that the theory of justice as fairness is itself the product of a certain community of thought. It also means that a complete understanding of fairness in American politics and culture will necessarily include an analysis of tradition as well as reason. Our tradition of civic virtue then becomes as important as rationally constructed principles and needs to be balanced against such principles.

The Limits of Fairness

Walzer discussed fairness from within the Rawlsian framework of fair opportunity to acquire social goods. For Walzer, like Sandel, fairness is a balancing act. He

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[23] Ibid., 156.

understood the balance to be one of rational efficiency in distributing social goods against the valid claims of communal belief. Sometimes, he argued, the quest for fairness in distributing social goods impeded the attainment of broader social justice. Without balancing this quest against other goods, the search for fairness would undermine itself.

Walzer believed the most important social good to be offices: positions of power and prerogative. The offices open to citizens include more than bureaucratic or elected office, but almost all jobs in the public or private sectors. This was because the procedures used to select individuals for these positions have become increasingly subject to political prerogative -- the standards of "fair employment practices" and "affirmative action" are examples of the politicization of selection. They represent government schemes to codify fairness and make selection fall within the sphere of government action.

> I think it is fair to say that the current thrust of both politics and political philosophy is toward the reconceptualization of every job as an office -- for the sake of justice...Any position for which people compete, and where the victory of one constitutes a social or economic advantage over the others, must be distributed "fairly," in accordance with advertised criteria and transparent procedures...Office must be won in open competition. The goal is a perfect meritocracy, the realization (at last!) of the French revolutionary slogan: the career open to talents.[24]

The fairness to which he referred is a simple fairness of opportunity. But this scheme of simple fairness is too simple, according to Walzer, because it quickly excludes

[24] Walzer, *Spheres of Justice*, 131-132.

those without talent. A tyranny of merit is as likely to arise as a tyranny of birth or a tyranny of wealth. Walzer believed the best guarantee against these tyrannies is community-based judgment -- a balancing of the competing desires for efficient institutions staffed by competent practitioners where all have fair opportunity to obtain offices. This of course requires judgments about the office and the office-seeker. Walzer advocated the prudent judgment about offices and office-seekers "to contain the universalization of office, to attend more particularly to the actual job and its social meaning."[25]

It was Walzer's larger purpose to point out that no office or wealth, no social good, is inherently abusive, but becomes so when it is used as the basis for suppression of fair opportunity for others. Therefore it is the exercise of power in an office that makes the office dangerous or its power unfair -- power constitutes the potential to diminish or uplift institutional fairness. The potential for fairness, even if selection of office is based on merit, depends on regulation of selection criteria to limit the unfairness inherent in the exercise of power.

Selection criteria varies from culture to culture and from time to time within the same culture. Because the criteria are political, they are subjective. Walzer noted that strict neutrality in merit-based selection criteria is impossible because, "particular choices always have to be made among possible 'merits' or, more accurately, among the range of human qualities, and then among relatively qualified individuals."[26] Rational construction alone is insufficient to justify possible merits. They must ultimately be

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[25] Ibid., 134.
[26] Ibid., 143.

consistent with socially-construed values because social values act as checks on undesirable results of purely rational rule implementation. The selection of who benefits from office is ultimately "determined politically -- the product of ideological argument and common understandings."[27] Fairness is not possible in this equation without applying the common understandings of political morality.

Communities for Walzer are thus key in establishing fair political action because community standards determine how to select the holders of various professional or bureaucratic roles. Pure objectivity is not possible in making such selections. But by using community values as reliable guidelines decision makers can more consistently select appropriate and inappropriate distribution of office.

Walzer proposed that office holders should not strive for perfect, abstract procedural fairness but that they should carefully apply the sentiments of their community in exercising the power of office. The fair application of fair rules then becomes more important than the procedures used to derive the criteria. This helps retain the validity both of the criteria and the exercise of power in implementing these criteria. It also helps decision makers choose which selection criteria are appropriate and which are not, such as race, wealth or birth. This judgment, an application of social values, preserves the validity and fairness of the final selections of who holds offices.

But Walzer's further recommendation is to limit the number of jobs which are filled on the basis of some government action. In other words, along with social limits on what may fairly be included in the requirements of office should be limits on which

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[27] Ibid., 157.

offices are considered truly public. Walzer would conserve some offices, perhaps most unskilled jobs, to the private sector, beyond the reach of government schemes to control selection criteria and conditions of service. Where the justification in the professions is to conserve fairness by limiting the power and perquisites of office, Walzer believed the distribution of many other jobs should be made according to the various dictates of local custom.

> Here [in the professions and important civil service positions] communal control and individual qualification are necessary, and the crucial principle is "fairness." ... But there are clearly desirable jobs that fall outside these systems, that are justly (or not unjustly) controlled by private individuals or groups, and that do not have to be distributed "fairly." The existence of such jobs opens the way to a kind of success for which people don't need to qualify ... [28]

Social control over some jobs is important enough to justify exceptions to fairness. This position, along with Sandel's position on the fact that underlying cultural beliefs impart meaning to the concept of contractually-derived fairness, encapsulates the communitarian view of fairness. While they describe it as a desirable virtue of civic life, and even as derived in part by rational discernment of social ends and means, fairness nevertheless is not a central aspect of well-ordered societies. In some circumstances, we may consider political action just which does not hold fairness as its driving theory, and we may consider the subjective distribution of some social goods as fairer than purely rational distribution.

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[28] Ibid., 163-4.

Thus the communitarian view of fairness seems to be that fairness is an element of justice, but not equivalent to justice. Fairness in economic distributions is not important in itself, but is most relevant when it promotes republican virtue. Further, fairness may properly be limited within acceptable boundaries established by communities. But neither of these views reject fairness outright. Excessively unfair or unequal distributions may create doubts about the regime and undermine the perceived utility of participation in political discourse. In this way unfair distributions of social goods may weaken republican virtue. The exact point at which fairness should become a relevant factor in policy making cannot be determined by contractual agreement or rational discourse alone, but should include examination of the antecedent moral principles imbedded in republican society.

It is important to understand the communitarian interpretation of these antecedent moral principles. Many communitarian writers have addressed the elements of fairness stipulated by Rawls. As mentioned in the last chapter, these elements are procedural fairness, reciprocity and equality. In each case, the communitarian explanation is that these principles constitute antecedent moral principles that are inherited, not chosen. As interpreted in communities, these principles can produce a more robust conception of justice than that found in Rawls.

1. Procedural Fairness

Procedural fairness is not only a fundamental element of fairness, it comprises a core belief of the constitutional state. Fair procedures for participating in political decision making is a hallmark of democratic society and a fundamental part of participatory democracy. On this general point, communitarians are in substantial agreement with Rawls. The emphasis on due process, procedural rules in criminal trials, sunshine laws and procedural fairness found in legislative and judicial decision making tend to constrain power.

In a famous 1984 article, Sandel described the link between the procedural republic and what he called the unencumbered self.[29] The procedural republic is a regime with an overdeveloped concern for the means of policy making. In such a state, fair procedure grows beyond being a mechanism to guarantee just institutions, eventually becoming the central concern of government and the grounds on which the morality of policy is justified. Political action is considered objective, valid and fair when it is produced pursuant to fair procedures. The proper role of government action is no longer seen primarily as determining what policy is good – that judgment is left to individuals to judge. The proper role of government in a procedural republic is to ensure strict neutrality, fairness, in the way policy is deliberated and implemented. The relative value of non-procedural issues, especially substantive issues and the moral content of policy,

[29] Michael J. Sandel, "The Procedural Republic and the Unencumbered Self," *Political Theory* 12 (1984): 81-96.

are increasingly determined by citizens who interpret what is moral and fair as their own reason dictates independent of community expressions of what is moral and fair. Such a citizen is an "unencumbered self," a morally autonomous individual whose judgment corresponds to rational reflection.

The danger of the procedural republic, according to Sandel, is that the appetite for procedural fairness, for strict procedural neutrality, turns into a preoccupation for establishing absolute government neutrality toward ends. In fact, the preference for procedural fairness reflects a belief that "what makes the just society just is not the *telos* or purpose or end at which it aims, but precisely its refusal to chose in advance among competing purposes and ends."[30] A procedural republic refusing to choose the ends it promotes leaves more room for individuals to choose ends for themselves. As individual valuations are given more weight, the regime becomes ever more concerned with procedural fairness as the primary expression of fairness. In so doing it overvalues the moral consequence of procedure, originally a cure for promoting toleration and limiting government's role in determining ends for society, turning procedural fairness into the obsession of governing.

Sandel argued that the over-emphasis on procedural fairness distorts the true nature of republican government by discounting the importance of civic attachments, the search for shared principles and the commitment to preserving the political order above personal gain. Individuals begin to see themselves less as citizens and more as bearers of rights apart from the larger body politic. By embracing proceduralism and avoiding the

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[30] Ibid., 82.

difficult but necessary role of expressing and justifying ends, the procedural republic begins to encourage the development of an atomized society. The citizens of such a society view themselves as without obligations except those they freely choose to be bound by. There is little incentive, and over time little inclination, to be concerned with the needs of other citizens since others are responsible for choosing their own ends, too. Thus citizens eventually become unconcerned with advancing the good of others. They adopt a minimalist attitude about their duties to others because the dictates of procedural fairness do not require it. "The average citizen is therefore without any special obligations to his or her fellow citizens, apart from the universal, natural duty not to commit injustice."[31]

Mary Ann Glendon's discussion of the "lone rights-bearer" is similar to Sandel's unencumbered self.[32] American courts and legislatures, she argues, increasingly view the citizen as a "free, self-determining individual,"[33] a view which tends to erode family ties, moral discourse, and even democracy itself. The danger to democracy arises because the "austere ideal of self-sufficiency cannot be successfully democratized. A large collection of self-determining, self-sufficient individuals cannot even be a society."[34] The effect of this view of citizenship on the processes of government is to impoverish political discourse, to "put a damper on the process of public justification, communication and deliberation upon which the continuing vitality of a democratic regime depends."[35]

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[31] Sandel, *Democracy's Discontent*, 14.
[32] Mary Ann Glendon, *Rights Talk* (New York, N.Y.: The Free Press, 1991): 47-75.
[33] Ibid., 70.
[34] Ibid., 74.
[35] Ibid., 171.

Ironically, in this atmosphere of morally autonomous citizenship the means of establishing procedural fairness among citizens is jeopardized. Government is better able to protect fair procedure when it views citizens as morally connected to family, community and finally to the state. A state that expresses a sentiment of well-ordered reciprocal relations among citizens can sustain a tradition of fair procedure more effectively than one preoccupied with fair procedure alone. Atomized society does not encourage social cooperation or effective political discourse, and ultimately endangers the very procedural fairness that justify views of political morality.

While the Rawlsian interpretation views procedural fairness and reciprocity as complimentary elements of fairness, the communitarian critique sees them in opposition if they are viewed outside the context of community. To the extent that government expresses an idea of what fairness means outside a community context, it discourages development of the civic cooperation republicanism depends on. Ultimately, fairness is best ensured when government encourages a strong sense of civic attachment. Communitarians are therefore opposed not only to an understanding of fair procedures outside the context of shared values, but also to a view of reciprocity outside this context.

2. Reciprocity

The fabric of republican society is formed by strong attachments to the idea of reciprocity between members of vibrant communities, according to the communitarian view. These reciprocal attachments can be weakened if government is excessively concerned with procedural fairness. Citizens cooperate in reciprocal relations in

republican society because they do not always demand from others actions designed to enhance their own immediate gain.

As we've seen, the Rawlsian view of reciprocity is quite different. It is a view in which the contractual agreement reached in the original position enforces reciprocal relations. But as Sandel argued, contracts do not by themselves possess sufficient moral force to compel citizens to accept reciprocal obligations. Contractual consent even implies some antecedent principles to make it effective as a legitimizing force. Background attachments to fairness bind. Promises do not bind, but the principle of fidelity to promises does.[36] If reciprocity between citizens is conducive to fairness, it is because citizens are willing to reduce their demands on others as they sacrifice their own interests to secure benefits for others. The notion of reciprocity as sacrifice cannot be enforced by contract alone.

The idea that reciprocity enhances fairness because citizens expect to get for themselves what others get turns the idea of reciprocity on its head, according to the communitarian view. If reciprocity means getting what others have, it turns the allocation of public goods into a zero-sum game. One would protect the rights of others not for the sake of others, but to enhance one's own claims for the same intervention in one's own behalf. This view of reciprocity implies that the motivation for protecting rights or enhancing liberty is to serve self-interest. But self-sacrifice founded on self-interest seems insufficient to motivate action that overcomes serious threats to rights or liberty. It

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[36] "Rawls emphasizes that, notwithstanding their voluntary dimension, our actual obligations are never born of consent alone but inevitably presuppose an antecedent background morality, independently derived, in the light of which it is always possible to ask whether one *ought* to have consented or not." (emphasis in original) Sandel, *Limits of Justice*, 110.

would appear that this kind of reciprocity is more of a check – I protect your rights so that I have a claim against you to protect mine. Of course, this is the reciprocity of contracts, but it is an idea that deprives reciprocity of its animating force.

Sandel takes reciprocity in the purely contractual sense to mean the "mutual benefit" of the contracting parties, assuming there is a way of judging benefits both parties can agree on. If both parties believe the contractual arrangement achieves the results they anticipated, the contract can be considered fair. If, on the other hand, one or both parties did not get what they thought they should, the contract can be considered unfair. Parties to a contract can even bring harsh results on themselves, although this would be considered an anomaly, as long as they do so freely and fully anticipate the results. Nevertheless, so long as the parties are autonomous and achieve the benefits they expect, any contract can be said to have moral force. But this implies some extra-contractual standard for judging whether the outcomes approximate closely enough the expectations of the parties when they made the contract in the first place. "Obligations arising under the ideal of reciprocity must presuppose some criterion of fairness independent of contract, some way in which the objective fairness of an exchange may be assessed. [37]

Sandel pointed out that contracts generally derive legitimacy from two sources: the autonomy of parties who make the contract and the satisfying of their expectations as the contract is executed. Advocates of the contract model of political morality view both these sources of legitimacy as neutral. The autonomous parties requirement corresponds

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[37] Ibid., 107.

to procedural fairness – when a contractual relationship is agreed to freely, with no coercion, the contract can be said to be legitimate by the standards of fair procedure. There are no antecedent valuations required -- the autonomy of the parties involved is an instrumental condition of justifying fairness. Similarly, the requirement that contracts satisfy simultaneously the expectations of all parties produces a kind of self-sufficient, neutral justification. It is akin to reciprocity, but only if expectations are met. This standard is also seen as neutral.

The difficulty arises in measuring these reciprocal outcomes. What does it mean for expectations to be "met?" How closely must outcomes correspond to expectations? Sandel's view is that rather than being value-neutral, the contract model of fairness depends on some rather explicit antecedent principles. This is especially true with the reciprocal requirement that expectations be met.

One assumption it requires is that agreements should be binding. Without this going-in assumption, the practice of making contracts would be futile. One could violate expectations of others any time a value with more weight, such as free association, presented itself in conflict with the agreement. What communitarians believe lends reciprocity its binding force is that citizens willingly submit their own needs in order to preserve the principle of promise-keeping, a principle that is based on shared principles. "Reciprocity points *through* the contract to an antecedent moral requirement to abide by fair arrangements, and this implies an independent moral principle by which the fairness of an exchange may be assessed."[38]

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[38] Ibid.

In the daily functioning of democratic government, certain reciprocal behaviors are expected of all citizens. These behaviors under gird virtues of the constitutional republic and form the basis of a common life devoted to the protection of liberty and fairness. Patriotism can be said to be chief among these behaviors because the patriotic sentiment supports not only attachments to fairness and virtues of political morality, but to the survival of the republic itself.

Ruth Anna Putnam expressed this for communitarians when she wrote that, "Communitarians believe that one has obligations to the communities of one's birth or, because of the possibility of cross-cultural adoption, the communities of one's upbringing simply because one would not be the person one is were it not for the nurture provided by these communities." Obligations to community are ultimately bound up in the idea of patriotism because, "patriotism is presumably a cardinal virtue in the public philosophy of a communitarian democratic state."[39] Taylor describes patriotism as the feeling of reciprocal attachment to the overall goals and well-being of the regime.[40] It is crucial to the perpetuation of the regime: "...the essential condition of a free (nondespotic) regime is that the citizens have this kind of patriotic identification."[41] So the survival of a constitutional regime is due at least in part to the feeling citizens share about the meaning and worth of their republic. Taylor understood this patriotism to involve what he called an "immediately common good" as opposed to a "mediately common good."[42]

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[39] Ruth Anna Putnam, "Neither a Beast Nor a God," *Social Theory and Practice* [online] 26 (2000) Accessed 12 February 2001, Accession no. A66681251, Available from InfoTrac.
[40] Charles Taylor, "Cross Purposes: The Liberal-Communitarian Debate," *Liberalism and the Moral Life*, ed. Nancy Rosaublum (Boston: Harvard University Press, 1989): 159-182.
[41] Ibid., 170.
[42] Ibid., 168.

The distinction between these two is what counts for the good: the feeling of reciprocity is held in the former as contrasted to mere simultaneous experience in the latter. The reciprocal relations Taylor believes we value so much find expression in friendship and true conversation, instances when acts and words hold implicit meaning that barely need to be expressed to be understood, so deep is the common history and experience. This deeply satisfying reciprocity is what we experience when we demonstrate our patriotism.

> ...patriotism involves more than converging moral principles; it is a common allegiance to a particular historical community. Cherishing and sustaining this has to be a common goal, and this is more than just consensus on the rule of right. Put differently, patriotism involves beyond convergent values a love of the particular. Sustaining this specific historical set of institutions and forms is and must be a socially endorsed common end.[43]

In the end, citizens' interests are served if the regime survives, and their interests are served best when the regime flourishes. Reciprocity does not bind them in a one-way obligation to serve the state, but pertains to a shared sense of self-sacrifice. Further, reciprocity does not demand that all citizens make the same sacrifice for the regime. What citizens share is not the expectation of action, but the sensibility to act on behalf of the best interests of the regime regardless of what others do. The survival of a regime depends on citizens making sacrifices without expecting anything in return from other citizens.

