

0001 SPEAKER 1: Last time we talked about Kant's Categorical Imperative.
0002 And we considered the way he applied the idea of the categorical imperative
0003 to the case of lying.
0004 I want to turn briefly to one other application of Kant's moral theory.
0005 And that's his political theory.
0006 Now Kant says that just laws arise from a certain
0007 kind of social contract.
0008 But this contract, he tells us, is of an exceptional nature.
0009 What makes the contract exceptional is that it's not an actual contract that
0010 happens when people come together and try to figure out what the
0011 constitution should be.
0012 Kant points out that the contract that generates justice is what he calls an
0013 idea of reason.
0014 It's not an actual contract among actual men and women gathered in a
0015 constitutional convention.
0016 Why not?
0017 I think Kant's reason is that actual men and women gathered in a real
0018 constitutional convention would have different interests, values, aims.
0019 And there would also be differences of bargaining power and differences of
0020 knowledge among them.
0021 And so the laws that would result from their deliberations wouldn't
0022 necessarily be just, wouldn't necessarily conform to principles of
0023 right, but would simply reflect the differences of bargaining power, the
0024 special interests, the fact that some might know more than others about law
0025 or about politics.
0026 So Kant says, "A contract that generates principles of right is
0027 merely an idea of reason.
0028 But it has undoubted practical reality because it can oblige every legislator
0029 to frame his laws in such a way that they could have been produced by the
0030 united will of the whole nation."
0031 So Kant is a contractarian.
0032 But he doesn't trace the origin or the rightness of law to any
0033 actual social contract.
0034 This gives rise to an obvious question.
0035 What is the moral force of a hypothetical contract, a contract that

0036 never happened?

0037 That's the question we take up today.

0038 But in order to investigate it, we need to turn to a modern philosopher,

0039 John Rawls, who worked out in his book, A Theory of Justice, in great

0040 detail an account of a hypothetical agreement as the basis for justice.

0041 Rawls' theory of justice, in broad outline, is parallel to Kant's in two

0042 important respects.

0043 Like Kant, Rawls was a critic of utilitarianism.

0044 "Each person possesses an inviolability founded on justice,"

0045 Rawls writes, "that even the welfare of society as a whole cannot override.

0046 The rights secured by justice are not subject to political bargaining or to

0047 the calculus of social interests."

0048 The second respect in which Rawls' theory follows Kant's is on the idea

0049 that principles of justice, properly understood, can be derived from a

0050 hypothetical social contract, not an actual one.

0051 And Rawls works this out in fascinating detail with the device of

0052 what he calls the veil of ignorance.

0053 The way to arrive at the rights, the basic rights that we must respect, the

0054 basic framework of rights and duties, is to imagine that we were gathered

0055 together trying to choose the principles to govern our collective

0056 lives without knowing certain important

0057 particular facts about ourselves.

0058 That's the idea of the veil of ignorance.

0059 Now, what would happen if we gathered together, just as we are here, and

0060 tried to come up with principles of justice to govern our collective life?

0061 There would be a cacophony of proposals, of suggestions, reflecting

0062 people's different interests.

0063 Some are strong.

0064 Some are weak.

0065 Some are rich.

0066 Some are poor.

0067 So Rawls says, imagine instead that we are gathered in an original position

0068 of equality.

0069 And what assures the equality is the veil of ignorance.

0070 Imagine that we are all behind a veil of ignorance which temporarily

0071 abstracts from or brackets, hides from us, who in particular we are, our

0072 race, our class, our place in society, our strengths, our weaknesses, whether

0073 we're healthy or unhealthy.

0074 Then, and only then, Rawls says the principles we would agree to would be

0075 principles of justice.

0076 That's how the hypothetical contract works.

0077 What is the moral force of this kind of hypothetical agreement?

0078 Is it stronger or weaker than a real agreement, an actual social contract?

0079 In order to answer that question, we have to look hard at the moral force

0080 of actual contracts.

0081 There are really two questions here.

0082 One of them is, how do actual contracts bind me or obligate me?

0083 Question number one.

0084 And question number two, how do actual real life contracts justify the terms

0085 that they produce?

0086 If you think about it--

0087 this is in line with Rawls and Kant.

0088 The answer to the second question, how do actual contracts justify the terms

0089 that they produce, the answer is, they don't, at least not on their own.

