Morality and Self-Interest

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The Trouble with Justice

CHRISTOPHER W. MORRIS

1. Justice Is Different

Must we always be just? Presumably. Do we always have reasons to be just? That is another question, and it is not obvious the answer is yes. Justice is different in some ways that make a difference.¹

Contrast justice with some of the other central virtues—for instance, prudence, courage, temperance, or wisdom. Justice is different. Unlike these others, it is principally a social virtue; its interpersonal element is central. Other virtues, such as generosity, as well as benevolence or charity, are also interpersonal. But unlike justice, acts of generosity or benevolence are not owed to specific people. One ought to help others, but the choice of when and where to act benevolently is for the most part up to the individual. In modern terms their requirements are duties of imperfect obligation; those of justice are for the most part owed to specific individuals (duties of perfect obligation).²

The "cautious, jealous virtue of justice"³ is different in other ways. It is cautious in that it would rarely have us aim for the best, seeming instead to settle for the stable and the secure. It is jealous, as Hume notes, demanding obedience even on occasions when its usefulness is not obvious.

¹. Earlier versions of this essay were presented at the University of Amsterdam (on two occasions), the Graduate Center of the City University of New York, the University of Maryland, College Park, and the University of Virginia. I am grateful for comments offered on all of these occasions, as well as written comments from Paul Bloomfield, Peter Carruthers, William Galston, Verna Gehring, David Lefkowitz, and an anonymous reader for Oxford University Press. A shorter and earlier version of this essay was published in Philosophy and Public Policy Quarterly 24, no. 3 (Summer 2004): 14–20.

². While there are several distinctions that are marked by these terms, this seems the most fundamental in contemporary philosophy. See Onora O'Neill, "Duty and Obligation," Encyclopedia of Ethics, 2nd ed., ed. L. Becker and C. Becker, 1:425 (New York and London: Routledge, 2001).

My classical list of virtues may signal another contrast. Justice is an imperial virtue, and its partisans often seek to secure its dominance, sometimes even by banishing other virtues from the realm of ethics or morality. In modern moral philosophy there is a disposition to identify justice with most or sometimes all of morality. This kind of imperialism raises questions about the distinction between the moral and the nonmoral; we need not try to settle these questions now, for the difficulties they present pale besides our trouble with justice.

The trouble with justice can be stated simply: it seems that sometimes we do not have reason to be just, specifically reasons of the right kind. It’s obvious that we sometimes are not motivated to act justly, but my concern in this essay is with (normative) reasons for action, not (nonnormative) motives. The problem is also not, as we shall see, what Hobbes’s Foole said, that “there is no such thing as Justice”. The Foole is often interpreted as a moral skeptic, and the difficulty that concerns me is different from that posed by this textbook adversary of moral philosophers. The moral skeptic seems to deny that morality is what it is said to be; rather, it is “merely a chimerical [i]dea without truth…[a] mere phantom of the brain…”. The trouble with justice, however, is not that the virtue, like Harry, is dead. Rather, it is that sometimes we do not seem to have reasons to be just or, as we shall see, reasons of the right kind.

Fictional immoralists of the kind characteristically found in philosophical texts are a distraction from more realistic adversaries. Genuine immoralists seem to be psychopaths, humans who are clearly defective in particular ways, affective and cognitive. By contrast, most of the unjust or evil people we know seem to recognize most of the fundamental norms of justice, apply them to many people, and have recognizable human dispositions and sympathies, however limited they may be (it is said that “Goebbels loved children and dogs”). Real immoralists do not seem to be moral skeptics.

The trouble with justice is more of an everyday problem, one that is insufficiently appreciated. Hobbes’s classical presentation of the Foole, read slightly differently than usual, is a first statement of the worry: the Foole “questioneth, whether Injustice…may not sometimes stand with that Reason, which dictateth to every man his own good” (italics added). The trouble with justice is that sometimes, on occasion, it seems we do not have reason to be just. As even thieves and ruffians recognize, we need justice. But sometimes it seems to pay not to be just. It appears that on occasion we do not have reason, or the right kinds of reasons, to be just. That is the trouble. How could this be?

My initial contrast of justice and other virtues suggests a classical approach to the trouble. We could try to show that even if justice is different from the other virtues, it is needed in the way that we need the other virtues. In the way that we cannot live well without courage or moderation, so we need justice. The worry about this approach has been clear since Plato’s defense of justice in the Republic. Plato succeeds well enough in showing that “justice in the soul” (or individual justice) is a virtue:

It is left for us to enquire, it seems, if it is more profitable to act justly, to engage in fine pursuits and be just, whether one is known to be so or not, or to do wrong and be unjust, provided one does not pay the penalty and is not improved by punishment.

But Socrates, [Glacon] said, this enquiry strikes me as becoming ridiculous now that justice and injustice have been shown to be such as we described. It is generally thought that life is not worth living when the body’s nature is ruined, even if every kind of food and drink, every kind of wealth and power are available; yet we are to enquire whether life will be worth living when our soul, the very thing by which we live, is confused and ruined, if only one can do whatever one wishes, except that one cannot do what will free one from vice and injustice and make one acquire justice and virtue.  