This again constitutes a balance between the needs and interests of individuals and

[43] Ibid., 176.

the communal attachments that make vibrant republics possible. Such a balancing of individual and collective obligations lies at the core of the communitarian sentiment expressed in the Responsive Communitarian Platform. This platform advocates an understanding of reciprocity among citizens and between citizens and the state binding all to the well-being of each. The Platform states in part that

> At the heart of the communitarian understanding of social justice is the idea of reciprocity: each member of the community owes something to all the rest, and the community owes something to each of its members.[44]

Communitarian reciprocity, as expressed in this document, calls citizens to be responsive to their obligations to others, not just devoted to the state. "Individuals have a responsibility for the material and moral well-being of others."[45] They are called to care for others, to safeguard their welfare and tolerate diverse communities of thought. This reciprocity is between citizens joined together in the common project of seeking meaningful communal life, "for ensuring the basic needs of all who genuinely cannot provide for themselves; for appropriately recognizing the distinctive contributions of individuals to the community; and for safeguarding a zone within which individuals may define their own lives through free exchange and choice." [46]

Reciprocity in the communitarian view can be expressed as the expectation citizens have for a minimum of social goods. But it also means to have that expectation

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[44] "The Responsive Communitarian Platform," in Etzioni, *Communitarian Reader*, xxxiv.
[45] Ibid.
[46] Ibid.

limited by the overarching need to protect the vitality of community. Reciprocal relations protect the individual but not at the expense of community. And the expectations these relations establish stem from an attachment that is antecedent to social contracts, including the contract of the original position. It is from society and the institutionalized expressions of morality in democratic deliberation and law that communitarians believe values arise. "Where grave moral questions are at stake, it is not possible to detach politics and law from substantive moral judgment."[47]

There is of course the danger that substantive moral judgment stemming from politics and law is tantamount to government involvement in determining how citizens should judge political morality. Such an involvement could lead to intolerance and unfairness. But where Rawls saw procedural fairness or reciprocity as solutions to this problem, communitarians do not. It is not the structure of deliberations and it is not reciprocal relations that constrains government from overreaching in the moral sphere. But vigorous protection of equality of citizenship can constrain government action if it also considers the community spirit of equality – the spirit of equality that fosters communal life.

To enact such a view of equality, however, implies some constraint on individual autonomy in the moral sphere. Consistent with the communitarian view of proceduralism and reciprocity, equality invigorates citizenship by supporting community ties and affections, and by drawing boundaries within which morally autonomous judgment is exercised. If there are restraints on individual moral autonomy, they are slight and may

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[47] Sandel, *Democracy's Discontent*, 23.

be observed as constraints only on the more extreme forms of individualism communitarians universally oppose.

3. Equality

Equality can be seen in at least two ways when viewed from a communitarian standpoint. From one perspective, it invites a libertarian devotion to equality of condition, a minimalist definition of equal citizenship, not equal outcomes or equal worth. From another perspective, it calls for limiting the expectation that all expressions of fairness will be equally valued in order to make sure the benefits from community virtues flow equally to all citizens. This is equality for individuals as equal members of a certain community, over against individual expressions of equal expectations for fair consideration. This meets a core communitarian objective in that it sets limits on individual equality to preserve vibrant communities. It is a balancing of individual equal rights against broader social purposes.

Wilson Cary McWilliams summed up the minimalist view of equality as follows:

> Equality is a matter of qualities. The statement "You and I are equal" means that we share in some essential quality: we are qualitatively the same in some significant respect. Equality does not exclude differences or imply identity . . .Quite the contrary: personal identity, a knowledge of what I am, logically demands a knowledge of what I am not, and of those wholes in which I am *included* but with which I am not *identical*. If human beings are equal, it is because all are included in the whole, humanity, and, depending on it for their equality, retain their identities as parts of the whole. . . . The proposition that "human beings are equal,"

> moreover, asserts that this equality is *intrinsic*.[48] (emphasis in original)

In this view, equality, like reciprocity, evokes an attachment to core beliefs. To be equal is in this sense is to have some equal characteristic, some identifiable nature. It is enough to be equal to be human. McWilliams rejected the position that equality corresponds to the equality of outcomes, or the equality of opportunity which leads to certain equal outcomes. Citizens are not equal because they have equal amounts of social goods, or because some equal measurements can be attached to them as consumers or as voters. There is no empirical analysis required to pronounce citizens equal. Nothing outside the individual need be measured to establish equality because it is the nature of citizenship alone that determines equality, not the nature of the citizen's achievements, attachments, wealth or position. All citizens are equal by virtue of their citizenship

But establishing citizenship only allows for equality at its lowest level. Such a view of equality permits a status-based equality only, a type of equality that makes sense when citizens can be expected to receive a roughly equal share of some social good. But what happens when it becomes apparent that outside factors prohibit a perfectly equal distribution of a social good, such as due process of law? Citizenship alone does not help us determine why poor defendants receive inferior legal representation, for instance. In such cases, a more complex assessment of equality must be employed.

Walzer considered a scheme of complex equality essential to the practical

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[48] Wilson Cary McWilliams, "On Equality as the Moral Foundation for Community," *The Moral Foundations of the American Republic,* ed. Robert H. Horowitz (Charlottesville, Va.: University of Virginia Press): 282-283.

discernment of equality. By complex equality, Walzer meant the system of equality in which each social good is evaluated separately. Therefore, to follow the due process example, we should examine the equality of wealth separately from the equality of treatment in court. Further, we should prevent inequality in one social good (wealth) from affecting equality in another (treatment in court). This complex equality prevents domination by those who use a relative advantage in one social good as a way to gain a relative advantage in another. And it prevents those with advantages from overstepping their authority. He argued that "complex equality is the opposite of tyranny"[49] because tyranny results from such leveraging of advantages.

The leveraging of advantages occurs when those with an edge parlay their good fortune into even greater gain. They build influence and wealth, multiplying their edge by appropriating to themselves unequal and unfair shares of social goods. But is Walzer's notion of de-linking advantages one from another any more fair? Perhaps this approach would create unfairness in other ways. For instance, the justification often given for affirmative action is that by giving members of minority groups an advantage in some facet of life, education is the most common, they will be able to achieve advantages in other facets of life, such as income. To discourage the linking of advantages would seem to work against members of racial minority groups. Their climb up will be longer and less certain.

But Walzer may not really be thinking about disadvantaged groups at all, but rather about those who already possess great advantages. He may want to de-link the

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[49] Walzer, *Spheres of Justice*, 19.

advantages that can be gained by those who need no help in gaining more. Perhaps he is thinking about people who already have enough to ensure a comfortable life for themselves.

If this is the case, he is not defining fairness by the way in which advantages link together, but instead by the absolute amount any one person has. Linking education to wealth is worthwhile for members of minority groups, but not heirs to large fortunes. It is not the act of leveraging advantages that is unfair, but rather having too much. We then face the thorny problem of deciding how much is too much. How did Walzer propose to address this problem?

He asserted that the criteria for determining the absolute limits to possession of social goods lies in communities of belief because, "social goods have social meanings, and we may find our way to distributive justice through an interpretation of those meanings. We search for such principles internal to each distributive share."[50] This leads to community standards for the worth of social goods. And the worth of social goods varies because there are many communities in which such goods are evaluated. As explained by Walzer, these judgments interpret the social meanings of social goods and express the value to the community of having social goods distributed in a certain way. It is difficult to imagine how an encumbered self, steeped in the assumptions and traditions of a society, may understand the meaning of a social good except in the way it already exists in society.

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[50] Ibid.

Similarly, it is difficult to see how an encumbered self can judge the rightness of the distribution of that good except in the way it is already distributed. The citizen desiring to test these meanings and distributions, then, would have to form some detachment from society, achieve some level of impartiality sufficient to view social goods without the influence of the assumptions and traditions society may use to justify them. To judge the value of social goods and the equality of their distribution requires individuals have the capacity to make judgments that might go against their tradition or beliefs. Such judges would have to be in this sense "unencumbered selves" -- at least unencumbered enough to engage in objective social criticism. Walzer's view of fairness then seems to depend on individuals who, though encumbered, can adopt the attitude of an unencumbered self at any time.

Judges like the ones Walzer envisions will find that there are differences in the value of a social good depending on the way it is used. This is because the context of the distribution of goods makes a difference in determining fairness. For instance, Sandel argued that the degree to which freedom of speech should be protected can be judged according the intent of the speech in question. It would be fair to permit greater protection for civil rights protesters than Nazis marching through Skokie, Illinois.[51] The content of the speech is different, and so is the use to which it is put. We should not be afraid to judge the relative value of propositions as disparate as civil rights and genocide. To judge these propositions as having equal worth requires the most remote and abstract of standards. Such standards keep us from addressing the intrinsic worth of social goods

[51] Sandel, *Limits of Justice*, xv.

in their social context, and hence keep us from a clear understanding of the sources of fairness. Limiting the speech of hate groups is unfair, but it supports the greater good of preserving civil society, something which produces social goods Nazis enjoy in equal measure with other citizens. This is the communitarian understanding of equality. It is an equality in which limitations to individual fairness are justified when they support civic virtue. Unequal valuations of moral principles can be considered fair when certain moral principles would work harm to more important principles.

There is an obvious danger in making judgments like these, by protecting one form of speech more than another, for instance. Individuals valuations on social goods may be overridden by a well-meaning but powerful form of civic action that seeks to preserve the virtues that support a particular way of life. The values of individuals are overridden, and community norms, established by majority rule, become the standard. This is this danger in communitarianism -- the possibility that judgments of equality will favor collective valuations at the expense of individual valuations. This danger extends beyond the communitarian view of equality to reciprocity, proceduralism and to fairness itself because the communitarian view seems always to place individual judgment within a community of belief.

CONCLUSION

At the same time communitarians see their task as one of striking a balance between individualism and community. For them there is no turning away from the social reality that confronts all who think about political morality today. Excessive individualism that damages social ties must be addressed, but not at the expense of individual freedom. Communitarians seek to reinforce the "internal associative capacities"[52] of modern culture wherever those capacities have been damaged by too much emphasis on individual moral autonomy. The communitarian credo seems to be: protect the modern way of life but don't let its own nature weaken the sources of its strength.

It is easy to overstate the danger communitarianism poses to individual fairness. Individual judgment is still valued in communities, as most of them grow and change over time. And communitarians are not ignorant of the fact that the great social movements of the past several centuries have included widening suffrage, expanding liberty and protection of individual rights. The position of communitarians as proponents of communities makes them also proponents of the social forces that have molded modern culture.

The communitarian vision is not formed in a cultural vacuum. For instance, to see the communitarian movement outside its historic position as a constant companion

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[52] Michael Walzer, "The Communitarian Critique of Liberalism," *Political Theory* 18 (1990): 22.

and sometime critic of liberalism may make it appear to be a more urgent revaluation of political morality than it is. Communitarianism is liberalism's constant companion because, "no liberal success will make it permanently unattractive. At the same time, no communitarian critique, however penetrating, will ever be anything more than an inconstant feature of liberalism."[53] Michael Walzer believed that the communitarian preference for community values actually protects the liberal practices of modern life: the community of liberty, tolerance and protection of individual rights. This is the community, heritage and tradition the communitarian sensibility urges us to preserve.

Still, fairness does suffer from some neglect in the communitarian project for several reasons. First, communitarianism is a philosophy that sees values primarily as inherited, not constructed, and this makes it out of step with the primary contemporary statement on fairness -- the Rawlsian moral constructivist project. By depending on the individual to make judgments about what is fair on the basis of what will best preserve individual justice, Rawlsian fairness is fairness for the "me" that seeks to serve it's own needs first, with the assurance that collective needs will also be met in the process. Communitarians would turn that reasoning around – when pre-existing social values are reinforced individuals will treat each other fairly. The pre-existing values such as promise keeping and patriotism are profound sentiments of shared morality that deserve protection. They are sentiments so powerful they can compel a kind of self-sacrifice no rationally constructed scheme could match. What follows from constructivist theories is, from a communitarian perspective, inadequate for preserving healthy republics, let alone

[53] Ibid., 6.

a shared commitment to fairness. So, if the quest for fairness interferes with the continuing vitality of communities, it should take a back seat. This sets a limit to the influence of fairness in shaping civic life.

The second reason the communitarian movement de-emphasizes fairness is that to evaluate fairness requires constant comparisons between individuals. In the original position, for instance, representatives judge how rules of social institutions could be constructed to permit themselves the best chance at fair and just treatment relative to others. In the social psychology of fairness, people compare their own conditions with the fairness they expect or the fairness they observe others receiving. To know fairness seems to require an awareness of how others are treated and to seek similar treatment.

But the communitarian ethos is to search for solutions that enhance the viability of communities. There is a sense that the goal of preserving the collective good is of paramount importance. The collective good is not embodied in procedure, it is not contractual reciprocity and it is not simple equality. The communitarian view of political morality is that the antecedent virtues of citizenship pass through generations and endure because they work to enhance communal life and, in so doing, enhance fairness. If collective evaluations of fairness are to work for the long-term health of the community, they must correspond to the beloved antecedent values that give fairness, and political life, its meaning. These values are not best preserved when individuals continuously ask for the same treatment others receive. If individual demands are too strident, critiques of the community's ability to protect fairness and the virtues can become too radical,

individuals will begin to feel isolated from community, to drift away from its premises, to abandon attempts to defend its values.

But fairness doesn't have to be interpreted only in this way, in the way Rawls did. The communitarian project makes ample room for fairness, and especially for the community virtues that enhance it, but it makes room for fairness understood as an aid to the continuing vitality of communal life. Fair procedure is a collective good communities actively protect because it strengthens republican virtue and enhances the legitimacy of political associations. Reciprocity not only makes fairness more vibrant, it assures the survival of communities by encouraging a deeply-held belief that self-sacrifice for the good of the community is virtuous. Communitarian fairness is fairness springing from antecedent values, tending to the improvement of civic virtue and collective judgment.

But the personal comparisons required to establish a more individualized fairness do not correspond to communal norms or the enhancement of civic virtue. As a result, communitarians cannot support too much of this kind of individual comparison fairness. By withdrawing support for this kind of fairness, communitarians limit "excessive" individualism by limiting the type of comparative fairness that seeks equal treatment above other social goods.

The equal treatment expected in organ allocation policy, for instance, is a desire embedded in many values, not simply a policy that aims only at the good for individuals. Because transplantable organs are scarce public goods, each allocation decision carries with it consequences for the individual who receives the organ and those who don't, as well as consequences for those who may be potential organ donors. A careful balance

between all these considerations is necessary for preserving the legitimacy of the system and maximizing the overall health of the community. To the extent that physicians are successful in balancing these concerns, they potentially achieve outcomes more favorable than would be possible under Rawlsian-style rule morality alone. Further, they may enhance social capital and strengthen the vitality of civic life.

Citizens may believe their community is strengthened when the fairness of their own treatment is enhanced. But this may not always be the case. Citizens taking this view may loose their enthusiasm for communal vitality just when their fairness expectations are met. The importance of other civic virtues may then fade away. The sense of responsibility that is the flip-side of rights may wither. This is the danger of atomized society, unencumbered selves and rights-bearing individuals that Walzer and Glendon discuss and that most communitarians decry. The reason this kind of individualized fairness is not a good fit within the communitarian movement is because the search for fairness frequently encourages the excessive individualism they are universally opposed to. Communitarians seek instead to foster civic engagement, the political virtues that produce a love of well-ordered community life the quest for fairness alone is unable to inspire.

CHAPTER 5

Bringing the Context Back In: Political Judgment and Fairness

The special difficulty of implementing fair policy is that those who ultimately make decisions about how public policy is put into action – mainly public administrators – need to be assured that their decisions are perceived as fair. Fair policy may enhance the legitimacy of government action if it is implemented according to widely accepted principles, provided the justification of the policy is within acceptable bounds of public morality and is not antagonistic to the rights of individuals. Perfectly unanimous approval is not necessary especially in a system founded on majority rule, but some sense of shared values must be applied if judgments are to be seen as legitimate and fair.

To carry out their duties fairly, therefore, administrators are dependent on ideas of fairness that reflect shared sentiments about values. The public expects government officials to consider specific cases under the guidance of general principles, but only when those principles are the ones most broadly accepted. Satisfying theory permits

satisfying outcomes if the theory is accepted as mainstream and applied in a judicious way. For even though practitioners of bureaucratic arts may have a personal view of fairness, they are most effective when they apply more widely held principles of fairness to concrete cases.

The plurality of comprehensive doctrines sometimes makes it difficult for administrators to identify the most broadly held principles. In the case of organ allocation policy, for instance, determining a fair distribution amidst competing interpretations of fairness presents decision makers with the dilemma of deciding which principles should take priority. Naturally, they might begin by considering the views of those most directly affected by policy. Potential organ recipients understandably desire an individualized, comparative fairness. Their primary desire is to survive. And even though they are aware of medical criteria and waiting times, they are not interested in maximizing overall social justice. They want the fairest outcome possible as determined by their expectations about fair treatment and the treatment they observe others receiving. Other views may also be relevant in transplant policy, especially community-based theories of fairness where fairness may require a balance between personal gain and the most efficient overall use of precious medical resources. The validity of judgment depends on physicians weighing the relative merits of comparative fairness and broader social fairness because the physicians represent both the interests of patients and the public. To keep these two goals in view simultaneously is the difficult task of the organ transplant surgeon. But public administrators often face a similar task. Because they cannot shirk their responsibility to

deliver fair policies, they are driven to balance the needs of individuals and communities and to reconcile the universalism-practicality dilemma.

The communitarian view seeks to strike a balance between the goals of individuals and communities. Sometimes these needs conflict, so that satisfying one weakens the vitality of the other. But even while they advocate balancing competing principles, there is little precise discussion in communitarian writings about how this is done. Certainly more practical than Rawls' abstract theory, the communitarian project would benefit nonetheless from some way of knowing how this to choose rationally, or of how to teach others to do so. The task faced by those who seek to balance competing interpretations of the good life calls for some way of rationalizing decisions that in practical matters as well as in theory can be justified as fair.

To what overarching theory can administrators turn for help in making decisions that are accepted as fair? Rawlsian theory will always favor individual expressions of fairness, even at the cost of other social goals. Communities may not value fairness as a paramount virtue even if it is important to cooperative political life. However, the emerging theory known as political judgment may provide a framework for administrators who seek not only a decision rule in cases demanding evaluations of fairness, but who also seek a way to resolve social and political conflicts about fairness through bureaucratic action. It offers a middle ground between the methods of rational autonomy and the needs of communities.

What is political judgment?

The kind of reasoning called political judgment is a way of thinking about concrete issues of political morality that allows decision makers to bring universals and particulars together. By universals, I mean principles of political morality that are widely and uncontroversially held by a majority of citizens, even if the principles themselves are not always clearly enumerated. Political judgment theorists use the term universal to denote the broad value sets that may be commonly held within particular communities and which are thought proper to bring to bear in considering issues of political morality. Such values are not really universal in the abstract sense Rawls might express, but they are held by enough members of a community to make them acceptable with little disagreement. By particulars I mean the specific cases where some definitive judgment is required, cases in which conflict may be resolved by the application of principles, but which finally call for some concrete, specific proposal to be worked out, usually for the benefit of a single person. The ability to make a proper connection between universals and particulars understood in this way is what is meant by the term political judgment.

