https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

WHAT IS CIRCUMSTANTIAL ABOUT JUSTICE?*

By David Estlund

Abstract: *Does social justice lose all application in the (imaginary, of course) condition in which people are morally flawless? The answer, I will argue, is that it does not — justice might still have application. This is one lesson of my broader thesis in this paper, that there is a variety of conditions we would all regard as highly idealistic and unrealistic which are, nevertheless, not beyond justice. The idea of "circumstances of justice" developed especially by Hume and Rawls may seem to point in a more realistic direction, but we can see that this is not so once we distinguish between conditions of need for norms of justice, conditions of their emergence, and conditions of applicability of the standard of justice. Justice, I argue, can have application even in conditions where no mechanism of justice is present or needed, such as the case of internalized motives of justice.*

KEY WORDS: Rawls, ideal theory, justice, norms, Hume

I. Introduction

Does social justice lose all application in the (imaginary, of course) condition in which people are morally flawless? The answer, I will argue, is that it does not — justice might still have application. Indeed, when we are asked to imagine a society of morally perfect people, it is fair to ask whether we should assume that they are just. And it is not clear what would even be meant by asking whether justice has any application in a world of people who are, among their other perfect virtues, just. Still, we could ask whether justice would have any application if people were otherwise morally perfect, leaving aside, at first, whether they are just. The answer turns out to be yes, as I will argue.[1] If this is correct, the theory of justice as a domain of inquiry covers even morally flawless conditions.[2] This is one lesson of my broader thesis in this essay, that there is a variety of conditions we would all regard as highly idealistic and unrealistic that are, nevertheless, not beyond justice.

* I am grateful to helpful audiences at University of Arizona, Queens University (Ontario), University of Warwick, and Texas Christian University. Special thanks to Nomy Arpaly, Jerry Gaus, Charles Larmore, Jacob Levy, Geoffrey Sayre-McCord, and David Schmidtz, who have helped me, in a relatively global way, shape this enquiry and line of argument.

[1] Jacob Levy compactly expresses the contrary view in "There Is No Such Thing as Ideal Theory," (present volume) where he writes, "If we could stipulate full compliance with moral rules however demanding, then there is no reason not to stipulate better virtues than justice and a morally good enough humanity not to need a coercive state at all."

[2] This would not yet address whether the higher, more idealistic cases are more truly or purely the proper context for the standard of full justice. I present some considerations in favor of that further claim in "Prime Justice," in *Political Utopias*, ed. Kevin Vallier (Oxford University Press, forthcoming).

doi:10.1017/S0265052516000261

© 2016 Social Philosophy & Policy Foundation. Printed in the USA.

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

On one familiar view about justice, to which I am sympathetic, whatever social justice requires, it is quite idealistic — a high evaluative standard.[3] Few societies, if any, have been just or even very nearly just, and we would not be surprised if few or none ever will be. This sad verdict is shared by many people who hold very different conceptions of what justice requires. If it is correct, then if a society were ever to be just, things would be unusually, surprisingly, and extremely good in that way, at least as measured by history and our expectations. Justice is thus a somewhat unrealistic standard. It is unrealistic because it is, in a general sense, idealistic.

Taking an opposing view, some are skeptical about the usefulness of standards that are not very realistic. It is not clear, they might think, what use we would have for such standards if there is little prospect of their being met. Working backward from that pragmatic concern, and assuming that justice is not useless, they infer that it is realistic. In that case, some actual societies, or at least some that are not unlikely, count as just which would not be so-counted on the less optimistic view described first. Lest this seem an arbitrary lowering of the bar, the latter view — I will call it the anti-idealist view[4] — might appeal to the idea of "circumstances of justice." Following Hume and Rawls, justice is understood as a solution to a certain kind of social problem, one that is itself defined by some unfortunate circumstances, as they see it.[5] Justice, on this view, has application only in those unfortunate circumstances, and so when things are just they are, necessarily, still not very good. We could imagine things being much better, but that would be beyond justice — "ideal" in some way perhaps, but neither just nor unjust. The standard of justice is reserved for conditions of a certain kind that are all too realistic, and far from any very high ideal.

Whatever else there is to be said for either of these approaches — the idealistic and its opposite — I believe that there is no support for the less idealistic approach in any proper understanding of circumstances of justice. My central argument will be that once we distinguish between conditions

[3] This is not to be confused with the plethora of other common uses of "an ideal," "idealism," "ideal theory," and so on. In particular, it is now common to distinguish between idealizing in the manner of simplification for theoretical purposes, and ideals or idealism in the sense of high evaluative standards. See, for example, Stemplowska and Swift, "Ideal and Nonideal Theory," in David Estlund, ed., *The Oxford Handbook of Political Philosophy* (Oxford: Oxford University Press, 2012). See also Jenann Ismael's deployment of a similar distinction to compare idealization in science and in political philosophy, in "A Philosopher of Science Looks at Idealization in Political Theory," (present volume).

[4] "Realism" is already in use and would be confusing here. However, self-described political realists seem likely to accept what I call the anti-idealist position. See Enzo Rossi and Matt Sleat, "Realism in Normative Political Theory," *Philosophy Compass* 9, no. 10 (2014): 689–701.

[5] Hume's account focuses on property. I drop that restriction here, as do Rawls and many others. I will speak generally of the task of adjudication of conflicts between individuals' aims and convictions. As for whether the justice-triggering conditions are sad or unfortunate, it is impossible to read Hume's opening to Section III of *An Enquiry Concerning The Principles of Morals* (1777) (any edition), in any other way.