0090 Actual contracts are not self-sufficient moral instruments.

0091 Of any actual contract or agreement, it can always be asked, is it fair

0092 what they agreed to?

0093 The fact of the agreement never guarantees the

0094 fairness of the agreement.

0095 And we know this by looking at our own Constitutional Convention.

0096 It produced a constitution that permitted slavery to persist.

0097 It was agreed to.

0098 It was an actual contract.

0099 But that doesn't establish that the laws agreed to, all

0100 of them, were just.

0101 Well then, what is the moral force of actual contracts?

0102 To the extent that they bind us, they obligate in two ways.

0103 Suppose--

0104 maybe here it would help to take an example.

0105 We make an agreement, a commercial agreement.

0106 I promise to pay you \$100 if you will go harvest and

0107 bring to me 100 lobsters.

0108 We make a deal.

0109 You go out and harvest them and bring them to me.

0110 I eat the lobsters, serve them to my friends.

0111 And then I don't pay.

0112 And you say, but you're obligated.

0113 And I say, why?

0114 What do you say?

0115 Well, we had a deal.

0116 And you benefited.

0117 You ate all those lobsters.

0118 Well, that's a pretty strong argument.

0119 It's an argument that depends, though, on the fact that I

0120 benefited from your labor.

0121 So contracts sometimes bind us insofar as they are

0122 instruments of mutual benefit.

0123 I ate the lobsters.

0124 I owe you the \$100 for having gathered them.

0125 But suppose--

0126 now take a second case.

0127 We make this deal.

0128 I'll pay you \$100 for 100 lobsters.

0129 And two minutes later, before you've gone to any work, I call you back and

0130 say, I've changed my mind.

0131 Now, there's no benefit.

0132 There's no work on your part.

0133 So there's no element of reciprocal exchange.

0134 What about in that case?

0135 Do I still owe you, merely in virtue of the fact that we had an agreement?

0136 Those of you who say, yes, I still owe you.

0137 Why?

0138 OK, stand up.

0139 Why do I owe you?

0140 I call you back after two minutes.

0141 You haven't done any work.

0142 JULIAN: I think I spent a time and effort in drafting this

0143 contract with you.

0144 And also I have emotional expectation that I'll go through the work.

0145 SPEAKER 1: So you took time to draft a contract.

0146 But we did it very quickly.

0147 We just chatted on the phone.

0148 JULIAN: That wouldn't be a formal form of contract though.

0149 SPEAKER 1: Well, I faxed it to you.

0150 It only took a minute.

0151 [LAUGHTER]

0152 JULIAN: As long as any effort is involved, I would say that the

0153 contract is valid.

0154 And it should take effect.

0155 SPEAKER 1: But why?

0156 What morally can you point to that obligates me?

0157 I admit that I agreed.

0158 But you didn't go do any work.

0159 I didn't enjoy any benefit.

0160 JULIAN: Because when I mentally go through all the work of

0161 harvesting the lobsters.

0162 SPEAKER 1: You mentally went through the work of harvesting the lobsters.

0163 That's nothing, is it?

0164 It's not much.

0165 Is it with \$100 that you were imagining yourself going and

0166 collecting lobsters?

0167 JULIAN: It may not worth \$100.

0168 But it may worth something to some people.

0169 SPEAKER 1: All right, I'll give you a buck for that.

0170 But what I-- so you're still pointing--

0171 what's interesting, you're still pointing to the reciprocal dimension

0172 of contracts.

0173 You did or imagined that you did or looked forward to doing

0174 something on my behalf.

0175 JULIAN: For example, two people agree to be married.

0176 And one suddenly calls the other in two minutes to say, I changed my mind.

0177 Does the contract have obligation on both sides?

0178 [LAUGHTER]

0179 JULIAN: Nobody has put in work.

0180 Or nobody has benefited yet.

0181 SPEAKER 1: Well, I'm tempted to say no.

0182 [LAUGHTER]

0183 JULIAN: Fine.

0184 [LAUGHTER AND APPLAUSE]

0185 SPEAKER 1: All right, what's your name?

0186 JULIAN: Julian.

0187 SPEAKER 1: Thank you, Julian.

0188 All right, that was good.

0189 Now, is there anyone who agrees with Julian that I still owe the money for

0190 any other reason?

0191 Now, I have--

0192 Go ahead.

0193 Stand up.

0194 ADAM: I think if you back out, it sort of cheapens the

0195 institution of contracts.