This type of judgment in politics is certainly not new, nor is it of concern only to theorists. Mass opinion often reflects a desire for reasoned judgment and careful weighing of alternatives. This judgment is sometimes called common sense. In popular thought, the common sense which makes sound political judgment possible is important and, unfortunately, all too rare. There is a longing for the kind of common sense columnist Leonard Pitts described as

> The ability to intuit, to infer, to make distinctions, to draw conclusions, to judge ... this is something we no longer value, it seems. Instead, we demand a uniformity of response in our public officials such that, if A happens, then B must in all cases follow. Even if B is absolutely the wrong thing. Even if B is a stupid overreaction.[1]

A further expression of this longing for leaders with sound political judgment was expressed by Anthony Lewis when writing about the nomination of Robert Bork to the United States Supreme Court. Quoting Former Attorney General Nicholas Katzenbach, Lewis recounted the advice Katzenbach gave the Senate Judiciary Committee. "Were I in your position," he told the committee, "the central question I would be asking is this. Is Judge Bork a man of judgment? Not intellect, not reasoning, not lawyering skills, not ideology, not philosophy -- simply judgment. Is he a wise person?"[2] These criteria place judgment above understanding abstract standards of justice, above scholarly achievement and above intelligence. Katzenback described political judgment as the ability to combine these attributes of character to the intellectual capacity to solve complex problems in a way unavailable to either character or intelligence alone.

Nancy Sherman also asserted that character and judgment are linked, that the ability to judge defines character. In her assessment of Aristotle's concept of practical reason Sherman wrote that "It is practical reason that integrates the different ends of character, refining and assessing them, and ultimately issuing in all considered judgments of what is best and finest to do."[3]

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[1] Leonard Pitts, "Zero Tolerance for Common Sense," *The Atlanta Constitution*, 6 January 2000.
[2] Anthony Lewis, "Question of Judgment," *New York Times*, 27 September 1987.
[3] Nancy Sherman, *The Fabric of Character: Aristotle's Theory of Virtue* (Oxford: Clarendon Press, 1989): 4-5.

Isaiah Berlin addressed this junction of judgment and character when he pointedly asked, "What is it to have good judgment in politics?" He concluded that political judgment in the individual is a finely tuned sensitivity to the practical, certainly guided by theory and even by rules, but not a single-minded impulse to serve either. This sensitivity implies balance, intuition, and educated instinct. Too much in political life happens too fast for careful analysis: political parties suddenly weaken, economic systems collapse, dictators seize power. There is not enough time in politics for a full analysis of each of these, nor is there time to consider every alternative course of action. Political judgment is a means of responding to the realities that time and information are limited. It is "the power of integrating or synthesizing the fleeting, broken, infinitely various wisps and fragments that make up life," and then to take decisive action; it is to possess a set of skills more akin to the novelist than the natural scientist.[4]

In this chapter I will examine the writings of various proponents of political judgment to see if they suggest refinements to our understanding of fairness. A central argument throughout this chapter will be that the effective development and implementation of public policy constitutes applied political judgment. At its most basic, policy requires choices about fairness: choices about resource allocation in light of congressional intent, the needs of individuals versus the needs of community, the proper weight to accord circumstances and character. To understand the approach policy actors take in making these choices may offer a further refinement to our understanding of fairness. It permits us to ask new questions. How do political actors, especially public

[4] Isaiah Berlin, "On Political Judgment," *The New York Review of Books*, 3 October 1996.

administrators, make judgments about the fairness of public policy? Can policy be implemented fairly even if no specific, objective principles are available in law? I will use these questions as springboards to examine fairness as it is understood by those who are ultimately responsible for its implementation and interpretation.

Choosing which principles to apply in concrete cases is not easy. But it is essential to the legitimacy of administrative decision-making. The problem is how to choose principles in a way that legitimizes the final outcome. I will explain in this chapter how political judgment theory offers a way to apply common sense to questions of political morality, and through that applied judgment, produce legitimate outcomes in spite of moral pluralism. I will also argue that public administrators can benefit from the political judgment approach. Finally, I will offer a model to refine this way of thinking.

POLITICAL JUDGMENT AND POLITICAL MORALITY

Political judgment is relevant in discussions of fairness because of its sharp focus on political morality and the means for achieving it. Political judgment advocates desire to provide theoretical foundations for the active settling of disputes between interests affected by government action. The capacity to judge what is moral in politics, and what is fair, often establishes the legitimacy of political action.

But how can principles of morality be used to justify political action when there is so little agreement on moral principles generally? Political judgment theorists address this question by returning to a notion of practical reason first expressed by Aristotle. They argue that this notion may supply a reasoned, common-sense approach for legitimizing political action.

Political Judgment and Moral Pluralism

Political judgment reflects a growing neo-Aristotelian movement among political theorists designed to recover a balanced understanding of political action through the use of practical reasoning to guide judgment. The list of advocates of political judgment includes Ronald Beiner, Steven Salkever, Alasdair MacIntyre, Robert Bartlett, Peter Steinberger and Richard Ruderman. For them the recovery of Aristotelian practical reason, is "essential to politics because it, unlike abstract theory, is flexible, practical, and

the product of a shared understanding concerned with particular, concrete human beings."[5] According to Ruderman,

> ... a diverse and increasingly influential group of political scientists, sociologists, and classicists has emerged in recent years that views pure theory or science as ultimately a bad influence on democratic political life, and so seeks to replace it with a different form of political thinking: political judgment. Unlike earlier religious or existentialist critics of science, those in this group resist irrationalism and oppose any retreat into apolitical self-assertion or self-abnegation. Instead, they seek in political judgment a form of reasoning that emerges from practice and so will reinforce, rather than undermine, politics.[6]

Political judgment offers a corrective to the excessive reliance on rules of contemporary liberal philosophy - what Benjamin Barber called the "absolutist science of straight lines."[7] In his view, the preference for universal principles and fair institutions stems from a preoccupation with political philosophy itself instead of politics. In Rawls' theory of justice as fairness, for instance, understanding political morality begins with certain epistemological assumptions instead of with observations of political action. The focus on epistemology precedes politics because Rawls sees knowledge as the origin of politics -- a people cannot know how to create well-ordered states until they know what constitutes knowledge itself. But this approach inhibits an accurate account of political life.

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[5] Richard S. Ruderman, "Aristotle and the Recovery of Political Judgment," *American Political Science Review* 91 (1997): 410.
[6] Ibid., 409.
[7] Benjamin Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* (Princeton, N.J.: Princeton University Press, 1988): 10.

> Thinking about politics creates a unique dilemma, for it seems inevitably to lead to thinking about thinking; and the more we think about thinking, the less we think about politics. . . . In much of what we have chosen to call political philosophy in the liberal postwar era, philosophy has flourished while politics has wilted. Because the constraints on how we define and understand philosophy are not necessarily commensurable with the constraints on how we define and understand politics, politics frequently ends up as a creature of absolutist philosophy -- and one that bears only slight resemblance to the public activities and goods associated with common power and common citizenship.[8]

Some today argue that an epistemological approach is necessary to revive the possibility of moral agreement. The sheer number of competing views of what is right in politics, and the potential impact these views have when incorporated in law, make it important to find common ground for political action through theories of knowledge and theories of fairness.[9] According to Alasdair MacIntyre, this is not an easy task because, "There seems to be no rational way of securing moral agreement in our culture."[10] By emphasizing study of the nature and limits of moral knowledge, we may be able to sidestep the difficulties of moral plualism -- if rational agreement is difficult to achieve, perhaps a more refined rationality is needed.

Political judgment advocates reject this position. They believe it is possible to achieve basic agreement on fundamental questions of political morality without resorting to rationally constructed rule morality. They believe that most worldviews are compatible enough to permit common cultural political experiences and hence can lead to similar

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[8] Ibid., 3.
[9] G.E.M. Anscombe, "Modern Moral Philosophy," in *Virtue Ethics,* ed. Roger Crisp and Michael Slote (Oxford: Oxford University Press, 1997): 1-44.
[10] Alasdair MacIntyre, *After Virtue* (Notre Dame, Ind.: Notre Dame University Press, 1981): 6.

judgments about the morality of political action. Peter Steinberger goes so far as to describe political judgment as a way of judging political morality divorced from pure rationalism. This notion is comfortable with popular ideas about common sense in politics. Steinberger describes this approach as political wisdom, a way of reasoning held to be superior to rationalism or intellectual achievement. It is a wisdom which holds that excessive rationalism obscures genuine political solutions. Steinberger believes this view is widely held because American public opinion generally contains an anti-intellectual core. "A life of theoretical speculation and a life of political wisdom are simply assumed to be conceptually distinct, empirically separable, and even mutually antipathetic."[11] Many citizens would assert that true political wisdom is acquired through study of human nature and actual politics.

Still, the assumption that we can exercise political judgment, or "situate ourselves in the political world without relying upon explicit rules and methods,"[12] is problematic. Norman Jacobson, for instance, explained that judgment itself, which as noted above is often known as "common sense," is difficult to defend today on the grounds that it can be "common" given the immense diversity of modern values, or that it can make "sense" when judged according to the standards of modern science.[13]

Other advocates of political judgment emphasize the morality of the judge instead of the morality of the judgment. This is known as "agent morality," a term used by Salkever to denote reflections on moral sensibilities which have as their focus the

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[11] Peter Steinberger, *The Concept of Political Judgment* (Chicago: University of Chicago Press, 1993): 6-7.
[12] Ronald Beiner, *Political Judgment* (Chicago: University of Chicago Press, 1983): 3.
[13] Norman Jacobson, *Pride and Solace* (Berkely, Calif.: University of California Press, 1978): 18-19.

concerns of individuals finding ways to come to grips with morality in their own lives.

In describing this neo-Aristotelian understanding, Salkever said,

> Agent morality begins by asking about the good life, or happiness, and about the good person or agent. Rule or law morality (which can also be called act morality) begins by asking about the good action or the good will. The center of the dispute is a question of priority: which is first, good actions or good agents (persons, lives)?[14]

What can equip citizens for applying practical reason to understand the purpose and methods of collective action? Salkever's answer is to foster prudence, a way of thinking, instead of fostering a certain solution to political morality. Citizens should internalize a predisposition to morality as understood in their culture by immersing themselves in the literature, philosophy, history and art of their culture. This education instills a sensitivity to moral judgments, to finding a moderate course that satisfies the needs of individuals and community. They will then be able to define for themselves the content of the good life and be able to apply the principles the find to the realm of politics. This type of prudential judgment necessarily restricts valuations in politics to the political realm alone much in the same way Rawls' revision of his theory of fairness has become more narrowly political in nature. But it still permits individuals to insert subjective valuations without collapsing political morality into a strict teleology. Fairness can be judged with a greater concern for context and character while remaining insulated from private views of the good that might undermine its legitimacy. So while

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[14] Stephen G. Salkever, *Finding the Mean: Theory and Practice in Aristotelian Political Philosophy* (Princeton, N.J.: Princeton University Press, 1990): 107-8 n.4.

prudence can be seen as an alternative to rule morality, it shares with rule morality a narrowing of public consideration of fairness to the political realm.

In yet another political judgment approach to the problem of moral plurality, Ronald Beiner proposed that political judgment can be understood as a corrective to the professionalization of politics. This corrective is necessary because modern political discourse has become so laden with prescribed behavior that true knowledge of what ought to be done is impossible for the average citizen to discern. According to Beiner, the conflict between the "rule-governed behaviour" of Rawls and the "individual values and preferences" of political experience cannot be resolved by common citizens; they have neither the specific education nor the practical expertise to mediate this conflict. "Consequently, the monopoly of political intelligence is handed over to experts, administrators and political technicians who coordinate the rules of administration and decision-making that accord with the reigning canons of method, rational procedure and expertise."[15] Because citizens are not able to reconcile rule-based political morality with the subjectivity they find everywhere in political life, they accept limits on their access to political debate. But many citizens have begun to turn to political judgment so they can

> comport [themselves] to the world without dependence upon rules and methods, and allow [them] to defeat subjectivity by asserting claims that seek general assent. In this way political reason is liberated, and the common citizen can once again reappropriate the right of political responsibility and decision-making that had been monopolized by experts. . . . Political reason, from being a technical science, is restored to a practical science.[16]

[15] Beiner, *Political Judgment*, 1.
[16] Ibid., 2-3.

It is no coincidence that the outline of political judgment just sketched is infused throughout with discussions of practical reason. The political judgment movement is comprised of theorists dedicated to a recovery of practical reason, *phronesis*, the Aristotelian principles for understanding politics. This practical reason helps legislators and administrators make definitive judgments about what is moral within a culture characterized by moral plurality. It permits government action to proceed by considering a variety of principles, to select one or more as especially appropriate, and to defend the resulting decision as legitimate. This legitimacy is not the result of procedural fairness alone, nor is it a restatement of clearly articulated community values. The legitimacy results from the fact that political actors are capable of simultaneously considering multiple approaches to understanding a single case, then using prudent, reasoned judgment to blend those considerations into a single political act. This is by no means to suggest that political judgment implies establishment of community values by bureaucrats interested in following simple guidelines. It is instead an adaptation of core Aristotelian concepts of prudent judgment to current political conditions. Naturally, many of the assumptions about political life that would have made sense in 4th century Athens do not make sense today. Therefore, political judgment advocates look forward in order to apply the practical judgment of Aristotelian ethical thought in contemporary politics.

The Revival of Aristotle's Phronesis *and the Problem of Ends*

The basic idea of political judgment is that, despite moral pluralism, it is possible to apply moral principles legitimately in the interpretation of public policy. This involves

the application of practical reason in a realm where most theorists would say there is little chance for agreement. The difficult problem is not the fact or method of applying moral principles. Rather, the problem lies with the legitimization of the choice of which principles to apply. Because the choice of moral principles is commonly seen as purely arbitrary, a matter of personal preference, many believe that choosing principles for judging political action is mere self-expression. Such expression may be rational, but it is unlikely to be widely regarded as legitimate.

In order to preserve its legitimacy, political judgment theory proceeds simultaneously along two parallel courses. One course admits the inclusion of certain propositions, predispositions or sensibilities as constituting ends of political action – essentially the framework for applying political judgment. At the same time, the theory calls for a way to discover what those ends are, to find the sources of propositions that can serve as a widely acceptable community expressions of political ends. Both courses are necessary. If political judgment theory is to produce outcomes that are legitimate, it must rationalize the proposition that principles are available to justify certain courses of action. If practical reason and prudential judgment are to prevail as elevated forms of common sense, some set of moral propositions must be presented as "common" and their application must be intelligently formulated so that it makes "sense."

Some authors have expressed a straightforward belief that Aristotle meant political action to aim at a rather more expressly articulated notion of the good. For example W.D. Ross seems to lean toward this view when he wrote that "Aristotle's ethics is definitely teleological" because it implies deliberation concerning the "good for

man."[17] Alasdair MacIntyre argued that "Aristotle's ethics, expounded as he expounds it, presupposes his metaphysical biology."[18] In this way it can be said that Aristotle's political ethics constituted limits to the number of principles that can be selected in assessing the morality of political action because he implied that the form of the best regime existed prior to the philosophical inquiry that discovered it.

MacIntyre was not satisfied that an unarticulated ethos, a predisposition to morality or a feeling for right conduct, is enough to justify the choice of principles. He wanted some more unified moral propositions to keep moral judgment from becoming merely a form of self-expression. He argued that a view of morality arising from the virtues of the practices, complex professional activities pursued for their intrinsic value, might supply the unified moral propositions he thought necessary. MacIntyre believed the virtues of the practices could satisfy the need for a minimally-specific expression of ends to justify specific actions.

Today, the good is decidedly an individual proposition because, "Modern politics cannot be a matter of genuine moral consensus."[19] Yet, while pursuing happiness for themselves, citizens can achieve a unity in their own lives sufficient for knowing what is good in individual cases.[20] MacIntyre concluded this is most effectively done in the professions, including the profession of politics, where we can find meaningful

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[17] W.D. Ross, ed., *Aristotle* (New York: Meridian Books, 1959): 184.
[18] Alasdair MacIntyre, *After Virtue*, 2nd ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984): 148.
[19] Ibid., 253.
[20] Ibid., 218-19.

foundations for specific virtues and moral principles which respect individual choice as well as correspond to some historical or cultural context.[21]

But, from this point of view, is the individual accorded enough room for morally autonomous judgment? Political judgment theorists believe that in considering concrete politics, there is enough room for individual judgment. They argue, following Aristotle, that political actors may deliberate over a range of valid alternatives. For instance, Robert Bartlett wrote that Aristotle's search for the best regime was aimed at an open-ended search for justice in concrete cases,[22] and that Aristotle's discussion of how to implement the best regime moved political speculation from the realm of metaphysics to the realm of practical politics, leaving citizens free to assert various opinions about it.[23] "Aristotle's science of the best regime can help us to make full use, on an individual or private basis, of the extraordinary freedom we enjoy."[24] Steinberger also believed that Aristotle's ethics made room for considerable freedom. Ethical judgments imply open inquiry since "there is no necessity with respect to questions of practice."[25]

Some want a deeper knowledge of the values associated with the questions of practice. Such citizens may desire a more sophisticated understanding of those questions than found in common opinion. When seeking this deeper knowledge, they find that ends are murky, orators only imperfectly articulate the complex notion of the good life and the lofty goals of politicians seem to reflect less well specified propositions. To understand

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[21] Ibid., 181-203.
[22] Robert C. Bartlett, "Aristotle's Science of the Best Regime," *American Political Science Review* 88 (1994): 145.
[23] Ibid., 149.
[24] Ibid., 152.
[25] Steinberger, *Concept of Judgment*, 109.

politics more fully, therefore, citizens begin to search for the distinguishing character, moral nature and guiding beliefs of their polis. This is the first task of political judgment – free inquiry into the ethos of political life.

Salkever proposed a recovery of Aristotle's practical reason founded on this notion of free rational inquiry into the nature of ends. Salkever's emphasis was on recovering an Aristotelian understanding of the motives and character of political actors, actors who possess reserves of moral sentiment while hemmed in by circumstance. He did not advocate any articulated end for political action. By so doing he hoped to avoid what he believed to be the greatest danger in rule morality; its tendency to abstraction in moral reasoning. The proclivity of rule morality to create a "separate and autonomous moral sphere governed by special moral motives" is perhaps necessary to achieve theoretical clarification of moral questions, but "carries with it an important, and highly dubious, claim about human needs -- the claim that particular and local relationships, ties of family, friends, and country, are in general obstacles rather than aids to living well or justly."[26] Salkever did not defend local ties and affections and he did not recommend they form the basis of decision making everywhere. He asserted that deciding about them is an intricate project requiring insight, balance and moderation.