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

under which there would be a certain *utility* in having social rules of adjudication, conditions of the *emergence* of rules of adjudication and of associated moral ideas, and conditions under which the standard of justice has *application*, we will see that the standard can have application in highly, even if not absolutely, idealistic conditions. But the essay argues for a related cluster of claims, each of which denies a way in which circumstances of justice might seem to preclude the standard of social justice having highly idealistic content. Nothing in a proper understanding of circumstances of justice precludes applicability of justice in any of the following conditions, or even in certain combinations of them. Justice might have application even where,

- there is no need for social rules of justice.
- there are no social rules or other mechanisms of adjudication.
- there are no conflicting aims or interests.
- there are no differences of opinion or conviction.
- no one is morally deficient in the slightest.

My argument is not that justice could have application even if *none* of these things were the case, and that is evidently not true. But each of the above claims, I will argue, is true. I also argue for two further theses:

- Mutual advantage might constrain what mechanisms of adjudication would arise, but it does not follow (and it is plausibly not true) that it constrains what arrangements might successfully specify justice.
- Even if ideas of justice would only arise in the train of mutually advantageous social rules of adjudication, this does not support the conventionalist view of justice — that it is, in any way, a human creation.

Seminal treatments of the idea Rawls christened "circumstances of justice," occur not only in Hume and Rawls himself, but also in Hobbes and Hart. I am not offering an interpretation of the moral philosophy of any of these authors, and nothing here is meant to criticize their views. In several places I do consider exegetical questions about Rawls, especially in the final section, mostly sympathetically. But the essay's main burden is not interpretive, as I hope the foregoing paragraphs make clear. In all of those authors, there are references to motives or inclinations it is natural to regard as morally deficient, but it is not always clear whether such deficiency is meant to be essential for the very applicability of ideas of justice. In any case, I hope to show that it is not.

A few preliminaries will be helpful in introducing what comes in the following sections. First, we are not concerned here with every kind of justice and injustice, such as deserved or undeserved punishment, or the

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

various things that might be meant by an individual virtue of justice.[6] Rather, the kind of justice in question specifies appropriate resolutions to interpersonal conflicts of desires or beliefs, roughly speaking. It is too easily assumed that the needed resolutions must be provided by the threat of sanctions, or even specifically by government. Or seen from the other side, it is too easily assumed that in conditions where there is no need for government or sanctions, there is no applicability of this kind of justice at all. I hope to show that those assumptions are mistaken.

Second, the issue here is not merely semantic, but substantively moral. If someone proposes to use the word "justice" to refer only to conditions that include, say, states, laws, familiar moral deficiencies, and/or other elements that might be arbitrarily defined as essential to "the political," then the question whether moral imperfection makes the idea of justice inapplicable is answered by definitional fiat, though implausibly to my mind. Nevertheless, I argue that there is a familiar form of behavioral need (as I will call it) for some or other mechanism of adjudication of interpersonal conflict that is not necessarily met simply by people being morally flawless. Furthermore, the need might, conceivably (even if unrealistically) be met without any sanction-based rules, or coercive government. If this is taken to show that justice as so understood is not essentially political, so be it. It is not especially interesting to claim that *political* justice depends on the presence of political elements however "political" might be defined. Now, having said all this, my topic is not limited to the question about moral perfection. More generally, I emphasize that justice might apply to a variety of highly idealistic conditions, moral perfection among them.

Third, I will speak of the standard of justice without presupposing any particular account of what the standard requires. This neutral use of the concept of justice is the operative one when, for example, we ask what justice requires. "Justice," in that setting, does not refer to or assume any specific conception of the content of justice. It will be central to my argument to assume that the standard of justice (whatever it might require) is not identical with the standards embodied in social rules or conventions of any kind. This should be common ground. My point is not only that any actual set of rules might be unjust, but that the standard of justice is at a higher level of abstraction. That is why adjudicatory social rules, conventions, or motives can embody the same standards — have the same standards as their content.[7] Just as beliefs

[6] For more on these ideas, see the articles "Justice as a Virtue," (by Mark LeBar and Michael Slote), and "Retributive Justice," (by Alec Walen) in the *Stanford Encyclopedia of Philosophy*, ed., Edward N. Zalta, (plato.stanford.edu).

[7] There is nothing hostile to Hume in this abstract idea of a standard, for what it's worth. ". . . [T]he true perfection of any thing consists in its conformity to its standard" (David Hume, *A Treatise of Human Nature* [1738], 1.2.4); and ". . . we seek some other standard of merit and demerit, which may not admit of so great variation" (Hume, *Treatise*. 3.3.1); and ". . . [they] are alone admitted in speculation *as the standard of virtue and morality*. They alone produce that particular feeling or sentiment, on which moral distinctions depend" (Hume, *Treatise*, 3.3.1, emphasis added).

have propositions as their contents, rules and conventions of justice have standards as their contents. And just as a rule or a convention can embody a certain standard of justice, so can a person's motives, sentiments, or attitudes. When a person obeys a social rule or convention she abides by its standards. If she should come to develop motives to behave in the same ways that those rules or conventions dictated even where there are no such rules or conventions, she still abides by the same standards, now internalized. They are now her own standards, those she possesses or accepts. So the standard of justice is not conceptually linked to social rules. That leaves open the possibility that the standard of justice is conceptually linked to mechanisms of justice of some kind, be they rules, conventions, or moral motives. The role of justice, one might conjecture, is nothing but to be the content of one or another such social mechanism. I will resist that way of thinking.

Fourth, I will speak of the applicability conditions of the standard of justice, so that is worth explaining briefly. In all of these cases of mechanisms — rules, conventions, or moral motives — we can consider the embodied standard itself in order to ask under what conditions it would have application. All standards are bound to have necessary conditions of their applicability. Decorum is not a standard that applies to the evaluation of a financial decision. Efficiency is not a standard that applies to the evaluation of the state of someone's health. Justice is not a standard that applies to conditions in which there is nothing to put people's interests and opinions at odds, at the very least.[8] There is that much truth in the idea that there is no justice without a problem. But that is not as inimical to idealistic conceptions of justice as one might suppose.

