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The Circumstances of Justice:

A Reformulation

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Abstract

In this thesis I explore an alternative formulation of the circumstances of justice. The circumstances of justice are the circumstances that make human cooperation necessary and possible, and because human cooperation is necessary to justice, they make justice both necessary and possible. For constructivists, principles of justice respond to these circumstances.

Standard accounts of the circumstances of justice can be found in Hobbes, Hume, and Rawls, and many contemporary theorists rely on these accounts. My dissertation rejects these standard accounts of the circumstances of justice—on the grounds of exclusion and trust—and defends an alternative account. A core idea of my proposed alternative is that the circumstances of justice must be understood in terms of *solidarity*.

A proper understanding of the role of solidarity in an adequate characterization of the circumstances of justice requires a good grasp of the nature of solidarity itself. To that end I offer a novel account of solidarity which I argue improves existing theories of solidarity. In the first part of this project I explain the role and importance of the circumstances of justice. I then offer a full description of solidarity and its normative character. In the second half of the project I offer my new account of the circumstances of justice, including an explanation and examples of how broad the scope of this reformulation is. I conclude the project by applying my new account of the circumstances of justice to the problem of climate change, and ask whether we can now construe the coordination of resources between generations as a problem of justice.

Declaration

Pursuant to the University of Edinburgh's Postgraduate Research Assessment Regulations, (section 2.5) I hereby declare that this thesis has been composed by me, that the work is my own, and that it has not been submitted for any other degree or professional qualification.

Ashley E. Taylor
Edinburgh, 28 February 2014

Notes on Publication

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Introduction

At a global justice conference in York, I heard a panel speaker from an NGO explain that one difference between a moral wrong and an injustice is that while we might reflect and then dispassionately conclude that something is morally wrong, injustice makes us angry. When we see injustices we take them personally; we take justice personally. I am uncertain to what extent her claim is true, but some degree of plausibility in her comments on justice and injustice certainly made me ask, why? Why do we take justice personally? The best response I have found to this question is that we take it personally because justice, adequately characterized, responds to us and to our situation. Justice, ideally, responds to the needs of individuals in societies. The role of principles of justice, then, is to respond to the needs that we have because of the particular human and worldly circumstances we find ourselves in. Those circumstances, the facts that justice ought to respond to, are the circumstances of justice.

This work defends a new account of the circumstances of justice. To better understand the circumstances of justice is to better understand the idea of justice for Constructivists. To particularize the circumstances of justice correctly is to explain the scope of justice—when its questions arise and when it has application. One significant aspect of my new account of the circumstances of justice offered here is a specification of the relationship between justice and trust, in which a particular kind of trust is a necessary condition for justice to have application. The formulation of the circumstances of justice which I argue for here is intended to be more of a complement to the earlier accounts of David Hume and John Rawls than it is a rejection of their positions. Hence, this project may be viewed as a refinement of their own considered views on the circumstances of justice.

Methodologically, this project is a political constructivist evaluation and reconstruction of the circumstances of distributive justice. The project is itself constructivist because it assumes (and to some extent argues) that the circumstances of justice have merit, and are important for our understanding of justice. If, however, one rejects political constructivism outright, chapters 2-6 of this project may still be of interest for, as long as any philosophers still engage with the circumstances of

justice—in particular, the standard account—this project will function as a critical assessment of, and counter-proposal to, that literature.

One fundamental role of the circumstances of justice is to outline the scope of justice. As a result, this project is an attempt to redefine the scope of justice. It aims for a better understanding of the facts in the world that give rise to obligations of justice. Though this project begins with heavy grounding in the literature that forms the standard accounts of the circumstances of justice, it moves far beyond this literature. My project attempts to carve out a list of facts that better fit with our intuitions and considered judgments on when justice obtains, and when it clearly should not. The hope is that if we can specify an account of the circumstances which meets most of our convictions and intuitions about justice, then we might use that account of the circumstances of justice to guide us when our intuitions and convictions are uncertain. While I cannot claim to have uncovered *the* circumstances of justice in this project, I do hope to have established that my account not only greatly improves on the former accounts of the circumstances of justice, but guides us more reliably when we reach difficult cases; cases in which it is unclear whether principles of justice should guide us at all—instead of, for instance, moral principles or principles of prudence.