0196 SPEAKER 1: Good, but why?

0197 Why does it?

0198 ADAM: Well, I think this is kind of Kantian.

0199 But there's a certain intrinsic value in being able to make contracts and

0200 knowing that people will expect that you'll go through with that.

0201 SPEAKER 1: Good, there is some--

0202 it would cheapen the whole idea of contracts, which has to do with taking

0203 an obligation on myself.

0204 Is that the idea?

0205 ADAM: Yeah, I think so.

0206 SPEAKER 1: What's your name?

0207 ADAM: Adam.

0208 SPEAKER 1: So Adam points instead, not to any reciprocal benefit or mutual

0209 exchange, but to the mere fact of the agreement itself.

0210 We see here there are really two different ways in which actual

0211 contracts generate obligations.

0212 One has to do with the active consent as a voluntary act.

0213 And Adam said this was a Kantian idea.

0214 And I think he's right because it points to the ideal of autonomy.

0215 When I make a contract, the obligation is one that is self-imposed.

0216 And that carries a certain moral weight independent of other

0217 considerations.

0218 And then there's a second element of the moral force of contract arguments

0219 which has to do with the sense in which actual contracts are instruments

0220 of mutual benefit.

0221 And this points toward the ideal of reciprocity.

0222 That obligation can arise--

0223 I can have an obligation to you insofar as you do something for me.

0224 Now, we're investigating the moral force and also the moral limits of

0225 actual contracts.

0226 And here I would like to advance an argument about the moral limits of

0227 actual contracts, now that we know what moral ingredients do the work

0228 when people come together and say, I will do this if you do that.

0229 I would like to argue first that the fact that two people agree to some

0230 exchange does not mean that the terms of their agreement are fair.

0231 When my two sons were young, they collected baseball

0232 cards and traded them.

0233 And there was a two year age-- there is a two year age

0234 difference between them.

0235 And so I had to institute a rule about the trades that no trade was complete

0236 until I had approved it.

0237 [LAUGHTER]

0238 SPEAKER 1: And the reason is obvious.

0239 The older one knew more about the value of these cards and so would take

0240 advantage of the younger one.

0241 So that's why I had to review it to make sure that the

0242 agreements were fair.

0243 Now, you may say, well, this is paternalism.

0244 [LAUGHTER]

0245 SPEAKER 1: Of course it was.

0246 That's what paternalism is for, that kind of thing.

0247 So what does this show?

0248 What does the baseball card example show?

0249 The fact of an agreement is not sufficient to establish the fairness

0250 of the terms.

0251 I read some years ago of a case in Chicago.

0252 There was an elderly widow, an 84-year-old widow named Rose, who had

0253 a problem in her apartment with a leaky toilet.

0254 And she signed a contract with an unscrupulous contractor who offered to

0255 repair her leaky toilet in exchange for \$50,000.

0256 But she had agreed.

0257 She was of sound mind.

0258 It may be terribly naive and unfamiliar with the price of plumbing.

0259 She had made this agreement.

0260 Luckily, it was discovered.

0261 She went to the bank and asked to withdraw \$25,000.

0262 And the teller said, what do you need all of that money for?

0263 And she said, well, I have a leaky toilet.

0264 [LAUGHTER]

0265 SPEAKER 1: And the teller called authorities.

0266 And they discovered this unscrupulous contractor.

0267 Now, I suspect that even the most ardent contractarians in the room will

0268 agree that the fact of this woman's agreement is not a sufficient

0269 condition of the agreement being fair.

0270 Is there anyone who will dispute that?

0271 No one.

0272 Am I missing anyone?

0273 Alex, where are you?

0274 [LAUGHTER]

0275 SPEAKER 1: Where are you?

0276 [LAUGHTER]

0277 SPEAKER 1: So maybe there's no dispute then to my first claim that an actual

0278 agreement is not necessary to--

0279 is not a sufficient condition of there being an obligation.

0280 I want to now make a stronger maybe more controversial claim about the

0281 moral limits of actual contracts.

0282 A contract or an act of consent, is not only not sufficient.

0283 But it's not even a necessary condition of there being an

0284 obligation.

0285 And the idea here is that if there is reciprocity, if there is an exchange,

0286 a receipt of benefits, there can be an obligation even

0287 without an active consent.

0288 One great example of this involves the 18th century philosopher, the Scottish

0289 moral philosopher, David Hume.