> The kind of Aristotelian agent morality I want to defend does indeed make reference to a perspective that is distanced from the local context. But reference to this perspective -- that of the *phronimos*, the person of practical wisdom or prudence -- results not in the statement of a rule, but in the creation of a metaphor --

[26] Salkever, *Finding the Mean*, 116.

> the metaphor of the mean -- whose function is to clarify problems of practical choice, and not to resolve them.[27]

For Salkever, practical wisdom may not be concerned with understanding how to justify a certain set of political circumstances, but understanding what those circumstances are. To be prudent means to see a political situation for what it is and then to make judgments which are moderate, appropriate and meaningful within the context in which they arise. It means to combine sound reasoning with acuity to political events -- to combine sense and sensibility. The "contextual discernment" or political sensibility Salkever advocates is facilitated by his reading of the *Ethics* in which Aristotle advocates a certain education and culture to inculcate in citizens the ability to make right judgments about conflicts within their own contexts. In so doing, Salkever articulates a common theme in neo-Aristotelian thought – he hopes to make Aristotle's *Ethics* useful in understanding contemporary politics.

Salkever interpreted Aristotle's concept of *phronesis* to include the "metaphor of the mean," the purpose of which is "to clarify problems of practical choice, and not to resolve them."[28] He intended merely to discover the assumptions of the regime, not to evaluate them. Salkever's intent was to render Aristotelian ethics intelligible in contemporary political practice by side-stepping the difficulties of reckoning with the nature of the moral law. Salkever saw in this approach "fundamental agreement between

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[27] Ibid., 116-7
[28] Ibid., 117.

Aristotle, Enlightenment science, and modern liberalism, at least insofar as each is opposed to arbitrary restraints on inquiry and individual freedom." [29] The Enlightenment spirit, nourishing unfettered thought, certainly finds roots in the *Nicomachean Ethics* and its praise of the contemplative life. If the essence of political action today is to aim at an elusive but weighty concept of the good, Salkever's conception of *telos* may be just what is needed in democratic political action to facilitate valid moral judgments.

Political judgment advocates such as Salkever do not look for ends outside politics to justify a certain way of describing right action in politics. Their understanding of politics is that the moral principles of political culture are essentially self-justifying, but moral principles and political practice are nonetheless linked. This follows Aristotle's concept of practical reason in politics. For Aristotle a thorough knowledge of politics served as a guide for theory formation, while at the same time the practice of politics itself was to be guided by theory, by some understanding of the goals of political life. Even though goals are not always clearly enumerated, they nevertheless motivate political action and justify views of political morality. Theories of morality in political action do not require an articulated end to supply a justificatory standpoint. Individuals may supply their own moral standpoint from which to judge politics.

But if "the end of the state is the good life" as Aristotle asserted in Book 3 of *The Politics*,[30] political action also proceeds along the path toward the good life -- happiness, individual fulfillment -- not necessarily toward perpetuation of the regime. The medieval

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[29] Ibid., 8.
[30] Aristotle, *Politics*, The Modern Library (1943), 144.

interpretation of Aristotle served to provide explicit justification for perpetuating the regime; it served to put the state in the position of defining the good, happy and honorable life for its citizens. Neo-Aristotelian advocates of political judgment generally advocate no such definitional activity -- leaving definitions of the good instead to private citizens reasoning in a private sphere. Since neo-Aristotelians like Salkever believe individual political agents must base their understanding of how to act according to personal valuations, they advocate a type of moral thinking that is strictly political to avoid subjectiveness and self-aggrandizement.

Steinberger restated this thesis in a slightly altered form. In *The Concept of Political Judgment*, he explained that by seeking a more complete understanding of politics as it presents itself, political judgment advocates may conform to assumptions of various schools of thought. For Steinberger political judgment does not itself constitute an ethical category, and is hence relativistic with regard to the morality of the regime as a whole.[31]

The possible effects of such moral indifference points out a problem this moral neutrality may have on political analysis. Stienberger's theory relies on the justification of public policy as given. Judgment begins after the assumptions justifying the regime or its laws have been established. But when the assumptions inherent in the regime serve as the basis for judging the morality of actions within the regime, the outside perspective of the skeptic is lost. If no inherent moral position is required to judge political events, the regime is vulnerable to excesses, possibly even tyranny. Steinberger countered this charge

[31] Steinberger, *Concept of Judgment*, 296-301.

against political judgment by arguing that every culture has within itself certain self-righting mechanisms that make critical judgments possible, especially when political actions deviate too far from foundational norms.[32] However, this defense is suspect when viewed against an historical backdrop.[33]

Alessandro Ferrara emphasized that "the judgment view of justice does not imply a restoration of the standpoint of the good as a privileged one" in order to mold pre-modern practical reason to modern conditions. Instead, common views of life serve today as "the good," – it is the outcome of cultural forces resulting from millions of independent judgments that steer citizens in particular directions. His view is that democratic political judgment arises from an account of communal sensibilities, culture, history and some common reflections on the value of higher lawmaking.[34]

James Rhodes also described a contemporary interpretation of political judgment indifferent to articulated, public ends. But Rhodes sticks closely to what he regards Aristotle's intent to have been: a system of political morality "that was universal but changeable in the realm of action, absolute in the rule of right reason but variable in the sovereignty of contingent judgments and deeds, and universal in the ideal of one naturally best *polis* but relative in actual constitutions."[35] This is what Rhodes calls "right by nature," and he defends this thesis as an effective solution to the very problem this dissertation is concerned with, namely, the articulation of standards of fairness useful in

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[32] Ibid., 297-8.
[33] Ruderman found Steinberger's position on this point not only weak, but naïve since "every regime demonizes to some extent what conflicts with its principles." Ruderman, "Recovery of Judgment," 412.
[34] Alessandro Ferrara, *Justice and Judgment* (London: Sage Publications, 1999): 225.
[35] James M. Rhodes, "Right by Nature," *Journal of Politics* 53 (1991): 324.

practical settings. In outlining Aristotle's theory of political morality, Rhodes has infused Aristotle's original argument with characteristics that are peculiarly useful in modern times.

Rhodes began by exploring Aristotle's concept of "right by nature" (*physei dikaion*), a moral truth or moral reality Aristotle asserted was universally valid and mutable at the same time.[36] This paradox can be seen in substantive politics -- a result of the experience of politics. This is because in political action, right action can be given two distinct meanings. Right actions can be interpreted as rational behavior tied to an individual's best interests or as responses to lasting standards of virtue, passed down through generations, forming the essence of communal notions of citizenship.

This paradox, discovered by Aristotle, mirrors the conflict between present-day Rawlsians and communitarians. It is a struggle between beliefs that political morality is instrumental behavior tied to security and beliefs that political morality conforms to traditional virtues. But whereas the present struggle is between theories and ideologies we reconcile only with difficulty, Aristotle described the paradox of *physei dikaion* as two sides of the same experience. He described right by nature as simultaneously rational and cultural, fixed and mutable. The basic moral truths are well established, such as the prohibitions against murder, theft and adultery.[37] But the more complex, subtle and contingent standards are more difficult to fix. Standards must float because the

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[36] Ibid., 320.
[37] Ibid., 321.

experience of politics "does not give us fixed, detailed canons."[38] Yet the basic standard of what comprises what is right is the same for both even if it leads to different results.

Discerning what is right in such conditions requires prudence (*phronesis*), itself a dualistic notion. Rhodes interpreted prudence to be both deliberation about true ends and concern for particulars, the search for laws and for the best way to implement laws in specific cases. Yet uniting them was a common notion of *physei dikaion*, having "the same force everywhere" while also "changeable as a whole in practice."[39] Again, knowing the difference between them stems from experience.

Experience unites political morality generally with political morality in practice. We know, for instance, that some political acts simply seem fair while others do not. The rationalist explanation is that our instincts for fairness are purely subjective, tied to the tastes of communities unconcerned with careful reevaluation of beliefs. Yet, as discovered by social psychologists, we find that experience informs our standards of fairness in quite similar ways regardless of what our particular beliefs about the good life are. We clearly understand our instincts prior to our attempts to rationalize them. We know what is fair when we see it because we have seen it before. We have striven ourselves to be fair to others. Our mature judgment, fortified by experience and habituation to promoting fairness, will guide us in making judgments about fairness. Our judgments about fairness comport to our standards of basic judgment more or less comfortably. Such standards, found in the observation of political practice, permit judgment about right to exist simultaneously as a fixed principle and as a mutable

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[38] Ibid., 322.
[39] Ibid., 328.

expression of that principle.[40] It may be unnecessary to possess knowledge of a clearly articulated set of ends to understand fairness.

Beiner presents perhaps the most specific rejection of the need for knowledge of specific ends to guide moral thinking. He follows much the same course as Salkever in advocating the use of moral propositions in justifying political action. But he stopped short of calling for the articulation of those propositions or expecting such an articulation ever to occur. Because he sees judgment as a specialized application of intelligence he attributes to it no inherent moral position relative to the good, being "indifferent to the purposes of political society," and therefore "not a full-blooded political theory in the traditional sense."[41] It is a way of thinking, nothing more. Political judgment conforms itself to the culture and times in which it is found without reflective judgment about its own foundations.

In the views presented so far, the modern appropriation of Aristotle's moral thought in politics requires a *telos*, but not one that is specifically articulated. It can be a sense of political ends that result from individual moral thought, behavior or experience. It can be a habit of moderation, an education into the principles of virtue or an allegiance to the metaphor of the mean. But it is a force that compels actors to behave morally according to the dictates of practical reason in the political realm. In this way political judgment advocates have sought to legitimize the selection of certain principles over others in judging political morality. They express a theory of practical reason in politics sufficiently universal to permit legitimate judgments about values, but sufficiently

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[40] Ibid., 330-4.
[41] Beiner, *Political Judgment*, 301.

individual, mutable and scientific to guide practical decision-making. Principles appropriate to deciding a particular case are available and can be defended as rational. But how can we defend, in the political judgment paradigm, the selection of those principles instead of others?

As complete as these theories of political judgment are, some may question what happens when a finely-tuned sense of practical reason is put to the test in the rough-and-tumble of actual politics. The legitimate application of moral principles to particular cases is crucial for establishing the validity of political judgment. In democratic regimes, is something more than prudence required to justify the selection of principles? In order to make their claim of legitimacy fully justified, they will have to demonstrate that the results of such inquiry can stand up to the scrutiny of democratic discourse.

Judgment and Rhetoric

The political judgment literature seems to offer a place for democratic discourse in discovering legitimate ways to apply moral principles to judgment in particular cases. The authors mentioned above are not tied to tradition or religion as sources of principle. To the contrary, most of them seem comfortable with democratic methods, including policy deliberations and debates about the justification for policy. Ruderman summed up this inclination as follows:

> Most advocates of political judgment connect it to participatory or socialist politics. They want to recover and mine the resources of an alternate political tradition, also said to stem from Aristotle: civic republicanism and/or participatory democracy, a tradition

> that, in their account, was more friendly to political judgment or prudence than is the liberal tradition.[42]

The work of Jürgen Habermas is emblematic of understanding democratic discourse in this role. In his theory of "discursive democracy," Habermas attempts to bring together "empirical-analytical" thinking with "historico-hermeneutic" thinking, a blending of particulars and principles. Michael McGee argued that Habermas succeeded in linking morality and rhetoric by asserting that even though our thoughts are saturated by ideology we can recognize the distortions caused by such thinking, and that we can also recognize undistorted communication.[43]

Habermas explained that there are many moral principles that are legitimate in their own right. They are prima facie valid expressions of good or moral behavior about which there is seldom any controversy. These may include the beloved principles expressed in communities of belief, or they may be rational constructs. But until they are put to use justifying a particular concrete action, they are only of partial usefulness in legitimizing politics. The fact that a principle itself is valid does not mean that it is valid in every case to which it is applied. It is by the process of democratic deliberation, discourse and rhetorical argument that a particular principle can have legitimizing power. By the act of deliberating and reaching consensus, the legitimacy of the principle or norm used in a particular way is established.

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[42] Ruderman, "Recovery of Judgment," 412.
[43] Michael Calvin McGee, "*Phronesis* in the Gadamer Versus Habermas Debates," in *Judgment Calls: Rhetoric, Politics and Indeterminancy*, ed. John M. Sloop and James P. McDaniel (Boulder, Colo.: Westview Press, 1998): 13.

> Because such norms are only prima facie candidates for application, one must first enter a discourse of application to test whether they apply to a given situation (whose details could not have been anticipated in the justification process) or whether, their validity notwithstanding, they must give way to another norm, namely, the "appropriate" one. Only if a valid norm proves to be the single appropriate one in the case at hand does that norm ground a singular judgment that can claim to be right. . .
> Discourses of application concern not the norm's validity but its *appropriate reference to a situation.*[44] (emphasis in original)

The further iteration of the political judgment paradigm as a form of rhetorical ethics hopes to extend the usefulness of political judgment by interpreting Aristotle's practical reason from within a contemporary framework. Writers such as Martha Cooper, Arne Vetlesen, John Sloop and James McDaniel understand Aristotle to be the source of the modern concept of judgment and find that his approach sounds surprisingly fresh. Their specific interest is Aristotle's discussion of rhetoric and rational discourse.

Some political judgment advocates rely on Aristotle's theory of rhetoric to explain the dialectical nature of political ethics. They seek to apply the Aristotelian ideal of rhetorical method as a modern technique for understanding ends in a democratic context. Through rhetoric, it is argued, the opportunity for free thought is not abandoned in the search for universal ends. Larry Arnhart, for instance, argued that a recovery of Aristotle's theory of rhetoric could help reconcile modern political disputes about morality since scientific logic is not possible in establishing political ethics.[45] In spite of some minor differences, those theorists who link rhetoric to practical reason share one

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[44] Habermas, *Facts and Norms*, 217.
[45] Larry Arnhart, *Aristotle on Political Reasoning: A Commentary on the "Rhetoric"* (DeKalb, Ill.: Northern Illinois University Press, 1981).

element in their project to revive Aristotelian *phronesis*. All of these theorists see rhetoric as a way to identify widely acceptable moral principles to guide political judgment.

Poststructuralists are deeply committed to the rhetorical model of determining ethics. Sloop and McDaniel, for example, pointed out that the many of the towering figures of postmodernism (i.e., Derrida, Heidegger, Foucault, Lyotard and Nietzsehe) appealed to rhetorical devices in bringing together universals and particulars in order to avoid references to given meta-narratives.[46] Martha Cooper wrote that "communication is a means of ethical action," and explained how rhetoric and ethics are linked.[47] She explained that since Aristotle we have believed that political rhetoric could, if exercised virtuously, guide citizens to sound judgment. But in her view, poststructuralist challenges to a stable meaning of ethics have lessened our attachment to judgment generally. Into the vacuum then seeps the ubiquitous assertion of the will to power. Power is unlike ethics however, in that it is always present, its effects clearly visible and its influence overwhelming. Agreement on ethical criteria becomes impossible.

But discourse serves as a way to overcome power differentials in the search for a common ethic. By discourse, Cooper is referring to rhetoric as persuasion, and this rhetoric she says helps those in power lead others to virtue. And while she argues that we cannot return to a pure enactment of Aristotelian *phronesis*, we can establish shared judgment on political morality. A postmodern ethic of communication (expressed

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[46] John M. Sloop and James P. McDaniel, eds., *Judgment Calls: Rhetoric, Politics and Indeterminacy* (Boulder, Colo.: Westview Press, 1998).
[47] Martha Cooper, "Decentering Judgment: Toward a Postmodern Communication Ethic," in Sloop and McDaniel, *Judgment Calls*, 63-83.

skepticism, response to that skepticism, and affirmation of opinion) can form the rhetorical basis for founding a news political judgment.

The postmodern interpretation of political judgment would not be considered mainstream among classical liberals, but it is gaining influence. In fact, the assertion that rhetoric, or discursive democracy, plays a part in the discovery of ethics in particular cases, characterizes a good deal of the literature on justice and fairness. It even hearkens to the Madisonian desire for increasing the number of factions in order that the greatest possible diversity of views be represented in political deliberations.

But this is not to say that public discourse and rhetoric are the same. Our instinct is to ascribe to rhetoric a pejorative connotation of manipulation by words, of "making the weaker speech the stronger" in order to win an advantage or assert dominance. Perhaps a virtuous rhetoric is possible. But can we use rhetoric to achieve something more than justifying the will to power; can it fulfill Aristotle's larger purpose (and mine) of bringing together widely accepted principles and particulars in moral reasoning? The answer seems to be yes so long as we add one caveat to this answer: rhetoric can bring together universals and particulars in liberal regimes whose large and heterogeneous population has roughly equal access to the means of public debate. The obvious reason for this condition is that if certain voices are systematically left out of the rhetorical exchange, the remaining voices will have greater influence in public discussion. Political ethics would then turn on questions of ideology and power instead of a collective effort to clarify the values and virtues of the regime.

It is often argued that conditions producing equality in public debate do not now exist in the United States. Political discourse is seen as tightly controlled by increasingly consolidated news organizations. Political parties are charged with being less tolerant of divergent views and special interest groups seem to have unprecedented access and political influence. The yearning for alternatives to the viewpoints of the two parties and the national news media may be explained by their dominance over the debate on political morality. It may also explain the powerlessness many citizens feel, and why plans to limit the influence of special interest money in political campaigns are popular. But if the reform envisioned by political judgment advocates rests on rhetoric, there seems to be little chance that it offers an avenue for reform toward greater fairness. Rhetoric on the grand scale of meta-politics leaves little room for individual expression and even less room for achieving individual fairness.

While it is clear that a discourse approach to identifying appropriate principles lends legitimacy to the principle, it also lends it an air of impermanence. As discourse changes throughout the course of political history, even throughout the course of a single political debate, the perceived appropriateness of a principle is likely to change, too. As the terms and contexts of debate change, the principles determined to be legitimate changes. Participants come and go, and the arguments they find convincing are different. Principles may be established as legitimate at a certain point in the cycle of political deliberation, but their legitimacy is immediately subject to question as the debate moves to a new cycle. Even if discourse establishes certain principles as legitimate in a given situation, there is no guarantee that the same principles will remain legitimate.

Determining what fairness means requires judgment according to legitimate principles. To that extent, those who would exercise political judgment in resolving questions of fairness cannot claim a universal or unassailable interpretation of what fairness means in any given circumstance. Therefore when prescribing action to bring about greater fairness, there may not be a way to counter the argument that the principle chosen to justify a particular action was subjectively chosen. In public administration, political judgment produces legitimate outcomes when the public believes in the judging abilities of administrators. There seems to be no rational justification for confidence in their capacity to identify appropriate values, principles and norms. And yet, very often the public does express confidence in their judgment, especially when it shows itself as a capacity for common sense responses to difficult situations.