This project involves four central tasks. The first is to establish the importance of the facts to which justice responds within political constructivism, and then to critically evaluate three central accounts of those facts. In chapter 1, I outline what constructivist theories of justice look like and show that an important framework, explicit in Rawls, highlights how obligations of justice are understood by many Constructivists to be binding. I then show how Hume's and Hobbes's theories of justice rely on this same framework to ground their own principles of justice. Simply put, they rely on facts about the world and human nature; they rely on the circumstances of justice. I demonstrate the shortcomings of these three accounts in the second chapter. In addition to some earlier criticisms of their views on the circumstances of justice, I argue that they all three fail to account for the *challenge of trust*. Hobbes himself raises this problem when he first explains the rampant mistrust of man in the state of nature, and then attempts to solve this by requiring an all-powerful state (the Leviathan) within his conception of justice. I argue that Hume

and Rawls can, to some extent, be read as responding to this problem left over from Hobbes, but neither quite meet Hobbes's challenge.

The second task of this project involves a description of solidarity. In chapter 3, I argue that despite the diverse accounts in the literature, which appear to be irreconcilable, solidarity can be reconciled under a single description that not only fits with many taxonomies of solidarity, but which reveals two normatively different species of solidarity. To this end I argue that solidarity is constituted by four jointly necessary features: a joint interest, identification with the group, a disposition to empathy, and mutual trust. When these features are bidirectional between the individual and the group, the solidarity is robust and strongly normative. When any of the four conditions is unidirectional it is weakly normative.

Once an account of solidarity is developed, the third part of this project is to situate solidarity within the circumstances of justice in such a way that it addresses the challenge of trust. Chapter 4 develops my own account of the circumstances of justice, which includes the fact of solidarity in the world, limited scarcity of resources, and limited human understanding. This chapter defends my account of the circumstances against the previous literature. Chapter 5 establishes that my view of the circumstances of justice fits better with our intuitions about when questions of justice arise than the earlier accounts of the circumstances of justice.

The final task of this thesis is to address the very real problem of intergenerational coordination. Chapter 6 situates the intergenerational resource coordination problem within justice and moral theory. After carefully evaluating whether the intergenerational problem fits with the previous accounts of the circumstances of justice, this possibility is rejected. I argue that the problem does not fit with any theory of distributive justice, and propose a better way to deal with the problem: imperfect moral duties. The chapter closes by suggesting a moral constructivist framework for working out our duties to future generations. I argue that such duties are legitimate juridical duties, and hence they can claim the efficacy which leads us to consider the problem as a problem of justice in the first place.

Chapter 1

Justice Constructed

A constructivist approach to political philosophy has played a dominant role in theories of justice since Hobbes's *Leviathan*. It has been reinvented in a variety of forms. Only since Rawls, however, has constructivism become something of a standard methodology in political philosophy. This chapter has two aims. The first is to offer an account of the appeal of political constructivism. This will involve a description of the defining features of political constructivism, so that we might better understand with what this project is concerned. The second aim of this chapter is to show that constructivism, in all its forms, embraces a methodological distinction that constrains its normative scope. I will call this distinction Requirement N. Anyone writing in the constructivist tradition must justify their theory with reference to this requirement and the facts with which it is concerned. After establishing the importance of these facts in constructivist theories of justice in this chapter, the next chapter explores the standard accounts of these facts, which political Constructivists tend to rely upon, but rarely address. The task of defining the facts that inform this methodological requirement will be the focus of the remainder of this project.

The chapter proceeds by first giving an account of political constructivism, its appeal, and then addressing a methodological objection in the first section. It next discusses Rawls's framework, which illustrates the importance of the relationship between the need for a solution to a recognized social problem, and the principles that respond to this need. Rawls locates the normative force of justice within this framework, which I call Requirement N. The chapter then moves on to locate this requirement and its role in Rawls, Hume, and Hobbes, before concluding with discussion of some objections to constructivist methodology in general.