What Plato is not able to show is that we have equal reason to do what we are required to do by “justice in the city” (social justice). The relation between the two, individual and social justice, is not as Plato hopes. It seems perfectly possible, indeed likely, that the demands of social justice will often not be beneficial to the just individual. Not surprisingly, Plato has the greatest difficulty showing that the rulers will be particularly pleased with their “spartan” lot.

Aristotle explicitly recognizes the other-directed nature of justice: “justice is the only virtue that seems to be another person’s good, because it is related to another; for it does what benefits another, either the ruler or the fellow member of the community.” It is unclear from his account why we should always want to be just (according to the general, rather than the special virtue). In a good community the laws will aim at “the common benefit of all… And so in one way what we call just is whatever produces and maintains happiness and its parts in a political community”. Justice, he says, is a distinctive virtue: it is complete virtue in relation to another. And that is why justice often seems to be supreme among the virtues…. Moreover, justice is complete virtue to the highest degree because it is the complete exercise of complete virtue. And it is the complete exercise because the person who has justice is able to exercise virtue in relation to another, not only in what concerns himself, for many are able to exercise virtue in their own concerns, but unable in what relates to another.…

This type of justice [general as opposed to special justice], then, is the whole, not a part, of virtue…. For virtue is that same as justice, but what it is to be virtue is not the same as what it is to be justice. Rather, insofar as virtue is related to another, it is justice, and insofar as it is a certain sort of state without qualification, it is virtue.

But it is far from obvious that virtuous people will always have reasons to be just in relations to others in the way they have reasons to be prudent or temperate.

In her early work Philippa Foot raised the question with startling explicitness.

8. Ibid., V, 1, 1129b1–1130a6.
9. Ibid., V, 1, 1130a10–14.
Morality without Self-Interest

But what, it will be asked, of justice? For while prudence, courage and temperance are qualities which benefit the man who has them, justice seems rather to benefit others, and to work to the disadvantage of the just man himself. Justice, as it is treated here, as one of the cardinal virtues, covers all those things owed to other people: it is under injustice that murder, theft and lying come, as well as the withholding of what is owed for instance by parents to children and by children to parents, as well as the dealings which would be called unjust in everyday speech. So the man who avoids injustice will find himself in need of things he has returned to their owner, unable to obtain an advantage by cheating and lying....We will be asked how, on our theory, justice can be a virtue and injustice a vice, since it will surely be difficult to show that any man whatsoever must need to be just as he needs the use of his hands and eyes, or needs prudence, courage or temperance?

Foot adds, infamously, “Before answering this question I shall argue that if it cannot be answered, then justice can no longer be recommended, as a virtue”.

Justice seems to be in trouble.

2. Source of the Trouble

The question is whether one always has a reason to be just (and a reason of the right kind). It is not obvious that the answer is affirmative. Why is that? Justice has a number of features that may be the source of trouble. The first I have already mentioned: the interpersonal and other-regarding nature of justice. Just acts appear not to aim, at least directly, at the good of the actor. Why be just on those occasions when one does not care for the good of others?

It is easy to think that undue attention to the interests of the self—egoism—is the source of the trouble here, but that is a mistake. Selfishness and other vices of self-interestedness may not be uncommon. But they are not essential to the problem. Thinkers like Hobbes, who thought that humans are rather selfish, formulate the skeptical worry about justice in terms of the interests of the self. But self-interestedness is only an extreme form of partiality, and it is partiality that is the source of the problem. Whenever justice asks us to benefit another, someone with whose interests we are not sufficiently concerned, the question may arise as to why we should do as required. The interests of friends and countrymen may appeal to us more.

Aristotle’s proposal that (general) justice is the whole of virtue may be relevant here as one may think that the other-directed nature of justice will not bother the virtuous. After all, “The worst person, therefore, is the one who exercises his vice toward himself and his friends as well [as toward others]. And the best person is not the one who exercises virtue [only] toward himself, but the one who [also] exercises it in relation to another, since this is a difficult task”.

This move will not, however, solve the problem. Consider a virtuous man, one who is prudent, wise, temperate, generous, and so on. He has many friends and treats them as he should.

11. Nicomachean Ethics, V, 1, 1130a7–9 (words in brackets are Irwin’s).
He recognizes, as befits a wise soul, that men are social or "political" animals. And he even possesses Humean sympathy (so he is not cruel to animals). We tend to think that all humans or at least persons have moral standing and that we may not take their lives or restrict their liberties except under certain special conditions. Certainly, slavery is a grave injustice. Our hypothetical man, endowed with the usual virtues, will act rightly most of the time; he will admire the courage of his adversary; he will make sacrifices for his friends and family and polis; and he will refrain from tormenting his enemies. But, at least on occasion, he may not have reason to refrain from profiting from injustices to distant peoples. It may be that so doing enables him to contribute to the building of a great temple or orphanage. Enslaving barbarians will offend his sympathetic nature. However, investing in companies that employ prison laborers in fascist or Communist countries may not. "Fellow-feeling", to move from classical to early modern times, is sufficiently partial to pose a problem for justice. As Hume noted, "[O]ur natural uncultivated ideas of morality, instead of providing a remedy for the partiality of our affections, do rather conform themselves to that partiality, and give it an additional force and influence".  