This is precisely the capacity that is required every day in Social Security offices across the country. It is what administrators of public assistance programs must do when determining benefit eligibility. It is what Veterans Administration officials must do when establishing guidelines for access to care in VA hospitals. The inescapable fact of contemporary political action is that finally, in offices and workplaces, the insights of theory are set aside in order to make decisions like these. This is not to say that theory has no place, that it is not influential. Quite the contrary. But it is to say that action must finally be taken by public administrators to whom responsibility has been delegated. Very often, the action involves deciding what is fair. How do administrators make these judgments?

THE JUDGMENT OF ADMINISTRATORS: FAIRNESS IN PRACTICE

The aim of this dissertation has been to examine theoretical perspectives on fairness with practicality in mind. In this vein I have tested Rawls's theory of justice as fairness, the communitarian view of fairness and the political judgment view of morality in political decision making. The question in each case has been: does this view produce satisfying theory while also producing satisfying practical guidelines?

Theorists from all three camps have taken into account the problem of moral plurality because this problem represents a pervasive characteristic of political life. The fact of moral plurality is especially problematic for administrators because not only are their actions scrutinized, the reasons for their actions are scrutinized, too. If their reasons do not correspond to widely acceptable principles, their actions may be deemed illegitimate.

This problem arises for bureaucrats more now than ever before because legislatures are delegating more discretion to administrators than ever before. Increasing discretion in bureaucratic decision-making is necessary because of the size and complexity of government. In this sense, bureaucratic discretion is a necessary and helpful characteristic of American politics. It sustains an efficient bureaucratic apparatus. But it also requires administrators to adopt a more sophisticated view of morality in bureaucratic action, to draw on sources of morality beyond the principles contained in law. According to John Cooper, administrators have

> an obligation to internalize and cultivate values from the American political community. Their professional values must transcend the limits of the organization. The problem, of course, is the identification of those values. This is the most difficult and important item on the agenda for research and theory development in administrative ethics."[48]

The cases that make up the subject of administrative action do not present themselves as representatives of discrete moral principles. Therefore the debate over judging which moral principles to apply in particular cases is one not likely to proceed within strict categories. It is possible to question nearly every judgment resolving a case in a certain way. Again, because their decisions are scrutinized along with the reasons for their decisions, administrators need a unified theory of action that permits them to follow the broad principles of democratic government while faithfully executing their roles as technocrats.

Charles Garofalo and Dean Geuras argue that achieving ethical unity in judgment is the product of a thinking administrator with a nimble intellect, steeped in the characteristics of democratic culture and yet competent to assess the nature of concrete cases and the decisions they require. This is the task of administrators interested in preserving the moral foundations of the regime they serve. When they pursue this interest, they follow a course of political judgment much as outlined in this chapter because ultimately, "To be moral is to exercise discretion and judgment."[49] This is the type of coherent moral point of view political judgment theory offers administrators. It is

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[48] Terry L. Cooper, *The Responsible Administrator*, 2d ed. (New York: National University Publications, 1986): xiv.

[49] Charles Garofalo and Dean Geuras, *Ethics in the Public Service: The Moral Mind At Work* (Washington, D.C.: Georgetown University Press, 1999): 132.

a theory already deeply embedded in the law and literature of public administration, and it is directly applicable to the quest for understanding fairness.

Fairness and Administrative Judgment

Democratic forms of government require that the outcome of administrative decision-making are fair. By showing partiality or applying idiosyncratic principles of morality to their judgments, bureaucrats undermine their own decisions. Legitimacy of bureaucratic action is always tenuous because civil service administrators are not elected. But the political judgment approach to understanding political morality and ethical administrative action can guide bureaucrats in choosing principles and applying them to bolster their decisions in the eyes of the public.

Fairness is the implied subject for much of the literature on administrative procedure. It could be said, for instance, that the literature of administrative law is devoted to the working out of fairness in administrative settings. [50] This literature is devoted to establishing rules of procedure in hearings and adjudications where public resources are involved. In so doing, the literature of administrative law has sketched the outlines for a normative conception of the proper application of bureaucratic judgment to ensure public resources are fairly used according to the dictates of efficiency, effectiveness and due process.

Fairness is sometimes the justification for government intervention into the private sector. When it becomes impossible for free enterprise to accord fair treatment to

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[50] Mark H. Moore, *Creating Public Value: Strategic Management in Government* (Cambridge, Mass.: 1995): 6.

all citizens, it is sometimes only through government action that underlying unfairness can be corrected. When administrators are attuned to the fairness of policy implementation, they satisfy an important social goal.

> Fairness is a separate quality of a social enterprise – not necessarily linked to efficiency and not necessarily compensated or replaced by effectiveness. Although an individual transaction can be more or less fair, fairness is also, and perhaps more fundamentally, a feature of the aggregate operations of a public enterprise. Moreover, it is a quality that has value to citizens in their role as citizens authorizing a collective enterprise, rather than as individual clients and beneficiaries enjoying the service for themselves. (It may also be an important part of the experience of those clients who are obliged rather than served and thus an important part of what determined their willingness to comply. Ultimately, fairness may influence the economic efficiency of obliging organizations.)"[51]

According to Phillip Cooper, fairness in administration can be thought of in three ways. The first is instrumental fairness – the positive responsibility administrators have to make their decisions according to the rules of due process. If the principles of a decision are selected according to appropriate fair rules, the effects of the decision can be considered legitimate.

A second way to think about administrative fairness is to consider how actions are perceived. This is intrinsic fairness, and it is just as important in justifying the selection of moral principles as instrumental fairness. If the public believes a certain agency or a certain administrator is earnest, diligent and fair-minded, the effects of decisions made by

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[51] Ibid., 47.

that institution or individual are more likely to be perceived as fair. Administrators must mind the impressions their decisions make as closely as they mind the actual results. If the goal is good policy, then,

> it is entirely possible that a number of elements of what we generally require of due process in adjudication are inappropriate. Instead, due process is about ensuring fairness in adjudication. In order to maintain acceptance of judgments, we must not merely ensure that the process is fair, but that it is seen to be fair. And when judgments determining the legal rights or status of specific individuals or groups are issued by agencies that lack the protections and restraints of law, the appearance of fairness and impartiality is all the more critical. The value of due process in this approach is intrinsic.[52]

Fairness, then, is a factor "beyond those situations where due process is required." This is because administrators have a duty to create an impression of impartiality, of not being arbitrary, as for instance applying inappropriate criteria like race or religion in deciding questions presented to the agency.[53]

The third element of fairness Cooper thought essential for administrators is maintaining a clear distinction between equality and equity. Mere equality of treatment is not always appropriate where suspect classifications of people are involved. Equity is often preferred. This is an approach in which unequal treatment is sometimes necessary to undo previous discrimination, as in affirmative action programs. The dictates of

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[52] Phillip J. Cooper, "Critical Issues in Public Law and Public Administration," in *Handbook of Public Administration*, 2d ed., ed. Jack Rabin, et al. (New York: Marcel Decker, 1998), 682.
[53] Ibid., 685.

fairness often require administrators to keep the equality/equity distinction firmly in mind. [54]

Terry Cooper advocated citizenship theory, a theory based on a refined sense of moral judgment, to guide administrators who must harmonize the norms of institutional ethics and community values.[55] The administrator as citizen is in a unique position to achieve this harmony. Her special position allows her to fortify the values of community by exercising political judgment – by balancing institutional and community needs.

The linkage between political judgment and administrative ethics permits administrators to achieve results no one else can. The intellectual capabilities and institutional knowledge of administrators are nowhere replicated in society. Henry Kass summed it up this way:

> The public administrator becomes capable and worthy of rebuilding an American political community because he or she has the ability and virtue to exercise some for of "practical" (ethical) wisdom that transcends the technical rationality traditionally required of public administrators ... It is the practical wisdom (phronesis) necessary to carry on ethical discourse, make ethical judgments, or take ethical actions that gives the administrator the capacity to help sort out the issues of justice and public welfare that lie at the heart of building any republican community.[56]

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[54] Ibid., 686.
[55] Terry L. Cooper, *An Ethics of Citizenship for Public Administration* (Englewood Cliffs, N.J.: Prentice Hall, 1991): 134-175.
[56] Henry D. Kass, "Prologue: Emerging Images and Themes in the Reexamination of American Public Administration," in *Images and Identities in Public Administration*, ed. Henry D. Kass and Bayard L. Catron (Newbury Park, Calif.: Sage Publications, 1990): 16.

The decision making that administrators use to determine questions of fairness or morality generally necessarily take into account the values of the institutions where they work. These values are not always chosen by the individuals working there. But they are important factors to consider when dealing with the fairness of official actions. Sometimes the values of organizations institutionalize poor moral conduct, and this tendency must be checked by administrators with the judgment to create "both an organizational environment which is supportive of ethical decision making and conduct and an ability to transcend the boundaries of the organization."[57]

Terry Cooper believes the ability to transcend the boundaries of the organization without resorting to excessive abstraction is achieved by combining an appreciation for the community values to an appreciation for institutional norms. By being active in their community, administrators not only come to better understand the political forces that are relevant in their jobs, they are better equipped to solve the problem of identifying important values. Acquiring a sensitivity to these values is achieved through the administrator's "larger obligation" as a citizen.

> A community identity suggests that one is engaged with manifestations of public life that occur close to home at the neighborhood, area, and municipal scales. Attention to neighborhood issues, the efforts of voluntary associations, public school activities, and the affairs of local religious organizations root one's mind and self-image in specific human problems and projects. This kind of identity provides a degree of protection from bureaucratic and intellectual abstractions, and vivid points of reference for the aims and purposes of government. Principles such as the public interest, social equity, regime values, and

[57] Terry Cooper, *Responsible Administrator*, xi.

> citizenship obligation can be tested in observable social life and personal experience.[58]

This is a precise restatement of the political judgment thesis geared toward administrators. Because administrators are responsible to the oath they take, the community and the individuals they work on behalf of and the institutions they work in, they must make moral judgments with all three in mind.

Warwick addressed the problem of how administrators can balance these concerns and exercise their discretion in a morally responsible way. The fact that they have wide latitude in implementing policy is well established. "Very often public policies are deliberately drafted in broad language to permit flexibility of action by the executing agencies."[59] The question remains, however, how are administrators to know when their exercise of discretion is appropriate? Warwick proposed a model of dialectical accountability where administrators, oriented to the needs and special characteristics of the publics they serve, are engaged in reflective choice about the decisions they make. They should try to understand how to implement policy fairly, how to discharge their duties truthfully, to respect fair procedure and to use restraint with respect to the means employed to achieve a certain policy.[60]

But there is a limit to how much of practical importance administrators can expect to gain by understanding the values of communities. John Rohr's theory of regime values posits that the Constitution, laws and the American constitutional tradition is a source of

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[58] Ibid., xvi-xvii.
[59] Donald P. Warwick in *Public Duties: The Moral Obligations of Government Officials*, ed. Joel L. Fleishman, et al. (Cambridge, Mass.: Harvard University Press, 1981): 101
[60] Ibid., 115-125.

moral knowledge administrators can draw on, but only to a point.[61] To expect concrete principles that supply answers for all moral problems is unrealistic because the practical problems administrators face are so varied that it would be unfruitful to search for simple, clearly-articulated principles that can be applied in particular cases. The reflective judgment of a well-educated administrator, sensitive to the character of the Constitution he or she is sworn to defend, is best positioned to discover and apply relevant values.

It may be more realistic to see the implementation of moral policies as a blending of competing values administrators learn in their various roles. Michael Harmon proposed that there are three prominent roles for administrators, corresponding to their duties of executing policy in an ethically and morally responsible way. The three types are:

> *Political Responsibility:* "Action that is accountable to or consistent with objectives or standards of conduct mandated by political or hierarchical authority."
> *Professional Responsibility:* "Action that is informed by professional expertise, standards of ethical conduct, and by experience rooted in agency history and traditions."
> *Personal Responsibility:* "Action that is informed by self-reflective understanding; and emerges from a context of authentic relationships wherein personal commitments are regarded as valid bases for moral action."[62]

Administrators should practice combining the needs and expectations of various

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[61] John A. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values* (New York: Marcel Decker, 1978): 62-4.
[62] Michael Harmon, "The Responsible Actor as 'Tortured Soul': The Case of Horatio Hornblower," in *Images and Identities in Public Administration*, ed. Henry D. Kass and Bayard L. Catron (Newbury Park, Calif.: Sage, 1990): 157.

communities, in various contexts corresponding to the roles they carry out. It is not surprising, therefore, to find administrators who can look at a policy like the allocation of human organs as though it were simultaneously a case about distribution of public goods, a forum for carrying out social values for protection of life and common virtues of cooperative citizenship, and a personal matter of life and death. This illustrates the complexity of bureaucratic discretion, and makes the case for political judgment as applied to bureaucratic action. It demonstrates why it is important that administrators have the ability to juggle competing values and moral claims, then use their judgment to sort through the relevant principles of fairness in a given case.

The connection between political judgment theory and theories of administrative ethics should by now be obvious. Because of the unique and complex tasks administrators are expected to carry out, they are required to bring particular cases under the widely held principles corresponding to community values. And there are many communities to consider. Knowing the needs of community in the broadest democratic sense requires administrators to act as representatives of the public. Considering the needs of institutions requires them to internalize the modes and assumptions necessary for efficient and moral operations within their own agency. Finally, the professional communities to which administrators belong makes demands on them to judge according to accepted standards and established ethical principles. And still, they must consider the needs of individuals. All these communities desire fair policy implemented according to certain principles that may not be shared. While we can confidently assert that reasoned

judgment is required, we still need to know how the implementation process helps or hinders executing this judgment.

Fairness and Implementation

Implementation of policy according to the discretion granted by the legislature constitutes a special category of political judgment, complete with its own justifications and consequences. Implementation requires administrators to use discretion in applying the broad mandates of law to particular cases they encounter. But the nature of the law appears differently to administrators than to legislators because of their positions relative to the law. Administrators are charged with applying the law, with all its intent, mindful of its often serious consequences, in a fair, impartial and lawful way. They receive the mandate of law, but must also understand the rationale behind the law. The theory which drives the creation of law may be seen as primarily intended to influence the administrator's interpretation of the law. It is because of administrative discretion that law must contain some clue as to the broad rationale that went into its creation. With the rise of broad grants of administrative discretion in the latter half of this century, law has become increasingly general in order to provide administrators a clearer understanding of the intent of legislatures which is necessary for implementing it.

In classical administrative theory, the problem of implementation was limited to discovering how to put the wishes of the legislature into effect efficiently. But as the political nature of public administration has been increasingly acknowledged, the problem has become much more complicated. Administrators are now asked to inform the

legislature of many of the effects of contemplated legislation before it is enacted. They are responsible for predicting such possible outcomes as time-tables, likely secondary effects and other special problems. They are also expected to take on a bigger role in deciding how to put legislation into effect, considering the wishes and all relevant opinions of the publics they serve. They must know when to act as a delegate of the people and when to act as a trustee charged with implementing laws by applying their technical knowledge.[63] Eugene Bardach characterized the implementation process as the interaction between various interested parties in and out of government who engage in the playing of various games to achieve personal and institutional goals.[64] What administrators often seek is a way to make coherence out of the competing moral claims made by the players of these games.

For all these reasons, administrators often view the legal code differently than legislators or theorists. They may not view it as a summary of political will, but instead as a broad net of prescriptions to be cast over vast schools of particular cases. They are certain that all the little fish will not be caught, and that it is their job to stretch the net here and there to catch as many as possible. They may even be able to join it to other nets to increase the coverage, but they know that they may not gather up the net and recast it in a more favorable location. Law comprises the givenness of administrative discretion. The ultimate justification of their actions and of the exercise of their discretion depends on their unquestioning acceptance of the legal code. It serves as the foundation of

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[63] Terry Cooper, *Responsible Administrator*, xxvii.
[64] Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes Law* (Cambridge, Mass.: The MIT Press, 1977).

administrative action. The judgment of administrators then is only as good as the laws they rely on. The quality of law can be determined in part by the quality of guidance it provides in selecting appropriate principles for implementation.

But even providing broad outlines of the rationale of policy may not be enough guidance for administrators. To implement a policy involves overcoming obstacles that might not have been foreseen by legislators, and the chance of this increases the longer the policy is in place. Even subsequent amendments to legislation may not give administrators the guidance they need to achieve the objectives the law was designed for. When the law is designed to promote fairness, the issues becomes particularly complex, for reasons that may already be obvious: there is no implied, widely held standard for judging what fairness means in concrete cases. In order to help ensure fair outcomes, legislators should pay closer attention to administrative science. Yet, too often they do not.

The fact that designers of public policy often give insufficient attention to implementation is a well-established phenomenon of public administration. Palumbo and Calista, for instance, explained that "policy formulators (i.e., legislators) [have] overlooked the role of implementation,"[65] while Bardach found that policy designers have often misjudged the importance of coalition-building among bureaucrats necessary to implement policies effectively.[66] According to Lipsky, inappropriately written legislation also causes difficulties when legislators misunderstand the needs and concerns

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[65] Dennis J. Palumbo and Donald J. Calista, eds, *Implementation and the Policy Process: Opening Up the Black Box* (New York: Greenwood Press, 1990): xii.
[66] Eugene Bardach, *The Implementation Game* (Cambridge, Mass.: The MIT Press, 1979).

of street-level bureaucrats who will implement the policies they craft.[67] The problems caused by the differences in outlook between policy designers and implementers led Louis Koenig to call implementation "the great Achilles heel of the policy process."[68]

But there is more to the implementation story than a mere difference of outlook. Those charged with putting legislation into practice must make decisions on a daily basis which carry significant consequences for the ultimate success of the policy. Koenig noted that "implementation is a critical juncture at which policy is endowed with essentials that were not and could not be provided for in its formulation, including doctrines to explain and defend it, and to attract and maintain the support that establishes it in a logical niche in a densely occupied policy space."[69] Thus, it is in the implementation of policy, the putting into play of the legislator's intentions, that policy acquires a specific meaning. This is not merely to say that policy acquires meaning through the faithful setting into motion of the elements of policy, i.e., the collection or distribution of money or the building of dams. More than this, policies acquire meaning by the interpretation of administrators reflecting on the moral principles that justify the policy. Their defense of their own actions is based on this reflection. To defend the fairness of a policy as it is implemented, therefore, is to give meaning to fairness not just within a particular context, but to clearly reflect the understanding of fairness held by those who designed the policy. For example, IRS agents who place the burden of proof on taxpayers instead of auditors reveal the tax code's principle that citizens bear the burden of proof in tax disputes. Of

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[67] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, (New York: Russell Sage Foundation, 1980).
[68] Louis W. Koenig, *An Introduction to Public Policy* (Englewood Cliffs, N.J.: Prentice-Hall, 1986): 149.
[69] Ibid., 156.

course, this overturns conventional notions of fair procedure (as well as substantial legal precedent) which places the burden of proof on the government. Procedural fairness in this case is given lower priority than expediently collecting money from taxpayers.