I. Political Constructivism and its Appeal

This project is concerned with political constructivism as distinct from meta-ethical constructivism or ethical constructivism. Political constructivism is characterized by a few common features. The first is that the principles with which it is concerned are correct when they are the outcome of a particular kind of

deliberative procedure deemed appropriate because it incorporates certain relevant requirements.¹ These requirements are meant to form an appropriate method for achieving the second standard feature: objectively correct principles. These characteristics capture another important feature of constructivism: the belief that objective principles are discernable by practical reason. Practical reason ultimately must identify some salient facts about a situation and judge that, in light of these facts, either certain normative principles are appropriate, or that a certain decision procedure is appropriate for determining suitable normative political principles. Whatever normative principles are generated by this procedure are valid as a result of the procedure that constructed them, not because of their accuracy in tracking independent moral facts.²

There are a number of reasons why constructivism is appealing to the political philosopher. First, *political* constructivism purports to yield normative principles based on certain relevant facts in the world. This allows Constructivists to remain largely agnostic toward meta-ethical theories and avoid commitment to independent moral facts. Depending on the account it may be agnostic toward normative moral theories as well.³ Hence, political constructivist methodology is compatible with a number of meta-ethical and ethical positions. This lack of commitment to independent principles yields a further attraction: political constructivism could yield a theory of justice that corresponds to a traditionally competing moral theory. For instance, if utilitarianism had come out of Rawls's original position, then constructivism would have resulted in a utilitarian theory of justice. Similarly, if reflective equilibrium were

¹ For identification of a similar uniting principle among constructivist positions see: John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) p.102 and Samuel Freeman, "The Burdens of Public Justification: Constructivism, Contractualism, and Publicity," *Politics, Philosophy & Economics* 6 (2007), p.7. It is worth noting, however, that some Constructivists argue that this typical focus on procedure should be shifted to standpoints.

² Objections to the fact-sensitive principle approach will be addressed in the final section.

³ For Hobbes and Gauthier, for instance, justice and morality are coextensive so their constructivist methodology cannot be compatible with other normative ethical theories. On a limited political constructivist theory that is concerned with justice as a subset of morality, however, such a constructed theory of justice is compatible with a variety of normative theories.

to yield a different initial position or decision procedure, an altogether different set of principles could be generated.

A second reason constructivism has the appeal it does is because prominent versions rely on the rational or reasonable endorsement of principles by all or most individuals. This public endorsement yields a system of rights and duties that meet with wide acceptance and are only minimally coercive. A third feature that makes political constructivism appealing is that it avoids some of the counterintuitive consequences of aggregative approaches to justice.⁴ The combination of these methodological benefits after a long history of analysis, rejection, and reformulation has contributed to political constructivism leading political philosophy discourse today.

Political constructivism can be divided into two dominant branches, the Rawlsian⁵ and Hobbesian. The Hobbesian tradition is markedly wider in scope than the Rawlsian. It attempts to establish a set of principles of justice that are coextensive with morality. Gauthier, for instance, defends a full account of moral questions. He begins with the assumption of a moral error theory and attempts to replace morality (which he takes to have already failed to be useful) with a constructivist procedure for accepting moral-like constraints. Gauthier grounds morality in rationality, arguing that the right or good thing to do is what a fully rational agent would do. Hobbes's theory is similarly extensive in scope, capturing all of morality. Gauthier and Hobbes are still properly considered *political* Constructivists (and thus relevant herein) because the moral and political are coextensive on their accounts.

The narrower Rawlsian constructivist procedure focuses on justice as a subset of morality. This approach arose in response to the divergent views of individuals participating in schemes of justice and the primacy of coordinating to solve political problems. Political problems require an approach that embraces this diversity and still allows individuals to justify their actions and normative judgments on political

⁴ It avoids aggregation in justifying reasons or principles. So, while a constructivist methodology may yield a utilitarian theory of justice, it would do so because this would be chosen by or justifiable to each individual.