I singled out the other-directed, interpersonal nature of justice as the first feature that seems to be a source of trouble. The second feature is somewhat different. Justice is not only cautious, but it is also jealous and very demanding. By this I do not necessarily mean that its requirements are onerous. That is a matter of considerable controversy. Some people think that justice demands only respect for a few, essentially negative conditions; others think that we must turn over the bulk of our possessions and advantages to the poor and illfavored. It is important to see that my claims are independent of these controversies about what we might think of as the demands of justice. Rather, what I am thinking of is the constraining nature of the virtue. Justice requires that we abide by certain norms or rules, that we respect the rights of others, and that we give them what they are due. We are not merely to strive to do this; we must not do less. These are minimal demands, compliance with which is no grounds for praise. But they are also constraints of a certain normative kind. It is this feature of justice that is the source of much recent controversy in moral philosophy, and it is the second attribute to which I draw our attention.

Suppose that we think of justice as aiming at an end, the common good or the general interests of people (or something else). Then the question will arise as to why one should abide by a particular requirement of justice on those occasions when one could, more efficiently, secure the common good or general welfare by other means. In contemporary terms, why act in constrained, nonconsequential ways in situations where alternative acts better secure the goal in question? Here the problem is not so much that the norms or rules of justice are crude, imperfect mechanisms, that they "seek their end in an oblique and indirect manner" as Hume says. Rather, it is that they appear to require us to act in nonconsequential ways, that they instruct us often to refrain from acting on the balance of reasons. The problem is one of the rationality of action.

It is this particular feature of justice—and of deontic notions in general—that is the cause of much contemporary concern and controversy in contemporary moral philosophy and the theory of rational choice. If one thinks of practical rationality as having a maximizing structure—or at least as requiring action in accordance with the balance of reasons—then it is puzzling how requirements that would have us eschew acting in a maximally effective way can be justified. It is, of course, this feature that is addressed by contemporary revisionist accounts of practical rationality that find special significance in the ways in which intentions or plans affect our rational deliberations and actions.\(^{13}\)

Justice is, as we have noted, both cautious and jealous, and its cautious nature may be exaggerated by its lawful form. The third and last feature of justice that I wish to highlight is its normative nature in one particular sense of the term. Justice guides us principally through norms or rules or laws, in an archaic, nonspecialized sense of this last term.

Suppose that we follow Aristotle in thinking that justice should aim at “the common benefit of all....And so in one way what we call just is whatever produces and maintains happiness and its parts in a political community”. The laws will usually be imperfect means of securing these ends, something effective usually and for the most part. Given that the best city, whether that sketched by Plato or by another theorist, may be beyond the reach of humans, the best for us will be a community ruled by laws that will secure our well-being usually and for the most part. This means that sometimes particular just acts will be useless. Hume notes this in his account of the artificial nature of justice. He argues that the rules of justice “seek their end in an oblique and indirect manner”. He notes that

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\text{tho' the rules of justice are establish'd merely by interest, their connexion with interest is somewhat singular, and is different from what may be observ'd on other occasions. A single act of justice is frequently contrary to public interest; and were it to stand alone, without being follow'd by other acts, may, in itself, be very prejudicial to society. When a man of merit, of a beneficent disposition, restores a great fortune to a miser, or a seditious bigot, he has acted justly and laudably, but the public is a real sufferer. Nor is every single act of justice, consider'd apart, more conducive to private interest, than to public; and 'tis easily conceiv'd how a man may impoverish himself by a signal instance of integrity, and have reason to wish, that with regard to that single act, the laws of justice were for a moment suspended in the universe. But however single acts of justice may be contrary, either to public or private interest, 'tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. 'Tis impossible to separate the good from the ill.}\(^{14}\)
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If we think that justice must require, at least on occasion, that we be guided by (nonideal) practices or conventions,\(^{15}\) then we should expect to find single acts of justice that appear

\(^{13}\) A good, brief introduction to this literature is found in Edward F. McClennen, “The Rationality of Being Guided by Rules,” in The Oxford Handbook of Practical Rationality, ed. A. R. Mele and P. Rawlings (Oxford: Oxford University Press, 2004), chap. 12. See also the references in the bibliography to the work of Michael Bratman, David Gauthier, Edward F. McClennen, Joseph Raz, and Scott Shapiro.