But it may never have been Congress' intent that the IRS should place procedural fairness lower than expediting collections. In fact, Congress later intervened in this issue to reinterpret fairness for the benefit of IRS administrators. It is likely that legislators did not understand how the code would be interpreted and the effect this interpretation, this discretion, would have on policy implementation.

The clearest way to see that lawmaking and implementation often follow different assumptions is by examining the difficulties lawmakers encounter when trying to influence bureaucratic action. These difficulties extend beyond the often ignored limits of administrative expertise. Maratha Derthick, for instance, noted that

> The assumption that pervades policy making is that the agency will be able to do what is asked of it because by law and constitutional tradition it *must*. It does not occur to presidential and congressional participants that the law should be tailored to the limits of organizational capacity. Nor do they seriously inquire what the limits of that capacity may be. There is a pervasive overestimate of the efficacy of law as a determinant of administrative behavior.[70]

That lawmakers overestimate their ability to influence agency behavior could be caused in part by their overestimation of the suggestive power of law. Because of the variations in cases administrators encounter, laws need to be written to convey both the

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[70] Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* (Washington, D.C.: The Brookings Institution, 1990): 184.

spceific criteria for implementation as well as the reasons certain criteria are more applicable than others. Law, to represent legislative intent fully, should therefore stipulate values -- the reasons for the law. But the ordering of values is seldom attached to legislation, and is often intentionally obscured to secure political compromise. This lack of clarity presents problems for administrators lawmakers may not anticipate.

Law can be said, therefore, to consist of more than mere prescriptive phrases and authorized punishments. The suggestive power of law depends on the fact that its purpose is discernable. Pressman and Wildavsky noted that the suggestive power of law is often diminished by legislators insufficiently aware of administrators' needs. Problems arise during the normal course of administrative activity, such as the friction that results from previously unknown dynamics affecting program goals, as well as the environmental effects of the law itself as it comes into force. Policies outlined in law and put into operation develop a life of their own, and the administrators who react to the dynamics of implementation find little in most laws to help them interpret legislative intent. Outcomes often deviate from that intent.[71]

Therefore, implementation of law requires knowledge of the background justification for the law. This view is similar to the one held by Montesquieu, who believed knowledge of the foundations of law comes from understanding the historical roots of ethical values and the circumstances which led to the development of the law. But, it is doubtful that any two interpreters, either in Montesquieu's day or in ours, will draw the same conclusions from a reading of history. Modern theory holds that people

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[71] Jeffrey L. Pressman and Aaron Wildavsky, *Implementation* (Berleley, Calif.: University of California Press, 1984): 217-231.

read history in light of their unique comprehensive doctrines. So the possibility of cultural or educational transference of meaning through law is not reliable -- some other force must be felt to move the administrator, exercising the permissible discretion of office, along the path laid out by the legislator.

The question of fairness in implementation often centers on the idea of equality. Especially in dealing with competing interest groups, administrators often resort to the principle that equal treatment is fair treatment. The ethos of administration reinforces the preference for equality through its preference for standardized procedure, whether in hiring practices or implementing policy. But a simple prescription that equal treatment is fair treatment is not appropriate in the complex circumstances where administrators work. Terry Cooper wrote that "the assumption that equal treatment is fair treatment needs to be re-examined. If, in fact, members of a population are not the same, but quite varied in their tastes, needs, preferences, and backgrounds, then treating them as though they were the same in these respects is not fair."[72]

We saw an example of this in the discussion of organ transplant policy. Because no two patients' have precisely the same clinical indications of transplant suitability, physicians must treat them differently. And even though physicians have sophisticated tools to assess the health of potential recipients, the tools still leave them with too many recipients for the organs available. As refinements in transplant techniques continue to reduce morbidity and mortality rates, allocation decisions are likely to grow more complex. Added to this is the fact of moral differentiation between patients. Some may

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[72] Terry Cooper, *Responsible Administrator*, 40.

have engaged in behaviors that contributed to their condition, such as smoking. Others may not have the stamina or resolution to complete the arduous post-operative therapy. Physicians who consider these factors often find that individual cases do not fit neatly into the prescribed decision-making structure.

Political judgment theory, with its emphasis on practical reason, offers a way to consider each case under the overall decision-making structure without ignoring the context that makes each patient unique. They totality of physicians' education and experience seems relevant to the decisions they make and should be brought to bear. By bringing particular cases under the rubric of UNOS guidelines, by avoiding unnecessary abstraction and even by applying common sense, transplant physicians may be able to judge fairly between patients.

Whatever particular role they play in public policy implementation, administrators often face the difficult task of making defensibly fair decisions. No one source of moral principles will supply them with the foundation they need to resolve disputes about policy in a morally responsible way. The values inherent in community are only part of the answer because these values sometimes clash with the interests of individuals. In addition, these values are not always obvious. Even the law itself offers little help – the principles used to justify a certain way of implementing policy are not often made explicit. Administrators need more. They need a more complete and explicit outline they can use to organize their reflections on fairness. I will attempt to supply such an outline in the following chapter.

CHAPTER 6

A Model of Administrative Judgment

The theories examined in this dissertation may help clarify our understanding of what fairness means. All three theories of fairness examined here aspire to broad validity and practical usefulness. Rawls offered a simple, memorable rubric for determining the morality of political action, justice as fairness. He also implied that fairness is fair procedure, reciprocity and equality in political action. In the fashion of Montesquieu, communitarians have offered a deeper appreciation for the history of ethical values. Their view is that the needs of community sometimes outweigh the needs of individuals, so long as basic human rights are respected. And political judgment advocates have offered a way for administrators to bring particular cases under widely acceptable moral principles according to the application of a common-sense form of rational judgment.

What seems needed to help further refine administrators' judgments about fairness is some sort of decision guideline or model to collect these views. As we have seen in the various approaches to fairness, there is nothing that can be thought of as a complete "theory of fairness." Even though citizens expect fair treatment and may expect

this treatment be justified in a systematic way, those charged with implementing fairness must look for guidance to loosely formed ideas, values and assumptions that comprise our cultural and political understanding of public morality. The lack of a unified theory of what fairness means may jeopardize the precise implementation of fairness. If it could be found, a model for making judgments about fairness would add clarity and predictability to the judgments needed in policy implementation policy. It might be a useful tool for locating our notions of fairness within the larger context of moral pluralism.

A model might have the additional benefit of helping to illustrate several other aspects of the idea of fairness as presented in the previous three chapters. First, it may show to what extent these ideas can complement each other. If some way of implementing fairness can be articulated that relies on the basic themes of each of the theoretical approaches, it may be possible to argue that they are not exclusive approaches but are open, in a practical sense, to incorporation. Second, a model of fairness might help theorists understand the practical implications of their theories. Much attention has been paid here to the intersection of theory and practice in evaluating various ways of understanding fairness. This attention has been intended to show the effect of the theories, and their usefulness. Demonstrating the influence of the theories on decision-making may show theorists where greater precision is needed in refining their understandings of fair government action.

Arriving at a definition of fairness through the use of a decision-making model, as I will propose, has the flaw of not being universal in the way Rawls would like because it is not strictly rational. Similarly, it may not fit well within any particular community of

belief – principles may be assigned importance with little regard for the coherence of views that really exist within philosophical traditions. But there is still a sense in which one can say that some widely acceptable results are possible when administrators give appropriate priority to their own capacity to judge among specified alternatives.

A model would be more relevant if in organizing the ideas of fairness it could be constructed to permit a sequence of decision-making. All the requirements for fairness discussed earlier would ideally be part of this sequence since they are all important for achieving fairness and since they cannot be considered simultaneously. We may expect this approach to result in predictable outcomes from a properly trained administrator, under competent supervision, considering cases within her area of expertise, being presented with the relevant facts and aware of the prevailing opinions of other professionals and interested laypersons.

For instance, it is easy to imagine a social worker confronted with a case that does not fit neatly into any given decision framework and unsure of how to arrive at a defensibly fair outcome. She might be trying to decide, for instance, whether Client A is entitled to certain benefits even though her circumstances are borderline; a case in which the decision to grant or withhold benefits could both be justified. A model of how she could turn for help to the insights of Rawls, communitarians and political theorists is offered at Table 1.[1]

From a Rawlsian viewpoint, the social worker might begin by addressing the first principle of justice.[2] Does this client have access to benefits on an equal footing with

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[1] See the appendix.

[2] "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."

other clients I have served? If I decide to make benefits available, will it reduce the benefits available to other clients with similar borderline claims? In addressing Rawls' second principle,[3] the administrator might ask how the decision to grant benefits might affect the least advantaged. Is Client A the least advantaged client with similar borderline circumstances I have seen? How can the decision to give Client A benefits work to the benefit of others who are least advantaged? Have I made these benefits equally available to others with similar circumstances? Is my decision fair?

This leads directly to a determination of fairness. Rawls would have the social worker ask herself three further questions, corresponding to the three components of fairness.[4] First, have I followed fair procedures in reaching my decision? Second, am I confident that my decision enhances reciprocal relations between all other clients and Client A, and between myself and Client A? Third, is this client going to receive a share equal to others in similar circumstances; will Client A's final state be roughly equal to others whose lives reflect similar conditions?

Taking their characteristic approach, communitarians would have the administrator facing this decision ask further questions. Not as concerned as Rawlsians with the overall issue of fairness, the communitarian suggestions might nevertheless focus on the three elements of fairness discussed above. They would be especially concerned with the values of community or the professional virtues expected of all social workers. New questions suggest themselves. What do explicit agency rules require of

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[3] "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."

[4] 1.) fair procedure, 2.) reciprocity, 3.) equality of outcome

me? What does the spirit of the rules require, as that spirit has been interpreted over time in other similar cases our agency has handled? How would other social workers in my office handle this case? What priority would my supervisor ask me to place on the particular circumstances of this case? Should these considerations be permitted to override specific legal requirements? Background conditions of the community, city or region may come into play. What are the background economic conditions that may have a bearing on Client A's future? Does her socioeconomic status have suggest certain approaches?

In both the Rawlsian and communitarian approaches, focusing on any one of these questions might go far in suggesting alternatives to deciding the case of Client A. But they cannot all be considered together, their requirements cannot all be met simultaneously. The administrator must therefore choose to apply one or two while temporarily setting aside the rest. Of course the question then becomes in which order to ask the relevant questions. Should the background economic conditions be given priority, or does priority properly reside with reciprocity? A number of combinations are possible, but ultimately neither the Rawlsian nor the communitarian approaches suggest a rule for choosing between the criteria each proposes. In the end the administrator may well choose those criteria which seem best to her in the case of Client A. It is rational to suppose that upon reflection certain priorities will suggest themselves. If for instance Client A has failed several times before to fill out appropriate paperwork, has been misleading to other case workers, has failed to meet appointments for no good reason or otherwise fails to live up to expectations, her character may be a relevant consideration. If she is, conversely, the victim of domestic abuse, without independent resources and

seems thorough and earnest in answers to questions, her status as "least advantaged" might qualify her for a greater allocation of public assistance than suggested by a strict interpretation of agency guidelines.

It is this kind of decision-making that is addressed by political judgment, the third of the approaches to fairness discussed here. In choosing among alternative criteria for use in determining the outcome of particular cases, the judgment view does not immediately rule any out. It rather suggests that administrators consider the greatest number of possibilities and then select the appropriate principle or principles to apply to particular cases. As discussed in the last paragraph, character or relative advantage may be most relevant depending on the educated, considered judgment of the administrator. The dependability of such judgment is likely to be enhanced when it is the result of some kind of dialogue or discourse in which judgments are discussed. The dialogue might be between the supervisor and the case worker, or among case workers as they compare cases. The dialogue between the case worker and clients is certainly relevant, as are discussions in the regional or national communities about the importance of assistance programs and they way lawmakers intend them to be administered.

But even the political judgment approach leaves open the question of how we may reliably choose the criteria for determining fairness. Administrators bring together particulars and universals according to a reasoning process that affords great latitude to their personal rationality. The variety of cases faced by administrators makes such latitude necessary. In the example discussed here, the morality of the decision to apply one interpretation of fairness instead of another cannot be circumscribed by a single

rubric or according to a desired ideological outcome. To do so would render the decision making process either unduly constrained or tainted with partisanship.

By considering each of these approaches, beginning with Rawlsian principles, continuing with communitarian approaches and concluding with the methods of political judgment, the fairest possible outcome might be more likely. The model assumes a decision about distributing a social good in which one person is to receive an unequal (greater) share, and further assumes that priority belongs to the Rawlsian view in light of the unparalleled philosophic rigor Rawls employed to achieve a complete theory, and in light of the theory's extraordinary influence. The communitarian view fills in many gaps left open in Rawls' theory, and corrects for Rawls' overemphasis on individual reason. The political judgment approach injects the intellect of the administrator and the circumstances of the subject into the equation, ensuring a final common-sense check that may be required for public acceptance of the decision.

Another assumption made in the model is that questions of unequal distribution are the ones most likely to lead to uncertainty about what fairness means. This is because equal distributions are usually unproblematic and may reasonably be viewed as being fair. Assessing the fairness of unequal distributions is more difficult and consensus would seem harder to achieve. Therefore the model assumes that unequal distributions are morally suspect, unless subjected to a careful analysis. If the answer to any question of the model is no, the contemplated unequal distribution is unfair, and a demonstrably equal distribution is therefore required. Only if the answer to all questions is yes can the unequal distribution be considered fair in the broadest possible sense.

This model permits administrators to justify as fair some ways of distributing social goods not now available to them. Because it asks administrators to supply links between fairness, the virtues of fairness and their own practical judgment, the model unifies thinking about fairness.

The first four decision points refer to Rawls' two principles of justice as fairness – that basic equality prevail and that any advantages (unequal distributions) go to those who are the least advantaged. This bears explanation, because it would seem to be a novel part of the determination of fairness. Applicants for government aid, for instance, should be able to expect no more than an equal share if they are more advantaged by factors such as wealth or education. It is implicit in the legislative intent of programs such as student financial aid and welfare that the greater help goes to those with the greater need. The model calls for explicit acknowledgment of this principle of fairness.

The communitarian elements of the model call for administrators to consider agency rules, social norms, precedent and applicable professional standards. All of these reflect the collective judgment of communities where similar problems have been considered and resolved according to fundamental principles. By considering community reaction to a potential distribution decision, administrators can safeguard themselves from judgments that make logical sense but fly in the face of experience and widely-held beliefs. This will be especially helpful in cases where controversial issues are at stake, such as cases involving moral concerns.

Finally, by considering the case according to standards of political judgment, the decision will result from an attempt to apply principles or standards intelligently to a concrete case. This important summing up of the previous elements of the model brings

together the Rawlsian conception of individual fairness and priority to the least advantaged with the communitarian concern for mores and civic virtue. To skip lightly over these two broad interpretations of fairness and jump right to political judgment shortchanges the importance of these elements in our contemporary understanding of fairness. The reasoned judgment of administrators is improved when explicit reference is made both to Rawlsian liberalism and communitarian principles.

In this way decision makers can collect the various strands of thought on the problem of fairness presented in this dissertation. The reason the model is a compilation of theories is because no single rubric for making fair decisions seems to stand alone, although Rawls' theory of justice as fairness comes closest. Rawls' influential theory has had an effect in many areas of political life, including the debate over organ distribution, and his view of fairness receives presumptive weight in the model as the primary explanation of what fairness means. While the theory of justice as fairness has generated much controversy, Rawls' understanding that fairness is comprised of procedural fairness, reciprocity and equality is virtually unchallenged in the literature, and I do not challenge it either. But by itself this way of understanding fairness does not take into account the shared sense of justice reflected in the political culture of democratic society.

And even though Rawls' views on fairness have been influential, they required Rawls to take a specific position on political liberalism generally, a position that in some ways jeopardizes the classical liberalism that undergirds the very spirit of fairness he hopes to support. Rawls achieved the worthy goal of providing a complete justification for political liberalism even if he abandoned the possibility of constructing the truly universal theory he originally hoped to justify. The very fact that his theory centers

around the concept of fairness led him to adopt a particular understanding of liberalism. Once individualized fairness is established as the standard for determining well-ordered liberal society, conflicting views are ruled out, especially if they are views that come from a particular community of belief.

The communitarian argument provides a needed corrective to Rawls' over-reliance on moral constructivism and rational choice theory. Two premier communitarian writers, Sandel and Walzer, asserted that fairness requires striking a balance between what citizens expect from government and the shared beliefs called for by communal notions of well-ordered political life. Communitarianism only allows fairness to guide political action when it does no harm to the vitality of communities or the virtues of communal life. If the needs of fairness and the needs of community clash, fairness should be limited. That is why the communitarian view is incorporated in the model after the Rawlsian view – to provide the needed corrective.

The model concludes with the political judgment theory because it supplies the rational framework to achieve this balance between of the needs of individuals and community. It offers a way to prepare administrators to decide moral questions according to the dictates of fairness. It does not dismiss the beneficial effect of community and it does not eliminate a Rawlsian rule-morality approach, either. The political judgment view imparts an emphasis on balancing the content of fair policy against the context in which the policy presents itself. It assumes that decision makers bring to their judgments the biases and moral values received from their culture. But it asks judges to temper their own feelings and beliefs in order to achieve ends beyond political or administrative expediency – it asks them to participate in the strengthening of

political virtue. To strengthen political virtue, it is vital to first know what virtue in politics is. And in answering this question, the advocates of political judgment supply the missing element of the communitarian argument – they make it possible to sustain the many sets of values found in contemporary culture while being able to distinguish between that which is fair and that which only appears to be fair in a particular case. Political judgment theory acts as a check on the other viewpoints. Administrators need a foundation for making moral decisions that can be accepted as fair and legitimate by citizens each pursuing their own vision of fairness. They need to know what the fair thing to do is without throwing out the possibility of strengthening the bonds of political association. The practical reason inherent in political judgment theory allows for the possibility that Rawls was right in his assertion that rational principles should guide our interpretation of what is fair, and the possibility that communitarians were right in their expression of the virtues of fairness.