⁵ Rawlsian constructivism is sometimes called Kantian Constructivism, but as the constructivist feature in Kant (the Categorical Imperative) is concerned with morality as a whole and not a narrower subset, I refer to this branch as Rawlsian and not Kantian Constructivism.

matters to one another. As Rawls explains, “Given the profound differences in belief and conceptions of the good”⁶ public agreement on basic philosophical questions, such as questions of religion or moral doctrines, cannot be obtained without the state’s violating basic liberties. He continues, “philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable shared basis for a political conception of justice.”⁷ Rawls’s proposal is to apply a principle of tolerance to political philosophy itself.

The result is a species of constructivism that typically accepts the pluralist nature of moral values and reasons, as well as the value of disagreement, while still able to commit to an objective justification of a certain subset of moral issues. Two paradigm examples of this approach are John Rawls and T.M. Scanlon. Both theorists endorse constructivist methodology to ground a certain subset of moral principles. Rawls is concerned with political constructivism and how to establish principles for a system of justice.⁸ Scanlon is concerned with the subset of morality marked by what we owe to each other, of which justice is a part. A feature of the pluralist foundations of both theories is that they try to discover the basis for public justification acceptable to all *reasonable* citizens, independent of, but compatible with a wide range of reasonable nonpublic views. Here, *reasonable* is a moral concept. Rawls explains that reasonable persons are motivated by a desire for a social world in which they, as free and equal individuals, “can cooperate with others on terms they can accept.”⁹ Essentially, a limited constructivist approach allows the theorist to set aside questions about the origin of moral principles. Instead, the theorist is interested in identifying a conception of justice compatible with good political citizens rather than good moral individuals.

⁶ John Rawls, "Justice as Fairness: Political Not Metaphysical," *Philosophy and Public Affairs* 14 (1985):223-51, p.230.

⁷ Ibid. p.230.

⁸ Rawls shifted from *Kantian constructivism* in his earlier work, *Kantian Constructivism in Moral Theory* to *political constructivism* in his later work, *Political Liberalism*. For excellent exegesis on why this shift was necessary within Rawls’s work see Freeman, “The Burdens of Public Justification: Constructivism, Contractualism, and Publicity.”

⁹Rawls, *Political Liberalism*, p.50. Rawls then further explains that this concept of reasonable is nearly the same as Scanlon’s principle of moral motivation, which is a basic desire to justify ourselves to others on grounds they cannot reasonably reject.

Scanlon's contractualist formula is that "an act is wrong if it would be disallowed by a principle that no one could reasonably reject," given the shared aim of finding principles with others, that they could not reasonably reject.¹⁰ Central to this idea is the shared aim of finding such principles. This does not mean that all individuals will agree or want to agree on all moral principles. It does mean, however, that when a group of people have the need for some principle to determine how they will act regarding each other in a certain circumstance, they will find such a principle by reflecting along the lines of Scanlon's formula. It is the primacy of this need that assures that whatever principle has passed the non-rejectability test is justified. In some cases, Scanlon explains, there will be more than one principle that could pass the non-rejectability test. In such cases, whatever convention the society has been using will be the correct principle.¹¹ On this formulation, individuals can be motivated to want principles to solve some problems that they are needed for, but not have the same motives or reasons for wanting this. So long as they agree on the need for some principles, whatever this decision procedure yields will be binding.¹² Exactly which problems these principles are formed to adjudicate will be decided by the needs of the group in question. Many of these problems will be problems of distribution, that is: problems of justice.

Rawls offers a framework to illustrate the importance of the relationship between the need for a solution to a problem, and the principles that respond to this need, and he locates the normative force of justice within this framework.¹³ In the opening of *A Theory of Justice* (hereafter *Theory*), Rawls distinguishes between a concept and a conception of justice. A *concept of justice* is specified by the role different sets of principles, different *conceptions of justice*, share.¹⁴ A concept of justice will define the role of the principles of justice in assigning rights and duties; it will aim at a proper

¹⁰ Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass. ; London: Belknap Press of Harvard University Press, 1998).