0290 When he was young, Hume wrote a book arguing against Locke's idea of an

0291 original social contract.

0292 Hume heaped scorn on this contractarian idea.

0293 He said, "It was a philosophical fiction, one of the most mysterious

0294 and incomprehensible operations that can possibly be imagined, this idea of

0295 the social contract."

0296 Many years later, when he was 62 years old, Hume had an experience that put

0297 to the test his rejection of consent as the basis of obligation.

0298 Hume had a house in Edinburgh.

0299 He rented it to his friend James Boswell who in turn sublet it to a

0300 sub-tenant.

0301 The sub-tenant decided that the house needed some repairs and a paint job.

0302 He hired a contractor to do the work.

0303 The painter did the work and sent the bill to Hume.

0304 Hume refused to pay on the grounds that he hadn't consented.

0305 He hadn't hired the painter.

0306 The case went to court.

0307 The contractor said, it's true Hume didn't agree.

0308 But the house needed a painting.

0309 And I gave it a very good one.

0310 [LAUGHTER]

0311 SPEAKER 1: Hume thought this was a bad argument.

0312 "The only argument this painter makes is that the work was

0313 necessary to be done.

0314 But this is no good answer because by the same rule this painter may go

0315 through every house in Edinburgh and do what he thinks proper to be done

0316 without the landlord's consent and give the same reason," that the work

0317 was necessary and that the house was the better for it.

0318 So Hume didn't like the theory that there could be obligation to repay a

0319 benefit without consent.

0320 But the defense failed.

0321 And he had to pay.

0322 Let me give you one other example of the distinction between the

0323 consent-based aspect of obligations and the benefit-based aspect and how

0324 they are sometimes run together.

0325 This is based on a personal experience.

0326 Some years ago, I was driving across the country with some friends.

0327 And we found ourselves in the middle of nowhere in Hammond, Indiana.

0328 We stopped at a rest stop and got out of the car.

0329 And when we came back, our car wouldn't start.

0330 None of us knew much about cars.

0331 We didn't really know what to do until we noticed that in the parking lot

0332 driving up next to us was a van.

0333 And on the side it said, Sam's Mobile Repair Van.

0334 And out of the van came a man, presumably Sam.

0335 And he came up to us.

0336 And he said, can I help you?

0337 Here's how I work.

0338 I work by the hour for \$50 an hour.

0339 If I fix your car in five minutes, you owe me the \$50.

0340 And if I work on your car for an hour and can't fix it, you'll

0341 still owe me the \$50.

0342 So I said, but what is the likelihood that you'll be able to fix the car?

0343 And he didn't answer.

0344 But he did start looking under--

0345 poking around under the steering column.

0346 A short time passed.

0347 He emerged from under the steering column and said, there's nothing wrong

0348 with the ignition system.

0349 But you still have 45 minutes left.

0350 Should I look under the hood?

0351 I said, wait a minute.

0352 I haven't hired you.

0353 We haven't made any agreement.

0354 And then he became very angry.

0355 And he said, do you mean to say that if I had fixed your car while I was

0356 working under the steering column that you wouldn't have paid me?

0357 And I said, that's a different question.

0358 [LAUGHTER]

0359 SPEAKER 1: I didn't go into the distinction between consent-based and

0360 benefit-based obligations.

0361 [LAUGHTER]

0362 SPEAKER 1: But I think he had the intuition that if he had fixed it

0363 while he was poking around that I would have owed him the 50 bucks.

0364 I shared that intuition.

0365 I would have.

0366 But he inferred from that--

0367 this was the fallacy and the reasoning that, I think, lay behind his anger.

0368 He inferred from that fact that therefore,

0369 implicitly, we had an agreement.

0370 But that, it seems to me, is a mistake.

0371 It's a mistake that fails to recognize the distinction between these two

0372 different aspects of contract arguments.

0373 Yes, I agree.

0374 I would have owed him \$50 if he had repaired my car during that time.

0375 Not because we had made any agreement, we hadn't.

0376 But simply because if he had fixed my car, he would have conferred on me a

0377 benefit for which I would have owed him in the name of

0378 reciprocity and fairness.

0379 So here's another example of the distinction between these two

0380 different kinds of arguments, these two different aspects of the morality

0381 of contract.