Applying this model to a concrete case instead of an imagined one would offer a better way of testing its validity as a decision rubric. Of course, the model is not intended to function as a checklist, nor is it intended to be a flowchart for the application of administrative discretion. But administrators steeped in the assumptions and methods mentioned in the model will be better able to bring the widest possible array of contemporary moral thought to bear on the specific cases they handle. Its use may produce more than merely decisions, but a certain kind of decision maker, one who is able to combine considerations from competing philosophical camps that all contain elements relevant to determining fairness in public policy. The model is integrative in that it does not ask administrators to identify themselves either as Rawlsian or

communitarian. It does not ask them to stake out a position in the liberal-communitarian debate. At the same time it is not a reductionist theory like utilitarianism, boiling down judgments about fairness to a simple dictum. It permits sensitivity to the needs of individuals and communities, where the administrator can bring his or her unique experience and reasoning skills to the process. For all these reasons, it would be helpful to imagine the model being put to use in a concrete policy setting where fairness is a central concern.

I will examine the usefulness of this model by applying it to the specific policy of organ allocation. As mentioned before, this policy is one in which considerations of fairness can make the difference between life and death for patients waiting to receive organs. If the model helps us refine what fairness means in this particular case, it may reveal its usefulness in other cases as well.

Assessing the Model

The model asks administrators to begin by considering Rawls' principles of justice. The first principle is that each person is to have access to the greatest amount of basic social goods consistent with a similar amount for all. This prompts two initial questions of organ allocation policy; is access to social goods equal in organ transplant policy and will the distribution of an organ to a particular patient ensure benefits remain available for all? Equal access to organs seems to be relatively well assured. Those without health insurance may be left out, but this is not necessarily the case since most states fund transplants. Both UNOS and HHS strive to eliminate money as a determining factor in organ allocation. The actual distribution seems to have some discriminatory

outcome, although there is no discernable pattern or practice of routinely denying access to organs to members of suspect classes. So while there may be some imperfections, there seems to be no systematic or state-sponsored denial of equal access to organs when they are needed. At the same time, giving an organ to a particular patient does not reduce the chances that others will have access to organs, too. The decision to grant an organ is based primarily on medical criteria, and given the acute shortage of organs available, there is little chance that a single decision will affect the overall availability for all patients.

Rawls' second principle of justice is that if there are any unequal distributions, the greater share should go to the least advantaged and all should have equal opportunity to receive that share. Two more questions are presented in the model for evaluating this principle. First, the explicit criteria of previous and current organ allocation policy is that the sickest should receive organs first. This is the principle behind the medical criteria physicians use to evaluate potential recipients, and it is an explicit goal of the Final Rule and UNOS. So on its face, the principle that a greater share should go to the least advantaged seems to be explicitly met. Of course, there is a point at which patients are so sick physicians may decide to give the organ to others. But again, this decision results from medical criteria that establishes the probability of a successful transplant. Barring the possibility that a gravely ill patient may not receive an organ before another very ill patient who is in slightly better condition, the priority principle seems to be met. The second part of Rawls' second principle is that all have equal access to organs. As mentioned before, this is the case, consistent with allocation procedures and relevant medical criteria.

The model now asks administrators to consider the distribution of organs according to Rawls' three elements of fairness – procedural fairness, reciprocity and equality. I will consider each in turn.

The procedures used for determining who gets an organ are the result of much democratic debate, reflection and reasoned judgment. Congress established the criteria by which organs are allocated and chose a contractor to oversee their distribution. Congress also oversees the continuing operation of the contractor. HHS overseas all aspects of the allocation system and has established performance measures for evaluating its operation. Competent medical authorities have written and continually evaluate the criteria used to establish which category potential recipients fall into. These criteria are peer-reviewed and adjusted to accommodate advances in medical technology. Physician discretion is implied in the process, but it is circumscribed and evaluated. A public comment period is required before any proposed UNOS allocation policy changes are implemented. It would seem that fair procedure is a core element of organ allocation policy.

The second element is reciprocity, a more difficult concept to analyze. The model asks physicians to answer this question: Will implementing the contemplated distribution (grant a particular organ to a particular patient) enhance reciprocal relations between relevant parties? There are numerous relevant parties. Of course, the reciprocal relationship between the patient and the physician can only be enhanced by the decision to allocate an organ to that patient. But what about the relationship between the families of organ donors and the families of organ recipients? Families grieving the loss of a loved one may take solace in the knowledge that their loss is not in vain. They may be

consoled that the prudent judgment of medical officials and policy makers believed this particular use of the organ to have been the wisest and best use to which it could be put. This may encourage others to agree to be organ donors. The most problematic relationship is the one between the patient receiving an organ and other patients not receiving one. Still, this relationship may be enhanced through the working of the current allocation system. The patient receiving an organ does so according to rules established long before he or she was ever on the list. Other patients know this, and presumably accept the operation of those rules. They may well applaud the continued adherence to the rules as the fairest way to ensure their own needs are not overlooked, even though they lost out in this particular case. Here again, it seems that the fairness of a decision can be justified on the grounds of enhancing reciprocity.

The third element of Rawlsian fairness, equality of outcome, is violated by the decision to grant an organ to this particular patient. Not every patient gets an organ, and those who finally do receive one have varying waiting times. But the fact that perfectly equal outcomes are not possible due to the organ shortage helps mitigate the strict requirements for equal outcomes. The fact that organs go equally to the least advantaged regardless of which organ is being transplanted also helps mitigate it. But the fact that waiting times vary according to where patients live seems to violate the requirement that fairness correspond to equal outcomes. This is not to say that any particular decision causes the delay. It does not even prove that the combined effect of all decisions causes some to wait so long that they eventually die just because of where they live. But there does seem to be a fairness problem under the current system. Moving to a national system of organ allocation in which the HHS secretary may step in at any time to correct

inequalities would seem to be needed. But, the relevant inequality is waiting times, not the receipt of an organ at all. It is impossible to equalize the receipt of an organ because there are not enough to go around. And even then, there are not enough at any one time to accommodate those with the most critical needs due to factors not affected by any single allocation decision. So to say that the allocation of an organ to a particular patient is not fair because some wait longer does not seem to cause us to reject the decision as unfair.

So far, according to the criteria of Rawlsian fairness, there does not seem to be a strong reason to reject outright an allocation decision based on existing rules. Now we turn to the communitarian criteria. These criteria ask decision makers to consider the underlying values embedded in communities of belief and to consider the virtues of citizenship that should be fostered. In the first place the rules and community values embedded in the medical community, both in letter and spirit, are supported by any given allocation decision. The spirit of the healing arts is to do everything possible for patients, consistent with medical technology, the concept of triage and available resources. Often, the expense and effort expended to transplant an organ gives a patient a year or two of extra life, sometimes much more than this. Still, no effort is spared for any patient, and the diligent adherence to the ethos of medical care givers is only enhanced when a decision is made to transplant an organ. Past practice reinforces the decisions made, and because of the considerable effort expended to learn from the success or failure of transplant operations, precedent improves objective medical criteria and therefore the fairness of the allocation decision.

The model next asks physicians to consider the relevant communities and what they would regard as fair. Of course the opinions of the political community that set the criteria are known, as revealed in the explicit enabling legislation and agency regulations. The opinions of physicians and administrators are incorporated throughout the clinical criteria for making the allocation decision. All of these are reviewed frequently and the resulting analysis is available for public inspection. For these two communities, then, the nature of what constitutes fairness in this particular policy area is evident. But, the opinions of patients about the fairness of the decision in any particular case is less clear, nor is there much information available to know how patients perceive the entire organ allocation system. Similarly, there is little known about how the public broadly, the pool of potential donors, perceive the allocation system. We know that when organs are allocated locally, people are more likely to become donors. Many believe it is unfair to harvest organs and then ship them out of state or across the country for transplant. This may be a contraindication to the establishment of a national waiting list because such a list may seen to be unfair. But how much weight should be given to this sentiment?

This last point bears some discussion. In communitarian theory, fairness is not necessarily relevant because of its intrinsic value, but because of the underlying virtues that give fairness its importance. In this case, it may be the value of strengthening local ties and affections that should receive priority. By agreeing to donate their organs, most donors believe they are helping people in their hometown or at least people nearby. They have some common base of experience with them, and they may feel good about a decision to help save their lives. But the more remote the potential donor feels from the recipient, the less likely they are to donate. This indicates an underlying value of helping

people in the community first – placing a priority on local ties and local relationships. If the decision to allocate an organ following the new guidelines put into effect in the Clinton administration cause more organs to be allocated across state lines, the policy may increasingly be seen as unfair. Similarly, any particular decision may be seen as unfair, too. People do not seem to trust the decision making of "Washington bureaucrats" as much as they do the decision of their own physicians. Removing authority to Washington, centralizing decision-making power, may harm fairness of public policy making by undermining the values communities believe comprise fairness.

Finally, the model asks decision-makers to consider the organ allocation decision according to the criteria of political judgment. The first question the model poses is whether the administrator is comfortable that the decision he or she is making – whether it conforms to their best judgment. Clearly, it would violate every principle of professional ethics for physicians or administrators to perpetuate a system they believed to be patently unfair. So, there must be some minimal comfort level with every decision. In some cases, however, the decision maker may well wish that they didn't have to make the particular decision they did. They may believe that a certain patient should have received an organ instead of the one the "system" indicates should receive it. These feelings are impulses to fairness that may not be supported by the relevant medical criteria, established rules or clinical practice. Nevertheless, the physician is often in the best position to determine when rules need to be modified, when conditions mandate a different outcome as being more fair. The current system allows physicians to act on the basis of such hunches, but only according to prescribed procedures and subject to peer review. It may be that the non-clinical factors of a particular case warrant deviation from

established policies. Similarly, patients can be moved from one category of the waiting list to another in spite of scientific analysis of their case. Physicians can petition that their patients be upgraded based on factors they believe have been overlooked in the traditional analysis. By the end of this process, with the available petitions and appeals considered, it seems as though physicians should be able to satisfy themselves that the decision they make corresponds to their best judgment and conforms to the relevant professional and ethical rules.

The model next asks whether the allocation decision has been validated by democratic dialogue. Of course the delegation of implementation power to a contractor was the result of open Congressional debate. The formulation of rules is published and available to the public free of charge. So in this sense, the criteria now exist as the result of democratic debate and open discussion of the relevant viewpoints. But no particular organ allocation decision is made with the same openness. Naturally, the physicians themselves may consult each other, but this is not open or democratic in the usual sense. Oversight of each and every decision by UNOS may be the minimum oversight democratic decision-making requires. It may also be necessary for HHS to assert more aggressively its review authority over individual decisions, whether they are made pursuant to a national waiting list or conform to the current regional plan. But the openness of the decision and the opportunity for those affected by it to have a voice in it is important for the decision to be seen as valid. It is imperative that patients and their families have a voice at every step along the way in the decision. It is also important that every decision be transparent to those who are still waiting for an organ. They will accept decisions they believe conform to democratic processes than those made behind

closed doors. It may be difficult for physicians to adapt to a system of participatory decision-making, but the needs of fairness may necessitate such an adaptation.

Finally, the model asks whether the particular decision to grant an organ to a particular patient is an example of subsuming a particular case under a broad moral principle. It seems that several principles take priority in any organ allocation decision. The first is the sanctity of all human life, and the principle that public resources are properly allocated to the preservation of life when it is possible to do so. Another principle is that the relevant characteristics to consider about patients is not their race, income, education or religion, but rather their status as a patient, the level of need based on objective medical criteria and their character. By character I do not mean whether they are nice people or whether they respect the rights of others. Instead I mean their optimism, dedication to the demanding regimen of post-operative physical therapy and the likelihood that they can conform to a lifetime of behavior modification that will give them the best chance at full recovery. This is important because of another principle – that the organ itself is a precious commodity, a rare social good that some receive only at the expense of others, and that its receipt implies a responsibility to use it in the most effective manner possible. All these principles are important, widely and uncontroversially held. They are reinforced when the decision is made to allocate an organ according to the system currently in place. The conformity of the decision to prominent moral principles thus reinforces the fairness of the decision and validates the reasoned judgment by which the decision was reached.

The decision to allocate an organ according to rules in place today, considered as a unity of complex and sometimes competing criteria, can be considered fair. There are a

few problem areas, the fairness of outcomes considering race and wealth, and characteristics of a national versus a regional allocation scheme. It should come as no surprise that these are the very elements most closely scrutinized by Congress, HHS, physicians and patients' rights groups. But assuming for the moment that the concern about these factors can be adequately answered, it would seem that a physician or administrator could make a decision to transplant an organ into a given patient, consistent with existing policy, secure in the knowledge that that particular decision was fair.

The Further Study of Fairness

Several areas for further study of fairness in American politics and culture suggest themselves. With regard to the case study presented here, it would be helpful to have a better understanding of public attitudes toward the current system of organ allocation, especially among those on the organ waiting list. Careful examination of the effect of health insurance and wealth on transplantation seems justified.

It would also be helpful to understand better the application of fairness in other policy areas. What are the underlying principles that cause some to question the fairness of tax policy, affirmative action in college admissions or the sentencing of convicted criminals? As mentioned before, discussions of fairness often assert the idea of fairness as being well understood or as conforming to a simple notion of equality. In fact, the concept of fairness is far more complex than many people acknowledge. Any systematic attempt to understand the fairness of particular policy areas would add much to our understanding of how fairness is worked out in contemporary politics.

The topic of fairness as a part of the field of political theory may also bear further analysis. The controversies that most easily justify further study of fairness may arise most visibly within particular policy areas, but the concept of fairness itself is not without theoretical controversy. A question brought up several times in this dissertation is the question of whether or not the pursuit of fairness is really desirable in the first place. If there is something inherently undesirable about expanding our concern for fairness, is it because of the relational nature of fairness? Demanding fair treatment may set people or groups at odds with each other. To know what fairness means requires a comparison between ourselves and others, between the treatment one group of people receive in a given situation and the treatment others receive in the same situation. An appropriate topic for further discussion would attempt to answer this question: Does the pursuit of fairness tend to further splinter an already fragmented society?

Another question that may bear fruit is the question of fairness in the most abstract sense: Is there a unitary standard that can guide our thinking about fairness? I concluded here that there is no single way of expressing fairness that would be useful for public administrators. But a less practical focus may yield different results. There may be a more permanent standard for fairness that proceeds from a more abstract reflection.

I have concluded that it is difficult to speak about some overarching standard for fairness when considered from a practical standpoint. Fairness corresponds to the treatment we receive and the treatment other receive, as for instance, the average waiting times for those in need of an organ transplant. It is considered unfair for patients to wait, but only if others do not have to wait as long. If all waiting times were very long but equal, we could presumably call the system fair. To take another example, it might be

considered unfair to pay a certain percentage of taxes, but only if others pay less. And it would be considered unfair to give some access to education or jobs but not others – not because of any affirmation of the rightness of this access, but simply because others receive it.

So the quest for fairness in concrete political action requires constant comparison between groups or individuals. This quest also requires a constant flow of information for making such assessments; a role filled today with eagerness by the news media who point out the disparities that lurk in nearly every significant public policy. Expectations for fair treatment are elevated when it is easy to observe the greater income or prestige some receive and others lack. If there is a diminished emphasis on such expectations, evaluations of the overall level of social fairness might rise. Conversely, if such expectations are pushed continuously, the perceived fairness of social and political institutions is likely to fall.

Care must be taken in evaluating information about the status of groups and individuals. Claims of unfairness often conceal a partisan motive. It is easy to claim that rules of procedure or policy outcomes are unfair when they work against a particular group or individual in a particular case. For instance, many claimed the recount of ballots in the Florida presidential election was unfair at each step, even though constitutional and judicial rules sanctioned each step. But fair procedure can produce unfair policy, as has been witnessed many times throughout our nation's history. We see again that fairness is relational – it is impossible to make a definitive judgment of fairness without knowing how others are treated in similar circumstances.

There is usually no absolute claim that a certain distribution is fair, merely a comparative claim. To evaluate policy against standards of fairness is to evaluate it according to the claims of groups for their share of scarce social goods. Because in many situations precisely similar treatment is not possible, legislators may be unable to produce policy that satisfies anyone. They may never be able to deliver a final or complete level of fairness.

For citizens to evaluate fairness, they are required to measure the treatment they receive relative to the treatment others receive. Further, some may not value fairness as highly as others. Those citizens disposed to make sacrifices for others even when such sacrifice works to their own detriment (for example, by military service), might well consider their position fair even though they experience severe restrictions on personal liberty and risk harm to themselves. This does not correspond to any preconceived proper distribution of the benefits and burdens of social cooperation. It corresponds to a personal ethic of sacrifice, service and patriotism that not even they would expect in equal measure from all their fellow citizens. Fairness, as the communitarians point out, also relates to the cherished virtues embedded in culture.

But the virtues of culture vary, and this is what makes implementation of fair policy problematic. Public administrators make judgments about the fairness of policy when stake-holders have competing and incompatible notions of fairness. In order to make decisions they must depend on a well-developed aptitude for judgment, an educated sense for achieving the fairest outcome circumstances permit without neglecting the influence of significant comprehensive doctrines. That is why my model for judging fairness requires administrators to consider the Rawlsian principles of justice --

procedural fairness, reciprocity, equality -- as well as the communitarian principles that political action should aim at the social ends expressed in law and administrative and judicial practice.

There is a Solomon-like expectation of administrators who are placed in the position of deciding what is fair when they cannot assign equal amounts of social goods to all who want them. Human organs, for instance, cannot be divided, and some will die waiting for a fair distribution. The capacity for making this judgment requires that underlying priorities be assigned by law, that technical knowledge be available for easy consultation and that pre-arranged procedures be followed. Still, there will be the odd case in which strict application of procedures results in unfair outcomes according to the basic virtues of fairness residing in culture.

The judgment of fairness in such cases requires a keen sense both of what fairness means in politics and what it means in culture. Those who make such judgments may just as often find themselves addressing social expectations in civic relations as they are in applying laws and making practical judgments. Such are the complex requirements of our pervasive desire to achieve "simple" fairness.

Bibliography

Adams, J.Stacy. "Inequality in Social Exchange." In *Advances in Experimental Social Psychology*, edited by Leonard Berkowitz and Elaine Walster, 267-99. New York: Academic Press, 1976.

Ainsworth, Mary Dinsmore Salter. "Object Relations, Dependency and Attachment: A Theoretical Review of the Infant-Mother Relationship." *Child Development* 40 (1969): 969-1025.

Anderson, Mark F. "The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?" *Health Matrix: Journal of Law and Medicine*. 5 (1995).

Aristotle. *Nicomachean Ethics*. Translated by Terence Irwin. Indianapolis: Hackett Publishing Company, 1985.

___. *Politics*. Translated by Benjamin Jowett. New York: The Modern Library, 1942.

Arnhart, Larry. *Aristotle and Political Reasoning: A Commentary on the "Rhetoric."* DeKalb, Ill.: Northern Illinois University Press, 1981.