¹¹ *Ibid.*, ch.8.

¹² See especially Scanlon, *Contractualism and Utilitarianism* p. 650. and *What We Owe to Each Other* ch. 8 for a full discussion on pluralism in Scanlon's contractualism.

¹³ In this project, "normative" is to be understood as something one ought to do.

¹⁴ John Rawls, *A Theory of Justice*, Rev. ed. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999) p.5.

balance between the various conceptions of justice.¹⁵ It defines the problem of justice and what its task or role must be. A conception of justice, in contrast, is the application of a set of principles to this problem.¹⁶ It involves affirmation of a set of principles that are necessary to assign basic rights and duties for determining proper distribution of various types of goods within a society. Korsgaard explains Rawls's framework this way: "The concept names the problem, the conception proposes a solution. The normative force of the conception is established in this way. If you recognize the problem to be yours and the solution to be the best one, then the solution is binding upon you."¹⁷ This emphasizes that what is primary to understanding right actions within the scope of the constructivist approach is general agreement on the problem, and the importance of finding a solution to it. The correct solution will be whatever solution works best. This is exactly analogous to Scanlon's explanation of why the principles his constructivist framework reveals are binding. So, if we want to identify what political constructivist principles aim to do, we must be able to identify their corresponding concept.

This concept/conception framework is necessary for the conception to be normative, that is, for the principles of justice, whatever they may be, to be binding for some people. Hence, some version of this method of justification of principles is found explicitly or implicitly in all political constructivism. We might extrapolate from this the following requirement for future reference:

REQUIREMENT N: For a constructivist principle to be normative it must offer a solution to a corresponding recognized problem, where the solution is a conception of X and the problem is named by concept X.

Though this principle may have broader scope than political constructivism, what matters in this discussion is that it holds for political Constructivists, and that for Constructivists the concept and conceptions of justice are fact-sensitive. In other

¹⁵ Ibid. p.9.

¹⁶ Rawls borrows this distinction from Hart, who defines the concept of justice as "Treating like cases alike (1961, p.155)." He describes this as the universal aspect that individuals can speak about and agree to, though they will argue over the shifting part of justice (its conception) which specifies what is relevant in determining which cases are alike or different.

¹⁷ Christine M. Korsgaard, *The Sources of Normativity* (Cambridge, [England]: Cambridge University Press, 1996), p.114.

words, both the concept of justice and its ensuing principles respond to certain facts about human nature and society.¹⁸ The content of the concept and conception depends on certain features of the world and humanity that lead us to want solutions to coordination problems (i.e., rules of justice).

In *Rescuing Justice and Equality*, G.A. Cohen has objected to this constructivist framework of political philosophy, arguing that we are wrong to think that justice is fact-sensitive in this way. He argues that the error of fact-sensitive accounts of justice is that they confuse principles of justice with an optimal set of rules to live by.¹⁹ That is, they conflate fundamental principles of justice and *rules of regulation*. This rules of regulation approach to justice results in principles of justice that are only *applied principles* involving justice and other empirical facts or values. Cohen thinks that applied principles cannot be fundamental principles of justice. He argues that when Constructivists aim to ask, What is justice? they are actually asking, What general rules of society would one chose from a “particular condition of knowledge and ignorance?”²⁰ His position is that the answer to the first question cannot provide an answer to the second question. Rules of regulation will be revealed by answering the first question, while answering the second question will reveal fundamental principles of justice, which are fact-insensitive. Cohen contends that this conflation of principles of justice and rules of regulation is evidence that Constructivists have the wrong concept of justice in mind. His aim is to rescue the concept of justice.²¹

Constructivists define principles of justice as those rules which respond to the concept of justice, where the concept of justice is sensitive to facts about the world that generate some need for coordination. The constructivist concept of justice articulates the kinds of problems that principles of justice are needed to solve, and it is responsive to real world facts, without which people would neither need nor endorse these principles. According to Cohen, this approach is a fundamental error. Justice is not

¹⁸ The content of these facts will be the focus of the remainder of this project so I leave it aside here and focus instead on the methodology.

