The Intrinsic Worth of Persons

Contractarianism in Moral and Political Philosophy

Contractarianism in some form has been at the center of recent debates in moral and political philosophy. Jean Hampton was one of the most gifted philosophers involved in these debates and provided both important criticisms of prominent contractarian theories and powerful defenses and applications of the core ideas of contractarianism. In these essays, she brought her distinctive approach, animated by concern for the intrinsic worth of persons, to bear on topics such as guilt, punishment, self-respect, family relations, and the maintenance and justification of the state. Edited by Daniel Farnham, this collection is an essential contribution to understanding the problems and prospects of contractarianism in moral, legal, and political philosophy.

Jean Hampton completed her Ph.D. under the direction of John Rawls at Harvard University. She was a Harvard Knox Fellow at Cambridge University; a Pew Evangelical Scholar; and a distinguished visiting lecturer at Dalhousie University, University of Notre Dame, Pomona College, and Bristol University. She taught at several American institutions, most recently the University of Arizona, where she was a professor of philosophy at the time of her death in 1996. Her last book, *The Authority of Reason*, was published posthumously in 1998.

Daniel Farnham is a Franklin Fellow in Philosophy at the University of Georgia.

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JEAN HAMPTON

Edited by
DANIEL FARNHAM
University of Georgia

CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

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www.cambridge.org
Information on this title: www.cambridge.org/9780521856867

First published 2007

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data
Hampton, Jean.
The intrinsic worth of persons : contractarianism in moral and political philosophy / Jean Hampton.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-85686-8 (hardback) – ISBN 0-521-67325-9 (pbk.)
1. Contractarianism (Ethics) I. Title.
BJ1500.C65H36 2006
171´.7–dc22 2006005044

ISBN 978-0-521-85686-7 Hardback
ISBN 978-0-521-67325-9 Paperback

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Preface and Acknowledgments

Jean Hampton wrote on an astonishing variety of topics. A small collection cannot hope to convey the full power and breadth of her thought. But it can suggest its richness, and it can push our own thinking further on issues she cared about. I have chosen essays on some of her central concerns in moral, legal, and political philosophy – concerns she returned to repeatedly to improve her view. Fortunately, much of Jean's work on other topics – in particular, her book on reason – remains in print. I have appended a selected bibliography to help guide the reader looking for further engagement with Jean's philosophy.

I would like to thank Tom Christiano, Richard Healey, Christopher Morris, David Schmidtz, and three anonymous referees from Cambridge University Press for their guidance. I am especially grateful to David Gauthier for his foreword and remembrance. The late Terry Moore helped to initiate the project at Cambridge, and Beatrice Rehl and Stephanie Sakson patiently saw it through to its completion. Work on this collection was supported by the Jean Hampton Memorial Fund at the University of Arizona.

These chapters originally appeared in the publications listed below. Permission to reprint them is gratefully acknowledged. Chapter 1, "Feminist Contractarianism," previously appeared in *A Mind of One's Own: Feminist Essays on Reason and Objectivity*, ed. L. Anthony and C. Witt. Copyright © 1992 by Westview Press. Reprinted by permission of Westview Press, a member of Perseus Books, LLC. Chapter 2, "Selflessness and Loss of Self," previously appeared in *Social Philosophy and Policy* 10, no. 1 (1993): 135–65. Chapter 3, "*Mens Rea*," previously appeared in *Social*

Philosophy and Policy 7, no. 2 (1990): 1–28. Chapter 4, "Correcting Harms versus Righting Wrongs: The Goal of Retribution," previously appeared in *UCLA Law Review* 39 (1992): 1659–1702. Chapter 5, "The Common Faith of Liberalism," previously appeared in *Pacific Philosophical Quarterly* 775 (1994): 186–216. Chapter 6, "The Contractarian Explanation of the State," previously appeared in *Midwest Studies in Philosophy* 15 (1990): 344–71.

Foreword

For Jean – Some Opening Words

David Gauthier

To be invited to introduce a selection of Jean Hampton's writings is a great honor. Would though that neither I nor anyone else were to receive it, and that Jean herself were still among us, able to write her own introduction. And if still among us, then still contributing striking ideas and challenging arguments to the never-ending conversation that we call philosophy. I miss Jean. But I am glad to have known her, and because to know Jean was to argue with her, glad to have crossed swords with her in mutually fruitful, constructive confrontation.