II. Uncoupling Justice from the Need for Social Rules

It will be helpful to distinguish what I will call social rules from social conventions as follows, limiting ourselves to ones that serve to adjudicate conflicts between individuals. A social *rule* of adjudication not only specifies resolutions of conflicts but is also accompanied by social or official sanctions for noncompliance with the standard. We can regard a *convention* of adjudication as the case where such a standard is conformed to in practice, even without any threat or mechanism of punishment for noncompliance, but still conditionally on most others complying as well.

[8] See also John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap Press, 1999): "Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage (sec. 22, p. 128). For a little fuller discussion of ways in which certain things fall in or outside of the applicability of (as she puts it) a predicate, see Ruth Chang, "Introduction," in Ruth Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA: Harvard University Press, 1997), 28. What's true of all predicates is true of moral predicates such as "just."

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

We will distinguish both of those from the case in which the standard is complied with, but owing neither to any social rule nor to any convention as I have defined these, but owing entirely to individuals having or adopting these standards in their own *motives*.[9] I will call these — rules, conventions, and motives — the three mechanisms by which the behavioral need (about which more shortly) might be met.

Hume famously says, "if men pursu'd the publick interest naturally, and with a hearty affection, they wou'd never have dream'd of restraining each other by these rules"[10] This Humean point will eventually suit my purposes nicely, but first notice how it is grist for the mill of the critic of idealistically high standards of justice. Hume is arguing that the very idea of justice is owed, causally speaking, to real conditions of human life which, being far from ideal in certain ways, gave rise to a human need for and development of social rules of adjudication. For my purposes we can allow that Hume is right about this. The lesson many seem to have drawn is that whatever the standard of justice might require, it is, for this Humean reason, inseparable from — has no application outside of — those unfortunate conditions that explain its emergence in rules. The problem to which such rules provide a solution sets the conditions for the very applicability of the standard of justice. This is one of the things I propose to challenge. The conditions necessary for the emergence of mechanisms of justice are not (at least not necessarily) conditions necessary for the applicability of justice. This will allow us to see at least one highly idealistic scenario that is not justice-inapt even though no rules are necessary there, namely a condition of widespread moral motives of justice.

We should consider first whether justice only applies when there is a human need for social rules of adjudication. In a first stage of argument, I will argue that this is not so, since those needs might be met by conventions or by motives embodying similar standards. That is a first important result, but it would not yet challenge the suggestion that justice applies only when there is a human need for one or another of the adjudicatory mechanisms, even if only internalized motives of justice. I turn later to questioning the broad strategy of linking justice to a human need. (See the section on "Who Needs Justice?")

The suggestion to be scrutinized first is that the applicability of a standard of justice depends on the presence of conditions where there is a practical need for social rules embodying such a standard. This suggestion, which I will criticize, makes use of the following two ideas:

> *Need for justice*: conditions under which a society will have the need for some social rules (or, considered later, other mechanisms) for adjudicating conflicts.

[9] Some standards are essentially reciprocal, but not all.
[10] Hume, *Treatise*, 3.2.2

> *Applicability of justice*: conditions under which the standard of justice has application.

In order to have all three in once place, I introduce a third class of conditions here and come back to it later:

> *Emergence of justice*: conditions under which a mechanism of justice will emerge, evolve, or be developed.

The need for social rules (the rule-need) is derivative, we must assume, from a need for a certain organization of behavior (which I will refer to as the *behavioral need*). In particular, the rules would serve to bring about behavior that is more peaceful and productive, largely by avoiding uncertainty and battle. The details should not matter. We are to consider circumstances in which a collection of socially interacting people stands to benefit greatly from behavior that is organized in the right way. We are to suppose further that behavior would never come to be suitably organized if not for the emergence of some social rules for adjudicating disputes and conflicts. In that derivative way, the people have a great need for such social rules, in order to meet the need for such behavior.

To say that the behavior, and derivatively the rules, are "needed" is plainly to claim that it would be in people's interest. We might wonder, which people's interest? I want to flag this issue and return to it (see section on "Who needs justice?"), but we can proceed for now on the simple assumption that to say that the behavior and rules are needed in the relevant sense is to say that having them would be to everyone's mutual advantage, adding, if you like, that the relevant interests that are mutually served are dire or urgent ones as opposed to refinements of the good life.

There are ways in which the needed organization of behavior could, in principle, be produced without social rules, and we will consider two such ways. If it were possible to arrive at a social convention in which the needed organization of behavior was present, each individual's behavior being conditional on the expectation of the others', but without threats of sanction, no social rules would be needed — rules being defined for our purposes as including sanctions. Maybe they were needed in the past as a precursor, or maybe not, but either way, they are not needed once there is such a convention. Maybe rules are needed because no such convention will, in fact, arise, but what is needed is either rules, or a convention, or some way of producing the behavior.

All sides agree that justice has application in the case where the organized behavior is needed and social rules are present. The question, as I have said, is whether that is the only case in which it applies. But once we consider the case of a convention, there is evidently as much application of the idea of justice there as in the case of enforced rules. The content of the mechanism, namely the standard, is, we can suppose, unchanged, and

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

the need they are serving is also precisely the same: the suitable organization of behavior along the conflict-resolving lines we described. So, as a first step, in the specific sanction-entailing sense of "rules," there is a condition in which the standard of justice applies even though there is no need for social rules: when there is the behavioral need plus a convention.