\(^{15}\) “One part of the politically just is natural, and the other part legal.” Nicomachean Ethics, V, 7, 1134b19–20.
to be useless or even harmful. Hume's example of restoring a fortune to a miser or bigot makes the point, and other cases will come to mind. Conventional norms, in general, will often be either under- or overinclusive, a common feature of legal norms.

The trouble with justice seems, then, to be connected to three features: the virtue's other-regarding or interpersonal nature, its constraining nature (in the sense explained), and the fact that its requirements usually take the form of norms or rules. It might be helpful to step back and to ask why we need justice and what this tells us about the virtue.

3. Why Justice?

We need justice in order to live well. But the particular kinds of situations that give rise to the need for justice also create the problems with justice. Not everyone will favor the story I am starting to tell. Contemporary American philosophy is dominated by neo-Kantian and ethical and is quite hostile to classical as well as to Humean accounts of the virtue. But such theorists should have sympathies to much I have said so far, even if their favored vocabulary is not mine.

Utilitarian and consequentialist theorists should also not be too displeased, but for very different reasons; they have long had difficulties with justice, and some have recommended that the virtue not be overpraised. J. S. Mill famously argues that "justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice." Mill argues that we redescribe exceptions so as to avoid asserting that "there can be laudable injustice," but that is exactly what consequentialists are committed to.

The story I tend to favor is best told by Hume, though it is also Hobbes's, and earlier, briefer statements may be attributed to Plato's Glaucous and to Epicurus. In brief, Hume's story is that the human condition is generally one in which there is a certain amount of conflict. He and Hobbes differ as to the amount of conflict and quite possibly as to the cause of some of it. But the account is roughly the same. Our partiality and the prevalence of scarcity among the objects of our wants mean that there will be conflict. Plato's hope that human interests, properly understood, do not conflict is

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16. Additionally, if a right to act is a right to act wrongly (though not in ways seriously unjust), then particular acts of guaranteeing people their rights may result in wrongful or harmful behavior.

17. Norms and rules constrain in the sense in question here, but so do commands and other particular directives. So the problems generated by justice's connection to norms and rules (the third possible source of trouble) are of a different kind from justice's constraining nature (the second possible source).


attractive but implausible. Even he did not seem to believe it; or perhaps he thought it possible only under certain unlikely conditions, one of which being that most people believe a falsehood, namely the "noble lie" that our souls are made of different metals. Interestingly, Marx's conjecture that the development of history will make it possible to live without justice under Communism, which appears to be of the same kind of story as Plato's, is consistent with Hume's. The latter, along with Hobbes and others, argues that in a condition of profuse abundance, where all our wants are satisfied, "in such a happy state, every other social virtue would flourish, and receive tenfold increase; but the cautious, jealous virtue of justice would never once have been dreamed of". Absent "the circumstances of justice" (Rawls's phrase), justice, "being totally useless, would be an idle ceremonial, and could never possibly have place in the catalogue of virtues".  

In small groups, especially of friends, it may be possible to think that one can do without justice. Aristotle's restriction of the number of people in a polis who count to the proper subset of (most) adult free males may have enabled him to think, in effect, that the other virtues, exercised "in relation to others", would suffice to secure the common good. That may be plausible in poleis of forty thousand citizens. But, as Hume notes, "[W]hen society has become numerous, and has encreas'd to a tribe or nation," the interests that bind us are less apparent.  

The conflicts that are to be found in "the circumstances of justice" and the possibility of mutually beneficial arrangements are what make justice useful. The norms or laws of justice seek to improve things, at least for all who strive to be just. They aim at the good of all, the common good, or the mutually advantageous. Different members of this tradition will offer alternative accounts of the conditions that the norms of justice are to satisfy. One important difference is between accounts that require that the norms be practice-based and others that understand justice solely in terms of (counterfactual) ideal agreements or standards.  

An important element missing in classical accounts of this kind—I am thinking principally of Hobbes and Hume, but also Rousseau and, more contentiously, Aristotle—is an analysis of the way in which justice tends to the good of all. Rules or norms that secure our common good may well elicit our approval or endorsement, and that may be good enough much of the time; that is, that may suffice to ensure adequate compliance much of the time. But justice seems to entail more than can be delivered by approval, or at least more needs to be said. The norms of justice pretend to be reasons of a special kind. In terms introduced above, the norms of justice are said to be reasons that would have us act in ways that sometimes contravene the balance of reasons. We are to act as required, even if more good may be done by not so acting. The norms of justice are reasons that, we may say, preempt some of the other reasons we may have to act. Kant noted the absence of a plausible account of this feature of justice (or morality), and neo-Kantians think that one cannot be offered that which does not abandon the sort of story I have been recounting. But the kind of revisionist accounts of practical rationality mentioned earlier in passing offer exactly that, namely an account of preemptive reasons.  