Like many moral philosophers of her generation, Jean received the core of her training from John Rawls – an experience that encouraged the development of a Kantian perspective. Kant was certainly one of Jean's philosophical progenitors, but so was Hobbes, and at times one can sense the opposing tugs of each on her thought. And we should not overlook the presence of a third influence, for Jean belonged to the distinct minority of analytic philosophers who are firmly committed Christians. Not that her faith replaces argument in her writings, but it is, I think, easier to appreciate the focus of some of her thinking, especially in one of the finest pieces in this volume, "*Mens Rea*," if one is aware of her religious background.

As a philosopher Jean was unusually forthcoming. Too many of us – at least in my experience – are reluctant to let our views into the public sphere until we believe we can meet all objections to them – a futile hope! – and once publicly committed, we are even more reluctant to

Emeritus Distinguished Professor of Philosophy, University of Pittsburgh.

change our positions, disguising shifts in thought as elaborations of what we of course meant all along. Jean didn't express views casually, but being rightly suspicious of final truths in philosophy, she willingly shared her views with her fellows and, while she defended them vigorously, was ready to alter or even abandon them in the light of what seemed to her the better argument. Tenacious in debate, she was flexible in her thought – an uncommon but welcome combination.

Were Jean still with us, she would be ready and eager to continue the debates that the chapters in this collection invite. Instead, we must carry on alone, absent the protagonist. Not being able to provoke her to respond, I will play a tamer role, raising, in this introduction, my questions and worries that the reader may, if he or she wishes, try either to answer on Jean's behalf or to incorporate into developing a more convincing alternative. Or the reader may prefer to ignore my comments, as distracting him or her from the encounter with Jean. What matters most is that the reader find, or find again, how fertile it is to read Jean and enter with her into some of the most challenging questions of moral, political, and legal philosophy.

In discussing Jean's papers that are reprinted here, I shall follow my own thread through her ideas, rather than proceeding in the order the editor has chosen for them. I begin with "*Mens Rea*," in which Jean offers an original account of culpability, taking defiance as her key. Genuine culpability, whether rational, moral, or legal, requires a defiant mind. The culpable lawbreaker knows, or should know, the law; he or she recognizes its authority but believes that authority can be defied, replaced by a different authority more to his or her liking. I am reminded of Milton's Satan, who expresses his (futile) defiance of God's law in his cry, "Evil, be thou my good!"

Essential to Jean's account is the idea that defiance is, and must be, deeply futile, in that the authority defied, be it reason, morality, or law, cannot be dethroned. Jean gives us an account of rational authority that establishes this. But moral and legal authority, as she recognizes, are deeply problematic. So what Jean offers us seems to me to be an account of legal culpability that needs impregnable authority as its basis. And the reader must ask him- or herself if such authority is to be had.

Before leaving this profoundly original chapter, one word of advice as to how to read it. Read the conclusion only after you have assimilated the body of the chapter. For the conclusion should come as an unexpected twist in Jean's argument – and, as it happens, one that reveals more about her character than any other single passage in this collection.

"Selflessness and the Loss of Self" is also a deeply illuminating chapter, both for its argument and for what it reveals about its author. Moral philosophers are all too ready to come down on the side of altruism and to consider self-sacrifice, if not always a moral demand, yet a mark of moral sainthood. Jean is rightly suspicious; not all self-sacrifice, she tells us, deserves our respect or approval. Selflessness may be a loss of the self that we should be guarding against those whom we might call moral imperialists (my term, not hers) – those who would use their fellows in the name of morality.

Of course Jean would not have us embrace egoism and selfishness in our effort not to be stifled by altruism and selflessness. There is a balance to be struck – and it is the need for balance that made contractarian thinking appealing to Jean, since the contractarian seeks principles and practices that afford fair mutual benefit, rejecting one-sided sacrifice but forbidding unconstrained self-assertion.

Two of the chapters in this collection focus on contractarian themes. In "The Contractarian Explanation of the State" Jean boldly attempts to use the social contract argument to answer not normative or justificatory but causal questions about the state, its origins, and its maintenance. Most contemporary contract theorists would cast a dubious eye on the explanatory use of the social contract, but Jean, with her usual disregard for conventional wisdom, is undaunted.