By distinguishing, in that way, the standard from the particular mechanism of social rules, it is easy to see that there is also a second way in which the behavioral need could in principle be met without the presence of social rules. Imagine, in a Humean spirit if you like, some long peaceful period of life under such conventions of justice. It is conceivable that people will become attached to the motive of compliance with these norms, praising it in others and taking pride in their own. (We might even regard them as becoming, in that Humean way, moral motives.) Predictions are not what matter here; just suppose this happens. Alternatively, and more generally, suppose that people come (maybe by this convention-induced mechanism, or some other functional explanation, or in some entirely different way) to be motivated to behave in just the same way as under that convention, except now the motive to comply with that same standard is not contingent on its being conventional to do so. Suppose the motive to so act has its force for each agent regardless of whether others are expected to behave similarly, though suppose they all do. The norms are now, as we might say, internalized. For simplicity, call these *coordinate motives of justice* in the case where there are no social rules or conventions of justice, even if there might have been in the past.[11] Coordinate motives of justice would meet the need for suitably organized behavior, since the behavior produced by the rules and conventions is the very same behavior (*modulo* the motives) that is produced by these coordinate motives. So we see that there could be conditions where neither rules nor conventions are needed, because there are coordinate motives to meet the behavioral need.[12]

If the standard of justice, having been granted to have application where no rules or conventions of adjudication were needed, applies here too, then we will have decoupled the conditions of applicability from the conditions in which rules or conventions of adjudication are needed. And, indeed, I see no way it could be denied even on the broadly Humean approach. Even if the standard of justice gets its content in a certain way from the standards embodied in the mechanisms of adjudication that arise from certain human needs, internalized motives of adjudication are one

[11] I do not call them "coordinated" norms, since that might distract us toward some question about who is the coordinator. That is no part of our question, and there need not be a coordinator.

[12] The cases of rules and conventions might well involve a measure of moral motivation as well. What is distinctive of the case I call "moral motives" is that the coordinate behavior is not a product either of threatened sanctions or an expectation of reciprocal behavior by others.

such mechanism. Justice, then, could apply even in conditions where there is no need for social rules or conventions because there is the alternative mechanism of just people. Not only does this let justice apply independently of the need for rules, it applies in what anyone would recognize as a highly idealistic, and maybe very unlikely condition — the condition in which motives of justice are sufficient to produce the needed behavior, even with social rules or conventions (as defined).

The idea that such a mechanism might arise, but only at a later historical period than the mechanisms of rules and conventions is important in Marx, as when he contrasts merely "political emancipation" with the "human emancipation" in which the "real, individual man resumes the abstract citizen into himself," a social function previously farmed out to political institutions in which one is seen as merely a juridical person. Marx and others sympathetic to this picture might conceive of that achievement as beyond politics, law, and the state. I will argue only that it is not beyond justice. The late stages of Marxian theory, if I am right, fall under the general theory of justice as a domain of inquiry, not outside it.

As we saw earlier, Hume says, "if men pursu'd the publick interest naturally, and with a hearty affection, they wou'd never have dream'd of restraining each other by these rules"[13] This passage, which is followed by many other authors, is double edged. On one edge, it says that if people's interests, understanding, and motives were never competing or conflicting in any way in the first place we would have no need for behavior to be organized by standards of justice, and (what is different) justice would fail to apply. I grant that. But on the other edge it also, inadvertently I suppose, shows us that sometimes where justice does apply, because something in people's conditions puts them at odds, there might still be no need for social rules of adjudication (by which people "restrain each other," as Hume says), or even conventions, and this is because there might be internalized standards of justice by which men pursue "the publick interest" if not "naturally," then still "with a hearty affection." Hume says that there would be no need for restraint by rules in that case. Whether or not we can find it in Hume, a further point is that, while there would be no need in that case for sanction-backed social rules, the hearty affection for the public good would itself be a needed, and happily present, mechanism of what Hart calls "mutual forbearance." The public interest is, presumably, some appropriate arrangement that, among other things, resolves conflicts and disputes of aims and beliefs. Those conflicts do not disappear just because all parties are motivated to deal with them in some specified way, and so justice plainly applies. The motive of justice will have (perhaps inherited from rules) content that coordinates behavior in order to adjudicate the admitted conflicts among people's other interests. The point is that justice cannot be denied application in that fortuitous case, since it is just a

[13] Hume, *Treatise*, 3.2.2.

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

third mechanism, embodying the same standard as might be embodied by rules or conventions, which tends to meet the need for certain kinds of organized behavior. Of course, justice, like any standard, has application only in certain conditions, as I have mentioned. If people had no attitudes that put them at odds in the first place — no self-favoring desires or headstrong beliefs that rules or conventions or motives of justice might restrain — then justice would not even apply. But those conditions of application are compatible with a highly idealistic world of people who have no need for rules or conventions of justice, because they are just in their coordinate motives.

Government, roughly the promulgation and coercive enforcement of laws, is obviously one salient form that social rules, in my sense, might take. So, if the presence of convention or coordinate motives of justice can meet the behavioral need, government would not be needed to serve that role. There is a traditional interest in the question whether morally perfect people would still need government, to which I return below.[14] For now, notice that no position is taken on that question by noting that there is a conceivable arrangement of motives that would make government unnecessary. I will argue below that moral perfection does not ensure such an arrangement, in which case government might yet be necessary.

III. Multiple Realizability and Specification

Prior to any mechanism, there might be no particular behaviors that count as unjust, since there are multiple, and indeed infinitely many, coordinate patterns of behavior any of which would be eligible as a pattern that specifies the content of justice. We might call patterns of which this is true *eligible patterns*. We sometimes say that it is arbitrary which specification is adopted. Certainly, when considering the enormous number and complexity of rules of property in a modern state, it is probable that there would be lots of alternative patterns that would be just. If some particular change would plausibly make a certain arrangement less just, it will often be possible to devise a second change elsewhere in the system that countervails the first from the standpoint of justice. And that procedure could probably be repeated a large number of times, generating a new just system with each iteration. If so, there might be a wide variety of systems of, say, property that are equally eligible from the standpoint of justice — equally suited to specify which behaviors count as just and unjust. We can speak, then, of the *multiple realizability* of justice, and also of a *pre-specification* phase in the development of just arrangements. It is important not to exaggerate the multiplicity. Not just any pattern would count as a specification

[14] Gregory S. Kavka, "Why Even Morally Perfect People Would Need Government," *Social Philosophy and Policy* 12, no. 1 (1995): 1–18, citing Madison's famous dictum.

of justice. (Consider, for example, the initial changes to a just system but without the countervailing changes just discussed.) Still, there is multiplicity and it is in some ways vast.