22. See references in note 13.
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22. See references in note 13.
We can see how a number of norms governing, for instance, what we may do regarding the lives and possessions of others (negative duties not to kill, assignment of liabilities for risky behavior, duties of rescue or of mutual aid), forms of interaction (norms governing truth-telling, fidelity, and the like), and status (norms governing respect for others) can be understood as addressing the problems we find in “the circumstances of justice”. Hume’s account is, I think, still one of the very best we have. He thinks of justice as an “artificial” virtue because it depends on conventions for its existence (and because the natural motives that move us to be benevolent or prudent are insufficient for justice). It may have a few features that make it difficult to generalize to a world such as ours, some of which may be due to its author’s particularly benign and optimistic nature (e.g., conflicts of interest may be greater than Hume seems to think). And, most important, it does not seem plausible to think that all aspects of justice are practice-based (see, in part, my discussion below). We may find in David Gauthier’s “morals by agreement” features of a more complete, plausible neo-Humean account of justice: the illuminating analysis of the problem in the terms of contemporary rational choice theory, a two-stage game-theoretical account of the norms of justice, and the revisionist account of constrained deliberation and action already mentioned.23

Accounts of this sort all make aspects of justice—specifically, the content of some norms—dependent on practices. Legal systems are an example of such practices, but much of justice is possible in the absence of (positive) law. Those constraints of justice that are reciprocal, that is, whose obligation is conditional on the constrained behavior of others, will also depend on practices. Practices, it should be noted, can often be improved. For one, they frequently may be indeterminate and need to be developed. In the best of worlds available to us, our practices and, consequently, our norms of justice will be imperfect in a number of ways. It is not clear how this could be avoided.24 This means, however, that we should expect that

23. See, of course, David Gauthier, Morals by Agreement (Oxford: Clarendon, 1986), as well as the essays in Gauthier’s Moral Dealing: Contract, Ethics, and Reason (Ithaca, N.Y.: Cornell University Press, 1990). Many parts of Gauthier’s account are separable from the whole. For instance, the principle of distributive justice (MRC) may be detached from the moral theory or, as the author is now disposed to do, replaced by a Nash bargaining principle. The most neglected part of the theory may be the account of the ways in which preconventional rights and duties can emerge in anticipation of agreement (the two-stage account). In particular, Gauthier’s so-called proviso is of considerable importance.

24. “We have to give up the hope...that we can actually arrive at moral norms shaped solely by moral reasons for action, in contrast to the norms shaped, in no small degree, by convention and arbitrary decision that we have now. Moral philosophy can provide grounds for criticizing our present norms. But when we have gone as far as criticism will, for the moment, carry us, we shall still not have eliminated all elements of convention and arbitrariness. Since life with these less than ideal norms is the only moral life we are ever going to have, we must get on with it” (James Griffin, “On the Winding Road from Good to Right,” in Value, Welfare, and Morality, ed. R. G. Frey and C. W. Morris [Cambridge: Cambridge University Press, 1993], 176–77).
there will be situations where we find ourselves without reason, or reasons of the requisite sort, to be just. We are back where we started.25

4. What Should We Think? Three Responses

I noted three main sources of trouble with justice: the virtue's other-regarding or interpersonal nature, its constraining nature (in the sense explained), and the fact that its requirements usually take the form of norms or rules. These difficulties appear in many classical and contemporary discussions of justice (and morality). The first is a special concern of Plato, Hobbes, and Hume, as well as several contemporary thinkers. They may have exaggerated our self-concern, but there is no doubt that partiality is a problem for justice. However, if agents are capable of constraining their action and of following norms, the problems posed by partiality should be surmountable. They may not be intractable.

The second problem features centrally in many contemporary discussions. It is at the core of some contemporary debates about moral consequentialism. Many philosophers, along with economists and decision theorists, who adopt a maximizing conception of practical reason will also be concerned by the constraining nature of justice. Consequentialist (and maximizing) ways of reasoning cannot easily make sense of constraints. Solutions to the problem vary. I think that the revisionist accounts of practical rationality mentioned above (see n. 13) can provide the basis for an explanation of the constraining nature of norms of justice.20 This conjecture is controversial and cannot be pursued here, and I propose to concentrate on the third problem. Even if the first two are resolvable, the third remains and seems most intractable. So it makes sense to examine it first.

Appearances, then, suggest that we sometimes lack reasons (or reasons of the right sort) to be just. And I have suggested different sources of the trouble. What to think? One reaction, of course, would be to deny the appearances. Given that I think that the best account of justice will most likely have this consequence—that we sometimes lack reasons (or reasons of the right kind) to be just—I shall not take up this suggestion. As we should expect, the main defenders of this response today are neo-Kantians.27 I wish to consider three possible responses available to theorists drawn to the sort of account of justice I have sketched.

The first response is that suggested by Philippa Foot early in her career: justice is not a virtue. This is mistaken, and Foot herself did not defend it. Justice is simply too

25. In addition, there will be times when a norm is not yet established (i.e., a practice), when it will be indeterminate what reasons one has to comply with its demands. I do not discuss this situation in this essay.