0382 Now, I want to hear, how many think I was in the right in that case?

0383 That's reassuring.

0384 Is there anyone who thinks I was in the wrong?

0385 [LAUGHTER]

0386 SPEAKER 1: Anyone?

0387 You do?

0388 Why?

0389 Go ahead.

0390 NATE: Isn't the problem with this is that any benefit is inherently

0391 subjectively defined?

0392 I mean, what if you wanted your car broken and he had fixed it?

0393 SPEAKER 1: No, I didn't want it broken.

0394 NATE: Yeah, in this case.

0395 SPEAKER 1: But who--

0396 NATE: I mean--

0397 SPEAKER 1: But who would?

0398 Who would?

0399 NATE: I don't know, someone.

0400 I mean, what if Hume--

0401 what if the painter had painted his house blue?

0402 But he hated the color blue.

0403 You have to sort of define what your benefit is before the person does it.

0404 SPEAKER 1: Well all right, so what would you conclude from that though

0405 for the larger issue here?

0406 Would you conclude that therefore consent is a necessary condition of
0407 there being an obligation?
0408 NATE: Absolutley.
0409 SPEAKER 1: You would?
0410 What's your name?
0411 NATE: Nate.
0412 SPEAKER 1: Because otherwise, how can we know, Nate says, whether there has
0413 been an exchange of equivalent or fair benefits unless we have this
0414 subjective valuation, which may vary one person to
0415 the next of the situation?
0416 All right, that's a fair challenge.
0417 Let me put to you one other example in order to test the relation between
0418 these two aspects of the morality of contract.
0419 Suppose I get married.
0420 And suppose I discover that after 20 years of faithfulness on my part,
0421 every year on our trip across the country my wife has been seeing
0422 another man, a man with a van on the Indiana toll road.
0423 [LAUGHTER]
0424 SPEAKER 1: This part is completely made up by the way.
0425 [LAUGHTER]
0426 SPEAKER 1: Wouldn't I have two different reasons for moral outrage?
0427 One reason could be we had an agreement.
0428 She broke her promise, referring to the fact of her consent.
0429 But I would also have a second ground for moral outrage having nothing to do
0430 with the contract as such.
0431 But I've been so faithful for my part.
0432 Surely I deserve better than this.
0433 Is this what I'm due in return?
0434 And so on.
0435 So that would point to the element of reciprocity.
0436 Each reason has an independent moral force.
0437 That's the general point.
0438 And you can see this if you imagine a slight variation on the marriage case.
0439 Suppose we hadn't been married for 20 years.
0440 Suppose we were just married and that the betrayal occurred on the way to
0441 our honeymoon in Hammond, Indiana, after the contract has been made but
0442 before there is any history of performance on my part.

0443 [LAUGHTER]

0444 SPEAKER 1: Performance of the contract, I mean.

0445 [LAUGHTER]

0446 [APPLAUSE]

0447 SPEAKER 1: I would still--

0448 oh, come on, come on.

0449 I would still--

0450 with Julian I would be able to say, but you promised.

0451 You promised.

0452 That would isolate the pure element of consent where there were no benefit--

0453 never mind.

0454 You get the idea.

0455 [LAUGHTER]

0456 SPEAKER 1: Here's the main idea.

0457 Actual contracts have their moral force in virtue of two distinguishable

0458 ideals, autonomy and reciprocity.

0459 But in real life, every actual contract may fall short, may fail to

0460 realize the ideals that give contracts their moral force in the first place.

0461 The ideal of autonomy may not be realized because there may be a

0462 difference in the bargaining power of the parties.

0463 The ideal of reciprocity may not be realized because there may be a

0464 difference of knowledge between the parties.

0465 And so they may misidentify what really counts as

0466 having equivalent value.

0467 Now, suppose you were to imagine a contract where the ideals of autonomy

0468 and of reciprocity were not subject to contingency but were

0469 guaranteed to be realized.

0470 What kind of contract would that have to be?

0471 Imagine a contract among parties who were equal in power and knowledge

0472 rather than unequal, who were identically situated rather than

0473 differently situated.

0474 That is the idea behind Rawls' claim that the way to think about justice is

0475 from the standpoint of a hypothetical contract behind a veil of ignorance

0476 that creates a condition of equality by ruling out, or enabling us to

0477 forget for the moment, the differences in power and knowledge that could,

0478 even in principle, lead to unfair results.

0479 This is why, for Kant and for Rawls, a hypothetical contract among equals is

0480 the only way to think about principles of justice.

0481 What will those principles be?

0482 That's the question we'll turn to next time.