If none of the eligible patterns has been selected by the emergence of eligible social rules or other mechanisms, does nothing count as just or unjust? We should allow for the possibility that some acts would be forbidden by each and every member of the set of eligible patterns.[15] Whatever is in that overlapping set is the portion of the content of justice that is, as I will call it "naturally determinate." Still, there is bound to be much that is not common in that way. We can grant for the sake of argument that social rules or conventions of justice are necessary in order to give fuller specification to justice, selecting among morally eligible patterns.

An arrangement that is selected by the rules at one time can remain selected whether the rules themselves persist or not. Think of a law that selects left-side driving. If convention or even internalized motives come to conform to that standard, left-side driving might remain selected even if the law were to expire or be repealed. The same point applies to social rules or conventions of adjudication. They do not need to persist in order for their power of selection to persist. Similarly, once some mechanism has done the specifying, then not even a mechanism of internalized motives is required in order for justice of behavior to be specified. Imagine such motives weakening over time. At least for some period this will count as a falling into injustice. The standard of behavior applies whether any mechanism is in place or not, even if some mechanism must previously have been in place to accomplish the specification. The behavioral standard's applicability is not ultimately owing to any positive rule or norm or practice's being currently in place or being needed. Plausibly, if all mechanisms have lapsed for too long, the specification lapses as well and there is a new need for one or another mechanism of justice. There might still be some requirements of justice if, as seems likely, there is some overlapping content of all eligible mechanisms, the naturally determinate portion of the standard of justice.

If not just any stable order of behavior is sufficient to count compliant behavior as just, we ought to ask which patterns are justice-apt in that sense and which are not. That is a hard question, and I return to it in the next section. However, acknowledging the question is enough to suggest the unavoidability of appealing to a higher-order standard by which whole systems (basic social structures?) are to be judged, so that only some are eligible as just (understood as justice-specifying) arrangements. Call this higher-order standard the *standard for just arrangements*. It is higher-order because it is the arrangements themselves that embody standards of just *behavior*.

[15] Something like this idea seems to be behind Hart's discussion of the minimal content of natural law, as a content common to all suitable "systems of mutual forbearance." See Hart, *The Concept of Law*, 195.

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

There is the need, then, to appeal both to a standard for just arrangements — those that would, by specification from the eligible candidates, render certain behaviors just and unjust — as well as standards of justice that are specified by the emergence of one of the eligible arrangements. The higher-order standard's status cannot coherently itself be a matter of artifice or invention, even if the specification of some particular arrangement is. Rather, it ranges over possibilities of human artifice — the mechanisms of adjudication that could conceivably be devised — and counts some of them as mechanisms of justice, other ones not.

One might hope to avoid appealing to any such standard of just arrangements (perhaps if one is hoping to stay broadly conventionalist about all standards of justice) simply by appeal to the question of which arrangements have any chance of actually emerging. Suppose only arrangements that would benefit everyone would tend to emerge. That would select some arrangements out of the set of all conceivable possibilities. And mutual advantage has a promising ring to it. I turn in the next section to criticizing this familiar approach.

Conflict or disagreement alone may not themselves be enough to count any behaviors as unjust prior to the selection of any of the eligible arrangements of adjudication; standards of justice of behavior would not apply. But either conflict or disagreement is enough to give meaning to the possibility of a system of adjudication, and prior to the emergence of any such system, some of the possible systems are disqualified by a higher-order standard of justice. Those conditions are ones in which, as Rawls says, "questions of justice arise."[16] The standard of justice is doing some work already. We might express it this way: the conditions of the applicability of justice come in two kinds: a) conditions in which non-artificial standards of justice-eligible arrangements apply, categorizing some possible arrangements as systems of adjudication that would successfully specify which behaviors are just, and b) conditions in which one of the eligible arrangements has been somehow selected in practice, and so now certain behaviors are just and others unjust (or ones that were not already naturally determinate). And, not to be forgotten: the specification might well persist, even if all mechanisms come to disappear, leaving certain behaviors to count as just or unjust even there.[17]

[16] Rawls, *Theory of Justice,* sec. 22, 112. The existence of such a standard of eligible arrangements is not itself enough to guarantee that there is any act that is either forbidden or permitted in all such arrangements, so it is not enough by itself to count any actions as just or unjust.

[17] It is worth considering whether once we are post-specification, the standard so-specified can be applied retroactively to pre-specification conditions. For now I see advantages and disadvantages of each answer. Rachel Cohon says that according to Hume, "We approve [the artificial virtues] in all times and places . . ." (Rachel Cohon, "Hume's Moral Philosophy," http://plato.stanford.edu/archives/fall2010/entries/hume-moral).

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

Since, to some extent, the content of justice gets specified by whichever mechanism arises, it might seem as though there is no independent basis upon which someone might criticize prevailing mechanisms. But it is always open to people to question whether the mechanism that has arisen is truly in the eligible set of arrangements — arrangements that, should they arise, not only specify resolutions, but also count as genuine norms of justice. That is a substantive moral question, not a sociological one.