26. David Gauthier's well-known account of "constrained maximization" specifically tries to understand how genuine constraint can be made compatible with maximization. But the problem arises with weaker, "balance of reasons" conceptions of rationality.

27. It would be misleading to think of consequentialists as denying the appearances in question, for they do not privilege justice; as I have said, they think of justice as an overrated virtue. In addition, many consequentialists recognize that we always have reason to be moral, not merely just.
important for us. But therein lies the problem: while prudence, courage, temperance, or wisdom are good for us, they are in the first instance good for me (each of us). Justice may be good for me, but indirectly; it is first of all good for us collectively. The difficulty is the familiar, even if rather oddly named, collective action problem. 28

Let me move immediately to the second response. This is that of Hobbes, Hume, Gauthier, possibly Rousseau (and myself some years ago 29). Essentially it consists in restricting the scope of norms of justice to the set of agents able and willing to abide by them. Justice on this view protects all and only those who find themselves in the circumstances of justice (e.g., who stand to benefit mutually, from cooperation); the scope is less than universal. In the absence of the conditions required to stabilize norms of cooperation, Hobbes thinks that “nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where there is no Law, no Injustice…. It is consequent also to the same condition, that there is no Propriety, no Dominion, no Mine and Thine distinct…” 30

It is not implausible to think that were someone “to fall into the society of ruffians, remote from the protection of laws and government…” that he may “make provision of all means of defense and security: And his particular regard to justice being no longer of use to his own safety or that of others, he must consult the dictates of self-preservation alone, without concern for those who no longer merit his care and attention”. 31 But it is not only ruffians who are in danger of losing the protection of justice, it is also those unable to harm us:

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence, I think, is that we should be bound by the laws of humanity to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property, exclusive of such arbitrary lords.

Creatures such as these will not be completely unprotected; but Hume thinks “[O]ur compassion and kindness the only check, by which they curb our lawless will…” 32.


30. Hobbes, Leviathan, chap. XIII, penultimate paragraph. I should note that the passage and Hobbes’s doctrine are more complex than these citations suggest.


32. Enq. Concerning the Prin. of Morals, sect III, part I, 152. Hume notes that “this is plainly the situation of men, in regard to animals”, and that “in many nations, the female sex are reduced to like slavery...”.
Unloved orphans, the infirm, and the unproductive, among others may also be left without the protection of justice, sheltered only by our compassion and kindness.

There is much more to be said about this possible implication of Humean justice. It is possible that the scope of the norms of justice can be extended in ways that will protect the infirm and nonautonomous. But there are other sorts of cases where it seems that some people will be left out. Hume notes that \[T\]he great superiority of civilized Europeans above barbarous Indians, tempted us to imagine ourselves on the same footing with regard to them [as with animals], and made us throw off all restraints of justice, and even of humanity, in our treatment of them\]. Hume thinks we were mistaken in so behaving. But consider a hypothetical but realistic case of caste slavery, where the enslaved are easily distinguished from the masters, where the practice is immensely profitable, and where sentiments of compassion and kindness are restricted to one's own kind. In such a condition while it would benefit the enslaved to act justly toward and to cooperate freely with others, it would be disadvantageous for the slave-owners to do so. It seems implausible to think that slavery under such conditions would not be unjust. That would be unbelievable.

In conditions of emergency it seems entirely plausible that many norms of justice could be overridden or would be suspended. But not all such norms: it would not be plausible to think that it would ever cease to be wrong intentionally to kill innocent, nonthreatening people—for instance, children, even those of our enemy. Further, it seems that killing the innocent in most of these circumstances would remain a wrong to them, something they have a right against us that we do not.

Suppose that the only effective means of defending ourselves against an adversary would be to harm, or to threaten to harm, the families and countrymen of our enemy. May we, for instance, retaliate against a nuclear attack by destroying enemy cities? Or may we torture and kill the families of terrorists who plant nuclear weapons in our cities? Presumably not. That is, it would be an injustice to do those things to innocent people. It is simply not credible to say that such acts would not be unjust. This is not to say that we would not, in the circumstances, have reason to act unjustly; that is the question under consideration.

35. It will not do merely to say that the Humean account has the resources to extend the protections of justice to all humans or persons. What is important is whether under certain conditions, when the circumstances of justice are not fully satisfied, justice would in fact extend to all.
37. The double negative is important as Hobbists or "realists" in the field of international relations would argue that such acts are beyond justice, neither right nor wrong.
The second response to the appearances—we do not always have reasons, or reasons of the right kind, to be just because some humans are not, in fact, protected by justice—is not to be taken up. Restricting the scope of the norms of justice is simply not credible.

I shall move right away to the third and only credible position that I can think of or understand. Many of the norms of justice seem to have universal scope in two respects: virtually all humans or persons are assumed to have moral standing, and all human agents have a number of obligations to anyone with moral standing. To possess moral standing is to be owed moral consideration; it is a status distinct from other kinds of value, such as that possessed by great works of art or valuable natural sites. The scope of the norms of justice is not unlike that of law: the universal quantifiers are to be interpreted literally.