Barber, Benjamin R. "The Compromised Republic: Public Purposelessness in America." In *Moral Foundations of the American Republic*. Edited by Robert H. Horowitz. Charlottesville, Va.: University of Virginia Press, 1986.

___. *The Conquest of Politics: Liberal Philosophy in Democratic Times*. Princeton, N.J.: Princeton University Press, 1988.

Bardach, Eugene. *The Implementation Game*. Cambridge, Mass.: The MIT Press, 1979.

Bartlett, Robert C. "Aristotle's Science of the Best Regime." *American Political Science Review*. 88 (1994): 143-55.

Beiner, Ronald. *Political Judgment*. Chicago: University of Chicago Press, 1983.

_____. *What's the Matter With Liberalism?* Berkeley, Calif.: University of California Press, 1992.

Bellah, Robert N. et al., *Habits of the Heart*. Berkeley, Calif: University of California Press, 1985.

Berlin, Isaiah. "On Political Judgment." *New York Review of Books*. 3 October 1996.

Blum, Lawrence. "Particularity and Responsiveness." In *The Emergence of Morality in Young Children*, edited by Jerome Kagan and Sharon Lamb, 306-37. Chicago: University of Chicago Press, 1987.

Brickman, Phillip. "Preference for Inequality." *Sociometry* 40 (1977): 303-310.

Broome, John. "Selecting People Randomly." *Ethics* (1984): 38-55.

Calabresi, Guido and Philip Bobbitt. *Tragic Choices*. New York: Norton, 1978.

Cate, Fred H. "Human Organ Transplantation: The Role of Law." *Journal of Corporation Law* 20 (1994): 69-89.

Cooper, John M. *Reason and Human Good in Aristotle*. Indianapolis: Hackett Publishing Company, 1986.

Cooper, Martha. "Decentering Judgment: Toward a Postmodern Communication Ethic." In *Judgment Calls: Rhetoric, Politics and Indeterminacy*, edited by John M. Sloop and James P. McDaniel, 63-83. Boulder, Colo.: Westview Press, 1998.

Cooper, Phillip J. "Critical Issues in Public Law and Public Administration," in *Handbook of Public Administration*, 2d ed., edited by Jack Rabin, et al., 681-7. New York: Marcel Decker, 1998.

Cooper, Terry L. *An Ethics of Citizenship for Public Administration*. Englewood Cliffs, N.J.: Prentice Hall, 1991.

_____. *The Responsible Administrator*, 2d ed. New York: National University Publications, 1986.

Crosby, F. "A Model of Egoistical Relative Deprivation." *Psychological Review* 53 (1976): 340-51.

Daniels, Norman. "Equal Liberty and Unequal Worth of Liberty." *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* edited by Norman Daniels, 253-81. Stanford, Calif.: Stanford University Press, 1989.

Department of Health and Human Services. "Organ Procurement and Transplantation Network; Final Rule." *Federal Register* 63 (April 2, 1998): 16295-16338.

Derthick, Martha. *Agency Under Stress: The Social Security Administration in American Government*. Washington, D.C.: The Brookings Institution, 1990.

Diamond, Martin. "Ethics and Politics: The American Way." In *Moral Foundations of the American Republic*, edited by Robert H. Horowitz, 75-108. Charlottesville, Va.: University of Virginia Press, 1986.

Dworkin, Ronald. "The Original Position." In *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* edited by Norman Daniels, 16-53. Stanford, Calif.: Stanford University Press, 1989.

Elazar, Daniel J. *American Federalism: A View From the States*. 2nd ed. New York: Crowell, 1972.

Etzioni, Amitai. Introduction to *The Essential Communitarian Reader*. Lanham, Md.: Roman & Littlefield Publishers, 1998.

Ferrara, Alessandro. *Justice and Judgment*. London: Sage Publications, 1999.

Flower, David C. "State Discretion in Funding Organ Transplants Under the Medicaid Program: Interpretive Guidelines in Determining the Scope of Mandated Coverage." *Minnesota Law Review* 70 (1995): 1233-1277.

Frolich, Norman and Joe Oppenheimer. *Choosing Justice: An Experimental Approach to Ethical Theory*. Berkeley, Calif.: University of California Press, 1992.

Furman, Jesse. "Political Liberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice." *Yale Law Journal* 106 (1997): 1197-1231.

Galston, William. "Political Theory in the 1980s: Perplexity Amid Diversity." *Political Science: The State of the Discipline II*, edited by Ada W. Finifter. The American Political Science Association, 1993.

Garland, Michael J. and Romana Hasnain. *Health Care in Common: Setting Priorities in Oregon*. Hastings-on-Hudson, N.Y.: Institute of Society, Ethics and the Life Sciences, 1990.

Garofalo, Charles and Dean Geuras. *Ethics in the Public Service: The Moral Mind At Work*. Washington, D.C.: Georgetown University Press, 1999.

Glendon, Mary Ann. *Rights Talk*. New York: The Free Press, 1991.

___. "Absolute Rights: Property and Privacy." In *The Essential Communitarian Reader*, edited by Amatai Etzioi, 107-114. Lanham, Md.: Roman & Littlefield Publishers, 1998.

Greenberg, J. "Organizational Justice : Yesterday, Today and Tomorrow." *Journal of Management*. 16 (1990): 399-432.

Gutmann, Amy. "Communitarian Critics of Liberalism." *Communitarianism and Individualism*, edited by Shlomo Avineri and Avner DeShalit. Oxford: Oxford University Press, 1992.

Guttman, Ronald D. "Cadaver Kidneys: The Rules of Rationing." *Lancet* 348 (1996): 456-7.

Habermas, Jürgen. *Between Facts and Norms*. Cambridge, Mass.: The MIT Press, 1998.

Hare, R.M. "Rawls' Theory of Justice." In *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* edited by Norman Daniels, 81-107. Stanford, Calif.: Stanford University Press, 1989.

Harris v. McRae., 448 U.S. 297 (1980).

Harmon, Michael. "The Responsible Actor as 'Tortured Soul': The Case of Horatio Hornblower." In *Images and Identities in Public Administration*, edited by Henry D. Kass and Bayard L. Catron, 151-82. Newbury Park, Calif.: Sage, 1990.

Hart, H.L.A. "Rawls on Liberty and Its Priority." In *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice,"* edited by Norman Daniels, 230-52. Stanford, Calif.: Stanford University Press, 1989.

Health Omnibus Programs Extension of 1988. U.S. Statutes at Large 100 (1988): 3048.

Hochshield, Jennifer L. *What's Fair: American Beliefs About Distributive Justice.* Cambridge, Mass.: Harvard University Press, 1981.

Holtmann, Alphonse. "Beyond Efficiency: Economics and Distributional Analysis." in *Policy Analysis and Economics: Developments, Tensions, Prospects*, edited by David Weimer, 45-64. Boston: Kluwer Academic Press, 1991.

Jackson, Shirley. "The Lottery." *The New Yorker*, 26 June 1948.

Jacobson, Norman. *Pride and Solace*. Berkeley, Calif.: University of California Press, 1978.

Jaffe, Erik S., John M. Herre and John H. Carson. "Eliminating Artificial Barriers to the Equitable Distribution of Hearts for Transplantation." *Journal of Corporation Law*. 20 (1994): 109-138.

Kagan, Jerome. *The Second Year*. Cambridge, Mass.: Harvard University Press, 1981.

___. *The Nature of the Child.* New York: Basic Books, 1984.

Kant, Immanuel. "What is Enlightenment?" In *Foundations of the Metaphysics of Morals and What is Enlightenment?* 2nd ed, translated by Lewis White Beck. Upper Saddle River, N.J.: Prentice Hall, 1995.

Kass, Henry D. "Prologue: Emerging Images and Themes in the Reexamination of American Public Administration." In *Images and Identities in Public Administration*, edited by Henry D. Kass and Bayard L. Catron, 9-19. Newbury Park, Calif.: Sage Publications, 1990.

Klosko, George. "Political Constructivism in Rawls' *Political Liberalism*." *American Political Science Review* 91 (1997): 635-46.

Koenig, Louis W. *An Introduction to Public Policy*. Englewood Cliffs, N.J.: Prentice-Hall, 1986.

Kohlberg, Lawrence. *The Psychology of Moral Development*. New York: Harper & Row, 1984.

Krasnoff, Larry. "Consensus, Stability, and Normativity in Rawls' "*Political Liberalism*." *Journal of Philosophy* 95 (1998): 269-92.

Kukathas, Chandran and Phillip Pettit. *Rawls: A Theory of Justice and Its Critics*. Stanford, Calif.: Stanford University Press, 1990.

Lipsky, M. *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation, 1980.

"Liver Styles of the Rich and Famous." *Time* 19 June 1995.

Lovecky, Dierdre V. "Identity Development in Gifted Children: Moral Sensitivity." *Roeper Review* 20 (1997): 90-95.

MacIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. 2nd edition. Notre Dame, Ind.: University of Notre Dame Press, 1984.

___. *Whose Justice? Which Rationality?* Notre Dame, Ind." University of Notre Dame Press, 1988.

Marwell, Gerald and Ruth E. Ames. "Experiments on the Provision of Public Goods. I. Resources, Interest, Group Size, and the Free-Rider Problem." *American Journal of Sociology*, 84 (1979): 1335-60.

Matthews, Gareth B. *The Philosophy of Childhood*. Cambridge, Mass.: Harvard University Press, 1994.

McGee, Michael Calvin. "*Phronesis* in the Gadamer Versus Habermas Debate." In *Judgment Calls: Rhetoric, Politics and Indeterminancy*, edited by John M. Sloop and James P. McDaniel, 13-41. Boulder, Colo.: Westview Press, 1998.

McMenamin, Brgid. "Why People Die Waiting for Organ Transplants." *Forbes*. 11 March 1996.

McWilliams, Wilson Cary. "On Equality as the Moral Foundation for Community." In *The Moral Foundations of the American Republic*, edited by Robert H. Horowitz, 282-312. Charlottesville, Va.: University of Virginia Press, 1986.

Miller, Gary J. and Joe A. Oppenheimer. "Universalism in Experimental Committees." *American Political Science Review* 76 (1982): 561-574.

Moore Mark H. *Creating Public Value: Strategic Management in Government*. Cambridge, Mass.: Harvard University Press, 1995.

Murphy, Andrew R. "Rawls and a Shrinking Liberty of Conscience." *Review of Politics* 60 (1998): 247-76.

National Organ Transplant Act, U.S. Statutes at Large 98 (1984): 2339.

Oaks, Dallin H. "Rights and Responsibilities." In *The Essential Communitarian Reader*, edited by Amatai Etzioi, 97-106. Lanham, Md.: Roman & Littlefield Publishers, 1998.

O'Neill, Onora. *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*. Cambridge Unversity Press, 1998.

Orentlicher, David. "Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick." *Harvard Civil Rights-Civil Liberties Law Review*. 31 (1996): 49-87.

Organ Transplant Amendments Act of 1988, U.S. Statutes at Large 100 (1988): 3116.

Pagge, Thomas W. *Realizing Rawls*. Ithaca, N.Y.: Cornell University Press, 1989.

Palumbo, Dennis J. and Donald J. Calista, eds. *Implementation and the Policy Process: Opening Up the Black Box*. New York: Greenwood Press, 1990.

Parekh, Bhikhu. "Theorising Political Theory." *Political Theory* 27 (1999): 398-413.

Pitkin, Hanna Fenichel. *The Concept of Representation*. Berkeley, Calif.: University of California Press, 1972.

Pressman, Jeffrey L. and Aaron Wildavsky. *Implementation*. Berkeley, Calif.: University of California Press, 1984.

Putnam, Robert D. *Making Democracy Work*. Princeton, N.J.: Princeton University Press, 1993.

Putnam, Ruth Anna. "Neither a Beast Nor a God," *Social Theory and Practice* [online] 26 (2000) Accessed 12 February 2001. Accession no. A66681251. Available from InfoTrac.

___. "Tuning In, Turning Out: The Strange Disappearance of Social Capital in America. *PS: Political Science and Politics* 28 (1995): 664-683.

Quinn, Kevin P. "Viewing Health Care as a Common Good: Looking Beyond Political Liberalism." *Southern California Law Review* 73 (2000): 277-375.

Rawls, John. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press, 1971.

___. *Political Liberalism*. New York: Columbia University Press, 1996.

Raz, Joseph. "Facing Diversity: The Case of Epistemic Abstinence." *Philosophy and Public Affairs* 19 (1990): 3-46.

Rescher, Nicholas. "The Allocation of Exotic Medical Lifesaving Therapy." *Ethics* 79 (1969): 173-186.

Rhodes, James M. "Right by Nature." *Journal of Politics* 53 (1991): 318-39.

Rohr, John A. *Ethics for Bureaucrats: An Essay on Law and Values*. New York: Marcel Decker, 1978.

Ross, W.D. *Aristotle*. New York: Meridian Books, 1959.

Ruderman, Richard S. "Aristotle and the Recovery of Political Judgment." *American Political Science Review* 91 (1997): 409-20.

Salkever, Stephen G. *Finding the Mean: Theory and Practice in Aristotelian Political Philosophy*. Princeton, N.J.: Princeton University Press, 1990.

Sandel, Michael J. "The Procedural Republic and the Unencumbered Self. *Political Theory* 12 (1984): 81-96.

___. "The Political Philosophy of the Procedural Republic." In *The Power of Public Ideas*, edited by Robert B. Reich. Cambridge, Mass.: Harvard University Press, 1990.

___. *Democracy's Discontent: American in Search of a Public Philosophy*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 1996.

___. *Liberalism and the Limits of Justice*. Cambridge University Press. 2nd ed, 1998.

Schaefer, David Lewis. *Justice or Tyranny?: A Critique of John Rawls's A Theory of Justice*. Port Washington, N.Y.: Kennikat Press, 1979.

Scheffler, Samuel. "The Appeal of Political Liberalism." *Ethics* 105 (1994): 4-22.

Selznick, Philip. "Foundations of Communitarian Liberalism," In *The Essential Communitarian Reader*, edited by Amatai Etzioni, 3-13. Lanham, Md.: Rowman & Littlefield, 1998.

Sloop, John M. and James P. McDaniel, eds. *Judgment Calls: Rhetoric, Politics and Indeterminacy.* Boulder, Colo.: Westview Press, 1998.

Steinberger, Peter J. *The Concept of Political Judgment.* Chicago: University of Chicago Press, 1993.

Stern, Daniel N. *The Interpersonal World of the Infant.* New York: Basic Books, 1985.

Taylor, Charles. "Atomism." In *Powers, Possessions, and Freedom: Essays in Honour of C.B. Macpherson*, edited by Alkis Kontos. Toronto: University of Toronto Press, 1979.

___. "Cross-Purposes: The Liberal-Communitarian Debate." In *Liberalism and the Moral Life,* edited by Nancy Rosaublum. Boston: Harvard University Press, 1989.

___. "The Dangers of Soft Despotism." In *The Essential Communitarian Reader*, edited by Amatai Etzioi. Lanham, Md.: Roman & Littlefield Publishers, 1998: 47-54.

Transplant Amendments Act of 1990, U.S. Statutes at Large 101 (1990): 3279.

Tyler, T.R. and A. Caine. "The Influence of Outcomes and Procedures on Satisfaction with Formal Leaders." *Journal of Personality and Social Psychology* 41 (1981): 642-55.

U.S. v. Holmes. 26 F. Cas. 360 (E.D. Pa. 1842).

Van den Bos, Kees; Henk A.M. Wilke; E. Allan Lind and Riël Vermut. "Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments." *Journal of Personality and Social Psychology* 74 (1998): 1493-1503.

Van den Bos, Kees, Riël Vermut and Henk A.M. Wilke. "Procedural and Distributive Justice: What is Fair Depends More on What Comes First Than on What Comes Next." *Journal of Personality and Social Psychology.* 72 (1997): 95-104.

Vermut, Riël, Eric Blaauw and E. Allan Lind. "Fairness Evaluations of Encounters with Police Officers and Correctional Officers. *Journal of Applied Social Psychology* 28 (1998): 1107-24.

Walster, Elaine., G.William Walster and Ellen Berscheid, in collaboration with William Austin, Jane Traupmann and Mary K. Utne. *Equity: Theory and Research*. Boston: Allyn and Bacon, 1978.

Walzer, Michael. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983.

Warwick, Donald P. in *Public Duties: The Moral Obligations of Government Officials*, edited by Joel L. Fleishman, Lance Liebman and Mark H. Moore. Cambridge, Mass.: Harvard University Press, 1981: 93-127.

Weigert, David L. "Tragic Choices: State Discretion over Organ Transplantation Funding for Medicaid Recipients." *Northwestern University Law Review*. 89 (1994): 268-317.

Weir, Robert F. "The Issue of Fairness in the Allocation of Organs." *The Journal of Corporation Law*. 20 (1994): 91-108.

Zajac, Edward E. *Political Economy of Fairness*. Cambridge, Mass.: The MIT Press, 1995.

Appendix

Table 1

A MODEL FOR DETERMINING FAIRNESS IN ADMINISTRATIVE DECISION MAKING FOR A PERSON SEEKING AN UNEQUAL (GREATER) SHARE OF A SOCIAL GOOD

First Principle of Rawlsian Justice:	Is access to social goods equal in the contemplated distribution?	--- no --- unfair
	yes	
	Will contemplated distribution ensure benefits are available for others?	--- no --- unfair
	yes	
Second Principle of Rawlsian Justice:	Can the person seeking contemplated distribution be considered among the least advantaged?	--- no --- unfair
	yes	
	Have others in similar circumstances had access to the contemplated distribution?	--- no --- unfair
	yes	
Determining Rawlsian Fairness	Have fair procedures been followed in achieving the contemplated distribution?	--- no --- unfair
	yes	
	Will implementing the contemplated distribution enhance reciprocal relations between relevant parties?	--- no --- unfair

Continued on next page

Table 1--*Continued*

	yes
	Will the contemplated distribution produce equal results, with the least advantaged receiving any greater distribtions? --- no --- unfair
	yes
Communitarian Fairness	Do agency rules permit the contemplated distribution? --- no --- unfair
	yes
	Does the spirit of relevant rules permit the contemplated distribution? --- no --- unfair
	yes
	Is the contemplated distribution consistent with past practice or precedent? --- no --- unfair
	yes
	Will the relevant communities approve of the contemplated distribution? --- no --- unfair
	yes
	Does agency management approve of the contemplated distribution? --- no --- unfair
	yes
	Do the circumstances of the individual justify the contemplated distribution? --- no --- unfair
	yes
Requirements of Political Judgment	Does the contemplated distribution conform to the administrator's best judgment? --- no --- unfair
	yes
	Does the contemplated distribution conform

Continued on next page

Table 1—*Continued*