Finally, it might seem that if there are no rules or conventions, then there will be no source to specify which of several competing interpretations of the norms is (already, or by fiat) correct or authoritative. There are two things to notice about this question. The first is that whatever indeterminacy there might be prior to that authoritative source, similar indeterminacy can just as well arise again in the interpretation of the source itself (a court, a written statute, or whatever). So it is not a decisive solution. Second, even if some such source is needed, that is compatible with the mechanism for meeting the behavioral need being nothing more than moral motives — that is, no sanctions, and no conditionality of the motives on similar behavior by others. So, the question of whether for some reason there needs to be such a coordination source outside of the motives themselves is not especially pertinent to our question whether justice might apply and even be satisfied even without rules or conventions.

IV. Who Needs Justice?

We noticed that there is this question: Which arrangements of adjudication are the justice-apt ones? Suppose the arrangements of behavior for purposes of adjudication that are to be counted as genuinely justice-determining are whichever ones are likely to emerge in real human social conditions, in response to a profound human need for such a thing. Central to this strategy is the suggestion that in certain conditions there *comes to be a need* for rules or some other mechanism of justice. What kind of need is referred to? This might mean that there are conditions in which the standard of justice applies, and that it will not be met unless there is some such mechanism. A mechanism is *needed if* there is to be justice. Or a mechanism might be said to be needed if there is to be justice, *which is morally required*. However, neither of these is the proposal I want to consider, since this is not yet to link justice to human needs in any way.

A third thing it might mean to say that there comes to be a need for some mechanism of justice is that there are certain human needs, understood as especially important and basic interests, that will only be satisfied if there is some mechanism of justice — some mechanism to specify and help produce behaviors that thereby count as just. This is saying importantly more than that mechanisms are needed if justice, which ought to

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

obtain, is going to obtain. It now makes essential reference to fundamental human needs that would be met. On this approach, the content of justice is eventually to be understood by first understanding justice's function, so defined, as its meeting a certain human need. I believe such a linkage between justice and human need is often thought to have the advantage of forestalling flights of fancy, keeping justice down to earth. The thought might be that mechanisms embodying high idealistic standards are patently not something humans would ever need. In any case, I want to cast doubt on the need-grounding approach in general, which would then undermine any alleged moderating pressure it is claimed to exert on the standard of justice.

When it is said that people come urgently to need some mechanism of adjudication, we ought to ask: Which people? When people are at odds, it is hardly guaranteed that everyone would benefit from the emergence of a mechanism of adjudication. Some might be better off without rules or other mechanisms of justice, retaining their advantages even while absorbing some costs of widespread dispute and conflict. They might win the battles and weather the storms.

Of course, there might be some method of adjudication that is better for all than the status quo, including the most powerful. That idea, of justice being mutually beneficial, is part of the Humean strategy that aims to show that justice is "artificial" — that is, invented by people to serve certain purposes. This is a claim about how rules of justice come about, plus a philosophical view about how the standard itself can be rooted in that functional causal history of certain social rules. The causal story invokes the idea of Pareto efficiency, and it is easy to let that suggest something normatively valuable in the causal process. That is, to give one specific such story, suppose that a method of adjudication would arise if and only if it were both a) Pareto superior (better for some, worse for none) to the status quo, and also b) Pareto superior, or at least not inferior, to each of the other Pareto improvements on the status quo. This might seem a salient possibility for the following reason: first, if people are at odds, then there will be some benefits for at least some people in having mechanisms of adjudication. However, since different methods might benefit different people, some methods might, in effect, be blocked by those with an interest in doing so. We next might notice that if any mechanism is doubly Pareto superior in that way then no one would have an interest in blocking it. For that reason, we might focus on this particular set of solutions — the mutually advantageous ones — when we ask what is likely to emerge. And then it might seem to be an auspicious side-benefit that this has led us to a normatively attractive set of cases, those that are good for everyone.

The charms of mutual advantage can be deceptive. If something is to everyone's advantage over some alternative, then no one is in a position to complain. But the loveliness of that possibility too easily draws the

spotlight away from what might be the plainer and yet still potent value of some alternatives that would not benefit everyone. The dubious claim is not that it would be great if there were a solution that is to everyone's advantage. Rather it is the suggestion that nothing but mutual advantage is good enough. Suppose that no mechanism would emerge unless it were to everyone's advantage over the status quo. That is no support for the idea that mutual advantage is a necessary condition of justice — that is, of an arrangement's being an eligible candidate to specify just and unjust behaviors. Even if no other arrangements will tend to actually emerge, this is no reason to doubt that there are some that, *if they were to emerge*, would fully and plausibly specify which behaviors are just and which unjust. Their being justice-apt, so-categorized by the standard of just arrangements discussed above, is simply different from their being emergence-apt, so to speak.

We could, of course, yet ask whether mutual advantage happens also to be suited for this moral question. It would be a kind of coincidence if it were. But in fact it is not so suited, or so I believe. The reason, to put it perhaps a little cryptically, is that pointing out that some arrangement is *not* in everyone's interest plainly has no bearing on whether it would be required by justice.[18] I won't argue for this last claim in this essay, but I do not believe that any of my other arguments depend on this verdict.

V. Does Justice Apply Only in Nonideal Conditions?

The conditions for the applicability of justice seem to include certain things in two main categories: competing interests, and conflicting judgments among people who must find a way forward together. Cases of either kind can put people at odds, and questions of a just resolution arise.[19] Since a cause in either category is sufficient for questions of justice to arise, neither of them is necessary.

Conflicts of both kinds will also often be present, of course. If there were no conflicting fundamental aims or desires, there might yet be conflicts in practice owing to failures of understanding. It might be that you and I both desire that a bridge be built over the river, and yet we might disagree irreconcilably about how this can be accomplished. This could put us at odds going forward, and the question arises about a just settlement of such a conflict. The source of conflict is a cognitive limitation (broadly speaking),

[18] The general line here is similar to and indebted to the ideas of Brian Barry, *A Treatise of Social Justice, Vol. 1: Theories of Justice* (Berkeley: University of California Press, 1989) and G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008).