¹⁹ G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass. ; London: Harvard University Press, 2008), p.278. I will return to separate arguments Cohen makes against fact-sensitive reasons in the final section of this chapter. Here I focus on his rejection of the constructivist concept of justice.

²⁰ *Ibid.*, p.277.

²¹ *Ibid.*, p.2, p.270.

about finding optimal rules for social regulation. Rather, justice involves fundamental fact-insensitive principles of justice. Cohen's argument however, is problematic for a number of reasons. I will address his concept of justice argument here and return to his closely connected fact-sensitivity argument at the end of this chapter, after illustrating the role of fact-sensitive principles for Constructivists.

In his attempt to rescue the concept of justice, Cohen, explicitly aligns himself with Plato, agreeing "that you need to have a view of what justice *itself* is to recognize that justice dictates P when F is true." He concludes, "justice transcends facts of the world."²² He further supports Plato in the belief that "justice is the self-same thing across, and independently of, history."²³ Pogge summarizes Cohen on these points, "[h]e holds that we should seek to justify all our moral judgments by the 'ultimate warrant' of fact-free principles that cover all possible combinations of facts and hence all possible worlds."²⁴ Cohen states that for a principle to be an ultimate, fact-insensitive principle it must have "intelligible meaning" regardless of what the facts are.²⁵ He gives examples of beings internally provided with everything they need to achieve their life plans and beings that only live for 24 hours, both of which are subject to the same concept of justice as ourselves.²⁶ As Pogge points out, however, it is difficult to identify a principle that could have meaning in all possible worlds, as other worlds could be radically different from our own.²⁷ There may not be "sufficiently separable individuals," the length of lives may be "dramatically unequal," and "conceptions of the good may be so radically diverse that it seems ludicrous to affirm what Cohen's egalitarianism requires: that the relational predicate 'is better off than' can meaningfully be applied."²⁸ The pertinent point for this discussion is that it does seem impossible to identify a fundamental principle that could apply in all possible worlds. This moral realism alone would certainly be defensible, but Cohen takes his Platonism a step further when he argues that,

²² Ibid., p.291.

²³ Ibid.

²⁴ Thomas Pogge, "Cohen to the Rescue!," *Ratio* 21 (2008): 454-475, p.469.

²⁵ Cohen, *Rescuing Justice and Equality*, p.231 fn.2.

²⁶ Ibid., p.246, p.293.

²⁷ Pogge, "Cohen to the Rescue!," p.462 fn.8.

²⁸ Pogge, "Cohen to the Rescue!" p.462 fn.8.

[u]ntil we unearth the fact-free moral principle that governs our fact-loaded particular judgments about justice, we don't know why we think what we think just is just. And we have to retreat to (what we consider to be) justice in its purity to figure out how to institute as much justice as possible inside the cave.²⁹

This last statement indicates that to some degree Cohen held the position that we—like the prisoners in Plato's cave—can only ever understand the concept of justice to the extent that the shadows of the puppets show it to us. Whatever else may or may not be true about justice, however, it must be the case that we can comprehend it. Not only do we make judgments about justice on a regular basis, we can identify considered convictions about principles of justice. We are even able to see errors in our judgments and our considered convictions about justice and correct them. We could not do this if we had an insufficient understanding of what justice is.³⁰ Further, if we consider the role justice plays in holding people accountable, it becomes clear that we must have some accessible, functional concept of justice. It would be unreasonable to blame and punish people for norms they cannot access or reliably discern.³¹ It seems then, that we do have a comprehensible concept of justice and that Cohen is wrong to think that the concept of justice is supposed to be—at least in part—beyond our understanding.

Cohen gives little explanation as to why the concept of justice should be a transcendent concept rather than optimal principles for social regulation. His argument appeals primarily to his own intuition and the claim that the right way to choose rules of regulation is to “take into account both justice *and* other considerations.”³² It is unclear though why Cohen thinks that allowing particular facts and values to shape our concept of justice—and thus our conception of justice—rules out the possibility of trade-offs with other virtues, or why this should matter. Cohen does not address this.