The scope of many norms of justice is universal in these two ways. In addition, the norms are intended as authoritative; that is, they are meant to be reasons (to act or to refrain from acting, to adopt certain attitudes, to assign responsibility, etc.) to all (to whom they apply) on all occasions (when they apply). A reason for action here is a consideration favoring an action that ought, in the absence of other considerations, to motivate an agent so to act. The authority justice claims over us is more than an additional consideration favoring action, to be added to the balance of reasons. For one, the reasons in question are meant not to be conditional on our interests or desires. The reasons justice claims to offer are not considerations that are just to be added to all the other factors that ought to determine one’s deliberations, as I noted earlier. Rather, they are to settle the matter and to determine one’s conduct (in the absence, presumably, of certain defeasibility conditions that would permit or even require acting otherwise). Even if the demands of justice do not override all other moral considerations, we can still agree that the reasons in question are meant to settle the question and to determine our conduct in the absence of other important considerations. We may think of these reasons as especially weighty, as it were. But I think that a mistaken analysis of reasons of this sort. They are not meant to be additional considerations that one is to add to the other factors that ought to be taken into account when deliberating about a choice. Rather, as I said, they are meant, in a sense, to settle the matter (subject to being defeated by certain other considerations). I think a better account can be had by understanding these reasons as preemptive. As Joseph Raz explains, “[A]uthoritative reasons are pre-emptive; the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.” So the norms of justice are authoritative; that is, they are preemptive reasons (to act or to refrain from acting, to adopt certain attitudes, to assign responsibility, etc.) to all (to whom they apply) on all occasions (when they apply).

38. I say that virtually all humans or persons have moral standing in order to sidestep difficult questions at the margins (e.g., abortion, advanced dementia). I also leave open the possibility that some rights may be lost, either by forfeit or alienation.

Now the norms of justice that are, at least in part, “artificial” in Hume’s sense are dependent for their force on the existence of certain conventions and practices. This is clear in the case of property: whether walking across someone’s land or drawing from someone’s well constitutes trespass or theft depends on the moral and legal conventions of the setting. In some cultures abandoned umbrellas or lost jewelry become the property of the finder, whereas in others finders have some obligation to find the owners. Norms of truth-telling and fidelity seem especially sensitive to the particularities of given practices.

We might, then, as with other systems of conventional norms, such as manners and the law, anticipate the existence of conflict between parts of justice as well as between justice and some of the other virtues. We might expect the (normative) laws of nature, whether established by an omniscient, benevolent deity or by nature itself, to form a consistent set. But we should have no such expectation of any complex set or system of conventional norms. Just as we expect to find conflicts between different laws or different parts of the law, so we might expect to find conflicts between different norms of justice or between different virtues insofar as these have conventional aspects. The conflicts may not be deep or may only be apparent, but we have no reason to expect human-made conventions, developed over a long time, in varying settings, to be consistent. In an interesting and insightful essay cited earlier, James Griffin argues:

Our norms are unlikely to have grown in a way that would make them a system; they have grown, by fits and starts, in response to pressing, heterogeneous practical needs. They have taken their shape partly from the kinds of circumstances we found ourselves in, from the sorts of problems that we faced. Since the problems were different—sometimes large-scale political, sometimes small-scale personal, sometimes about dispositions for facing moral life generally, sometimes about the way to decide out-of-the-way cases—it would not be surprising for different clusters of norms to have emerged.

If this is the case, we should not be surprised to find many instances of norms of justice that are not, in fact, always preemptive reasons.

Consider next a different kind of case, a particular and now familiar problem of conflicting norms. In many parts of the world today it is often said that resolving certain long-lasting conflicts and securing peace comes at the price of sacrificing justice.

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Preemptive reasons, it should be stressed, need not be conclusive, that is, reasons that are not overridden by other reasons (or cancelled), or absolute, that is, reasons that cannot be overridden. For one way of drawing these distinctions, see Raz, Practical Reason and Norms (Oxford: Clarendon, 1975 1999), 27.


41. “I think we come to ethics with a false assumption. We expect the content of morality to derive from one kind of source—namely, from principles of one sort or another. We expect it to derive from the good, or from the right, or from fairly normative standards of rationality. The reality seems to me quite different. When we understand the forces shaping moral norms of property, say, we see how heterogeneous the forces are” (Griffin, “On the Winding Road from Good to Right,” 171–72, 174).
Recently, in Argentina, South Africa, the Middle East, Northern Ireland, and several Central and Eastern European countries, many accommodations have been defended in the name of peace with the understanding, implicit or explicit, that justice is thereby sacrificed. Amnesties of different kinds have been defended as necessary for peace, even though they allow many crimes to go unpunished. Older and more familiar examples set justice against benevolence or liberty in opposition to equality. But the conflict between peace and justice is in some respects more interesting and harder to deal with. Justice is a virtue that would have us shun compromise and accommodation, at least in most contexts. 42 But in the contemporary cases, the conflict with the cause of peace seems so clear and pressing that it is not unreasonable to think that justice should lose; in nearly all of the cases alluded to above, it does lose. If so, the norms of justice are not always preemptive reasons. One might be tempted to respond by reinterpreting justice to be compatible with accommodation and compromise, but this maneuver is unlikely to succeed in all instances.