[19] Hume and Rawls focus mostly on conflicts of interest, but Rawls writes, "A lack of unanimity is part of the circumstances of justice, since disagreement is bound to exist even among honest men who desire to follow much the same political principles" (Rawls, *Theory of Justice*, sec. 36, 196).

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

and not competing desires. It is sufficient, and so fundamentally competing desires are not necessary, for matters of justice to arise.

Likewise, suppose there were no cognitive limitations of the right kind to trigger questions of justice. Indeed, suppose people did not disagree about any matters of fact or doctrine. Still, if there could be competing interests and desires, the question could arise about what would be a just adjudication. Earlier (Section III) we considered whether the standard could apply even if there had not yet ever been any justice-specifying social rules or conventions. All that is needed for now is that, at least if there are or have been such specifying mechanisms, the applicability of justice can be triggered by competing interests alone, even if there were (bizarrely) no disagreements of other kinds. And vice versa.

The conditions in these two categories — competition and disagreement — are sometimes treated as if they are each necessary conditions of applicability. If that were so, then justice would only apply if conditions of both kinds were present, and so if things were, in that way, especially nonideal. I have argued that this is a mistake, but we might conjecture that there is often the following explanation for making it: it might be thought that justice ought to be defined so that it is, in some way, responsive to the normal conditions of human life. Rawls, whose treatment of these issues is at least as influential as Hume's, famously says, "The circumstances of justice may be described as the *normal conditions* under which human cooperation is both possible and necessary."[20] Normal human life surely does include conditions of both kinds, and these are the conditions that, in normal life, "set the stage for questions of justice."[21] None of this, however, is any basis for concluding that either or both of them is necessary for such questions to apply. In our normal conditions, questions of justice apply not because both or any particular one of these — competition and disagreement — is the case, but because *at least one or the other* of them is.

If there are no conflicts of belief or aim to put people at odds, then justice does not apply. Jacob Levy argues that a theory such as Rawls's, in which principles are selected under the hypothesis of full compliance with them, " . . . assumes away the circumstances of justice. . . . " This is because he believes that if there were either "limited beneficence or reasonable disagreement" then there would not be full compliance. So to assume full compliance is to assume that neither of those is present, in which case the circumstances of justice do not apply. Perhaps Levy means, specifically, reasonable disagreement about the content of justice itself. If so, however, it is not clear why we should think that such reasonable disagreement will give rise to noncompliance. But even if we waive that, other disagreements

[20] Ibid., 126, emphasis added.
[21] Ibid., 130.

may well be present to put people at odds. Similarly, why should we think that "limited beneficence" (or, he might have in mind conflicting aims, judging from the surrounding passage) would guarantee noncompliance? Mechanisms of justice are not normally meant to dissolve conflicts of aim, but to fix what is to be done in their presence. Just because we agree to flip a coin between restaurants, for example, does not mean either of us has changed our preferences, and those preferences can remain in conflict even as we each accept the result of the coin flip and proceed to the winning venue. Conflicts of either aim or belief are sufficient for the applicability of justice, and an assumption of full-compliance, for whatever theoretical purpose it might serve, does not entail that neither kind of conflict is present.

VI. Is Moral Deficiency a Circumstance of Justice?

Suppose there were no conflicting aims and no cognitive failure. Things are sounding pretty good so far. However, there might yet be (as of course there always would be) some degree of individual moral deficiency. We know that moral deficiency is not necessary for the applicability of justice since we have seen that either competing interests or certain cognitive disagreement is sufficient.

We should not skip over this point too quickly, since I believe many have been inclined to assume that justice has no application in conditions where people are morally perfect — morally perfect, that is, in other ways, leaving the virtue of justice out of it, since the question is whether justice has any application here.[22] That is a mistake, at least so long as there could be disagreement or competing interests even without moral defect. It might seem that morally flawless people would not have conflicting interests or desires, but this is very hard to believe. Consider several people, each of whom has a parent painfully and prematurely dying of a condition that can be fully cured by the one available dose of medicine. The claim in question is that there is no occasion for rules or even motives of justice so long as no one is morally deficient. But, if justice is temporarily put aside, it is hard to discern any moral deficiency merely in the profound desire of each party to save her parent's life even at the cost of another person's life. Since any population would find themselves confronted with many such scenarios, questions of justice would seem to arise even if no one was

[22] Michael Sandel argued, as against Rawls, that justice is a virtue only in the presence of the vice of selfishness. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982). Andrew Lister discusses replies to Sandel's argument, and notes the ancient argument, voiced by Glaucon in Plato's *Republic* book II that justice arises "as a pact for mutual protection between equals unable consistently to dominate each other." See Andrew Lister, "Hume and Rawls on the Circumstances and Priority of Justice," *History of Political Thought* 26, no. 4 (2005): 664–95.

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

(in that pre-justice context) morally deficient.[23] Morally excessive selfishness does seem possible there, as in a person who cares not at all for the suffering of others and only for himself, but that sort of extreme selfishness would not be necessary in order for the issue of justice to arise.

Hobbes, whose account of the need for coercively backed political authority is a clear precursor of Hume's account of circumstances of justice, saw the need for adjudicatory mechanisms even in the absence of vice. He argues that before there are any rules with sanctions, if a contract is made, "upon any reasonable suspition, it is Voyd." If and when there are, instead, credibly threatened sanctions, "that feare is no more reasonable."[24] Hobbes, of course, doubted that such assurance could be present without the threat of force, and we do not need to deny that psychological conjecture, which Hume plainly rejected, here. We can simply note the agreement between Hobbes and Hume that it is not essentially owing to any moral defect that the need for coercively enforced social rules emerges. Even morally perfect people might need government, or other social rules, although this depends on whether conventions or coordinate moral motives are available to meet the behavioral need instead.