But Jean recognizes that her claim is deceptive, in that the procedure by which she supposes a state might be generated is coordinative rather than contractual, in that it does not involve the promises that characterize contractual agreement. (We in North America follow a convention in driving on the right; common sense, and not any contract or promise, ensures that we follow the convention.)

The interest of the chapter, however, does not turn on a terminological point. Jean proposes what she calls the convention model, and the questions for the reader should concern the merit of the model. And here one should, I think, applaud Jean for recognizing that any explanation of a democratic state must account for two directions of control: the rulers by the people and the people by the rulers. She deploys her model to try to show how these seemingly opposed directions may be fitted together. If she succeeds, we can readily forgive her for replacing the idea of a contract with that of a self-interested convention.

But we may be less ready to forgive her departure from the idea of a contract in "Feminist Contractarianism." This chapter plays a valuable philosophical role, making clear the difference between Hobbesian and

Kantian ideas of the social contract and showing how contractarian modes of thought are the ally, rather than the enemy, of the feminist moral theorist. And before raising my concern with Jean's approach, I want to comment briefly on the divide between Hobbes and Kant. The former treats the contract as a deal that each person finds reasonable to accept in order better to advance his or her own interests. The latter treats the contract rather as guaranteeing proper respect for him- or herself as an end. One can readily appreciate, in the latter, the connection with Jean's insistence that we not be morally used. The contract ensures that everyone receives due moral recognition. And it is a short step from this to seeing the contract as a device appealing to feminists who seek to eradicate male dominance in morality as elsewhere.

But now my worry. In "Feminist Contractarianism" Jean insists that "every contract theory . . . has used the idea of a contract as a heuristic tool that points us toward the correct form of moral reasoning and has not relied on the notion of contract in any literal way to do any justificatory work." This seems to me to sell contractarianism short. For at least on my view, the contract is intended to do real work.* Only by determining what rational persons would agree to in a suitable pre-moral situation can we give content to and a rationale for moral principles. Proposed or alleged moral principles can be put to the contractarian test – might they be agreed to by rational persons seeking principles to govern their interactions? I leave to the reader the question whether this role is merely a "heuristic tool." Would that I could argue the issue with Jean herself!

"The Common Faith of Liberalism" pits Jean once more against her mentor, John Rawls. Here the issue is whether a pluralist society can be unified by "Enlightenment liberalism," a rationally grounded political conception that provides social justice and stability. Rawls dismisses such a conception as partisan and tries to replace it by a conception of political liberalism freed from the bias of the Enlightenment. Jean – rightly to my mind – argues that Rawls is unable to avoid the faith that, she believes, all liberals share: faith in the possibility of "a social and political structure that is reliant on reason and respectful of all individuals' dignity and autonomy." In a world increasingly hostile to the idea of the Enlightenment, Rawls has sought to maintain the vestiges of liberalism without

* *Editor's note*: Hampton discusses Gauthier's view at length in "Two Faces of Contractarian Thought," in Peter Vallentyne, ed., *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement* (Cambridge: Cambridge University Press, 1991), pp. 31–55.

its traditional commitments. Jean's chapter is a salutary reminder that without those commitments, liberalism would be defenseless.

One chapter remains to be mentioned: "Righting Wrongs: The Goal of Retribution." Jean sees retribution as expressive, as asserting the claim of the moral order in the face of one who denies it. (Is this another case of defiance?) More specifically, moral wrongdoing consists in diminishing human value; retribution reasserts that value. But what is it to *diminish* value? It cannot be literally to degrade someone, for as a Kantian Jean denies that persons can be degraded. The attempt to degrade is futile. (But, to refer back to another of Jean's papers, what is loss of self if not degradation?) Diminishment is "the appearance of degradation" – treating someone as if he or she lacked the inalienable value he or she possesses. And retribution treats the wrongdoer in a way that repudiates his or her attempt to degrade and reasserts the value that he or she diminishes.

I find this doctrine puzzling. If we cannot be degraded, how can we appear to be degraded – how can we be diminished? Jean is aware of this question – objections to her views rarely escape her notice. And of course she grapples with it – how successful she is will have to be judged by the reader.

So these are the ideas awaiting the reader of this book. I have tried to suggest some of the treats in store – and some of what to me are the hard questions to be faced. Jean would want us to pursue those – and other – questions. She was never one to shy away from controversy. The best way we can honor her is to accept the challenges of the papers she has left us, and seek to carry forward their arguments.