The failure of all norms of justice to be authoritative in all instances is a blow to the self-image of justice. This seems plausible with regard to some moral norms, for instance, those governing truth-telling or fidelity or property. Critics will respond by trying to show that apparent violations of these norms, where it appears we lack preemptive reasons to tell the truth or to be faithful to engagements, are in fact instances of the rules being defeated or our disregard of them excused. It is not plausible that all the cases where we have sufficient reason to tell a lie will be covered by the complex defeasibility or excusing conditions governing this norm. Consider cases where someone has told a falsehood with the intention to deceive, where it seems a violation of our norms of truth-telling to do so; are all the cases ones where the exceptions are handled by the norm or by some other moral consideration? Consider lying when pleading in a criminal trial. We might say that wrongdoers may lie and plead not guilty when accused of a crime because such pleas are part of a system designed to secure justice through adversarial proceedings. But what about the criminal who pleads innocence solely in the hope of acquittal, where there is no danger that a guilty (or nolo contendere) plea would risk increasing the penalty? The plea of innocence here is wrong even if legally permissible. But note that we do not for a moment think that the criminal has preemptive reasons to concede guilt.

Consider cases of theft. The poor who steal a loaf of bread to feed their hungry children are perhaps excused given their plight. But others who help themselves to some neglected cash found in an office drawer presumably are doing wrong or committing an injustice. Are there never any cases of this sort where we so act wrongly without disregarding any preemptive reasons against stealing? The cash we take, perhaps knowing that it will not be missed, might be used for our children’s education or to take a long trip abroad with a friend. It seems somewhat far-fetched to think that all such cases of theft are instances of acting against preemptive reasons. Similarly, a physician may be tempted to favor a relative or friend in decisions on the allocation of spare organs, or an admissions officer may be tempted to favor someone in school

42. "Justice is the first virtue of social institutions, as truth is of systems of thought...an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising". John Rawls, A Theory of Justice, 3–4.
or college admissions. Are there no such cases where the person would be acting wrongly but without acting against preemptive reasons?

The thesis that the norms of justice are not always preemptive reasons may appear much less plausible regarding certain central norms of justice, for instance, the principle prohibiting the intentional killing of nonthreatening innocent persons. The same may be true with the prohibition of cruelty. Do we not always have preemptive reasons to abide by these norms? If not, are all cases where it seems reasonable to disregard these norms ones where one is so justified or excused? Justice undoubtedly is understood to forbid such things; what is doubtful is that every agent in every situation in fact has preemptive reasons to comply. Consider particular cases of intentional killings of the innocent in wartime, for instance, the targeting of German cities at the beginning of the Second World War (when the survival of Great Britain was at stake) or the bombing of the Japanese cities at the war’s end. It is hard to see how many of these bombings could have been just. But it is certainly possible that some of the bombings were wrong, though the statesmen who ordered them did not, in fact, have preemptive reasons to desist. They were not justified in bombing, and the situation did not excuse their acts; they acted wrongly but not against reason.

Suppose you have in your possession the family of the leader of a group of homicide bombers known to be planning to detonate several small nuclear weapons throughout your country. Would it not be unjust to coerce or torture them so as to deter the bombers, even if that were an effective means of defending your country? I should have thought so. But the injustice of this act would not necessarily be a reason, much less a preemptive reason for action.

I think it is quite clear what justice requires in each of these examples. Some details may have to be changed in order to achieve consensus. Consequentialist moralists may think that “morality” would have us override the concerns of justice. But I am not interested in battering these foes here. I take justice more seriously. However, it is not clear to me that we, in fact, have reasons of the requisite sort to be just in all of these cases. And there has to be more than a handful such cases.43

Now we should still expect justice to be practical even if its norms fail to be authoritative in all circumstances in which they apply. For one, there are many reasons to do what is right, even if one lacks the preemptive reasons that justice is said to give us. One might fear being caught or merely be squeamish or worry what others might think. Most of the time, just behavior seems overdetermined. So the trouble with justice may not, in practice, be all that troublesome. But it is troubling for moralists and theorists. I am not certain I am right, but there seems to be trouble with justice.

43. Consequentialists will find these remarks inadequate. Kantians have even more reason to be annoyed, as I don’t face up to the challenge their positions pose to my story. One can think of Kantianism in ethics as consisting in part as the hypothesis that rules or norms can always be specified so that the right values are captured and compliance is always required. I have not said enough to allow us to dismiss this possibility. That is a topic for another time.