It is important to distinguish two points in this context:

a) People who are morally perfect, apart from the question of justice, may (indeed, certainly will) yet have conflicting aims and beliefs, leading to a need for some mechanism of justice, coordinate motives being one such mechanism.
b) Even people who are just, as well as morally good in other ways, might not lexically prioritize justice, so there might well remain a need for coercive social rules in order to meet the behavioral need.

It might seem as though this threatens my claim that coordinate motives of justice could meet the behavioral need. But it does not. That would be a conceivable motivational solution even if it is not one entailed by moral perfection, including perfect compliance with the *due* demands of justice. Even morally perfect people, even if they are just according to a common specification of justice, might yet need social rules or even government. However, even though moral perfection does not guarantee it, there is a possible arrangement of moral motives in which they meet the behavioral need even without government or other sanctions.

[23] As I understand Hume, "selfishness" cannot be seen as a moral defect for which justice might be the remedy. Our "natural" moral ideas prior to the invention of justice, would contemplate a due partiality with pleasure. " . . . [O]ur natural uncultivated ideas of morality, instead of providing a remedy for the partiality of our affections ["to ourselves," and "to our relations and acquaintance"] do rather conform themselves to that partiality, and give it an additional force and influence" (*Treatise*, 3.2.2).

[24] Hobbes, *Leviathan*, chap. 13 (any edition).

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press

Moral fault comes in for mention in Rawls's treatment of circumstances of justice, but only as an aside. He points out that while moral fault can sometimes lead to deep disagreements, it is not an essential ingredient:

> Some of these defects [of knowledge, thought, and judgment] spring from moral faults, from selfishness and negligence; but to a large degree, they [DE: those cognitive defects] are simply part of men's natural situation. As a consequence individuals not only have different plans of life but there exists a diversity of philosophical and religious belief, and of political and social doctrines.[25]

This normal cognitive imperfection is the source of conflict that in Rawls's later work comes to be called "the burdens of judgment."[26] There is no reason to disagree with Rawls here: this source of conflict does not depend on any moral defects.

It is important not to misunderstand Rawls when he also writes, "In an association of saints agreeing on a common ideal, if such a community could exist, disputes about justice would not occur. Each would work selflessly for one end as determined by their common religion, and reference to this end (assuming it to be clearly defined) would settle every question of right. But a human society is characterized by the circumstances of justice."[27] Grant that justice has no application in that case. But the condition envisaged there is not that of moral perfection, but (in addition or instead) a set of agents whose overriding motives are all perfectly common and determinate. That goes beyond conditions of the applicability of justice, but there is no reason, as I have argued, to think that such a scenario is entailed by individual moral flawlessness.

Moral deficiency is not a necessary condition for the applicability of justice, but consider the view that moral deficiency belongs on the list of conditions, along with competing interests and disagreement, *sufficient* to trigger questions of justice. It is hard to see how moral defect itself might put people at odds independently of competing aims and interests, or of conflicting judgments and beliefs. In particular, an immoral degree of selfishness only gives rise to conflict because people's aims differ. In normal conditions, it is true, conflicts of interest come to a head and need resolution often only because one person or the other is, morally speaking, insufficiently concerned with the interests of others. Moral defect plays an exacerbating role. But conflicts of interest would raise questions of justice whether or not they were intensified by moral defect. A parallel point applies to the fact that sometimes people's conflicting beliefs or convictions depend on one of them being morally deficient in some way. Again, that moral point

[25] Rawls, *Theory of Justice*, 127.
[26] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), esp. pp. 54ff.
[27] Rawls, *Theory of Justice*, 129–30.

might intensify matters, but the moral defect itself does not trigger questions of justice unless it gives rise to the disagreement. Moral defect by itself is not a source of conflict but only a potential intensifier. It is not sufficient for the applicability of justice (nor, as we have seen, is it necessary).

Moreover, even if moral deficiency were a third category of individually sufficient conditions that can trigger the applicability of justice, it would not be a necessary condition, since either of the others would be sufficient. For these over-determining reasons, then, justice cannot be denied applicability to some imagined scenario on the ground that moral defect has disappeared or been assumed away. For example, whatever the interest of doing so might be, there would be no conceptual mistake in theorizing about what would be just or unjust under otherwise morally flawless conditions, or to ask whether moral flawlessness is in some way part of what justice requires, and so on. There is no reason, including no reason stemming from the idea of circumstances of justice, to think that this kind of highly idealistic condition is outside the scope of justice's application.

VII. Justice's Self-Limiting Reach

There is an important general point about the limits of a standard's applicability, one that is sometimes mentioned in thinking about circumstances of justice.

> *Self-limiting reach:* Since any standard[28] only applies given certain conditions, then it cannot condemn the presence of those very conditions. That would be for it to favor the case where they do not obtain. But it has no application to that case.

It follows that the standard of justice cannot condemn as unjust the fact that people are at odds owing to conflicts of interest or opinion. As far as this point goes, it tends to favor critics of utterly unbridled idealization. However, it is no challenge to the possibility that justice has application even in what are, by anyone's lights, highly idealistic conditions. If there are important disagreements of the right kind, then justice would have application there even if there were some perfect harmony of interests, and moral perfection all around — pretty idealistic. If, instead, there were conflicts of interests or desires, then justice would have application even if, as before, and in a highly idealistic scenario, there were not the slightest moral deficiency, and no disagreement in any judgment, belief, or conviction.

Philosophy, Brown University

[28] Like any predicate. See Chang, *Incommensurability, Incomparability, and Practical Reason*, "Introduction."

https://doi.org/10.1017/S0265052516000261 Published online by Cambridge University Press