²⁹ Cohen, *Rescuing Justice and Equality*, p.291.

³⁰ This argument may sound similar to Rawls's reflective equilibrium, but the claim I am making is that we could not engage in such thought experiments if we did not have a concept of justice that we understand, even though we may not be aware of having such a concept. I am indebted to conversations with Alex Lantham for this point.

³¹ I am grateful to Mike Ridge for this point.

³² Cohen, *Rescuing Justice and Equality*, p.303.

Cohen may here respond that the reason we should seek such ultimate principles, whether we can know them or not, is because understanding justice both when there are circumstances such that it could apply, and understanding justice when it has no application but is still a fundamental principle, will reveal some *better* understanding of the concept of justice. But Cohen never tells us why this wider understanding of a concept of justice is better than understanding a concept of justice when it has application. Why do we need or want a concept of justice that goes beyond this world and our societies? This is the crux of the problem for Cohen; he never tells us why a concept of justice qua ultimate principles (regardless of whether they are applicable or not) is better than a concept of justice qua rules of regulation for current societal needs. He explains that he agrees with Plato that you must have a transcendent notion of justice before you can identify its instantiations. But it is left undefended why a concept that applies in our societies now is insufficient to meet Cohen's and Plato's concern that we must understand a concept of justice to understand which principles to apply and when to apply it.

Constructivists identify concepts of justice that aim to solve practical problems that guide us in our choice of principles of justice (qua rules of regulation). Cohen has shown that there is an alternative concept of justice, one grounded on ultimate fact-insensitive principles. Cohen has given us reason to wonder whether the constructivist commitment to agnosticism about moral facts results in the best concept of justice. He has not, however, shown us that a realist position on moral facts is better for our concept of justice, nor whether such a concept is ever attainable or useful for discovering the rules of regulation type principles of justice that a particular society needs on both his and the Constructivists' account. I will return to this particular point in the final section of this chapter.

What this discussion reveals is that, for Constructivists, the principles of justice must not only meet Requirement N, but the concept of justice must be practical. It must respond to facts in humanity and the world so that its conception of justice is relevant—and binding—for those it aims to guide (those who see the problem of the concept of justice as their own). The remainder of this chapter attempts not only to locate Requirement N and practical concepts of justice in the work of Rawls, Hume, and Hobbes but also to highlight the importance of identifying which facts in the

world generate the concept and ensuing conceptions of justice. Of the three accounts of justice that will be considered here, the constructivist methodology is most consciously applied in Rawls. Hence, I will attempt to thematize its essential features in Rawls before trying to locate it in the historical works of Hume and Hobbes, whom I understand to be Constructivists, but with slightly different characteristics.

II. Rawls's Constructivism

Rawls's conception of justice involves his two principles of justice: (1) "Each person has an equal claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme for all" and (2) "Social and economic inequalities are to satisfy two conditions (a) they are to be attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) they are to be to the greatest benefit of the least-advantaged members of society (the *difference principle*)."³³ The principles, for Rawls, are what should ultimately guide the rules that shape the major social institutions in a well-ordered society. Rawls's task or concept of justice then, is to assign rights and duties and determine the appropriate division of social advantages. The principles of justice arrived at by his fair decision procedure of the original position, which is in turn arrived at by engaging in reflective equilibrium, are what accomplish this in a *well-ordered society*. It is clear then, that Rawls's concept and conception of justice are practical and action guiding.

Another important feature of Rawls's theory is that "the primary subject of justice is the basic structure of society, or more exactly, the way in which major social institutions distribute fundamental rights and duties and determine the division and advantages of social cooperation."³⁴ These social institutions consist of the political constitution and the principal economic and social arrangements. In his article, "Justice as Reciprocity," Rawls explains that justice is a virtue of social institutions or practices, "meaning any form of activity specified by a system of rules which defines offices, roles, rights and duties, penalties and defenses and so on."³⁵ On the surface this seems like Rawls is arguing that justice applies only to such social institutions. However, Rawls clarifies that his exploration is limited to one instance of the

³³ Rawls, *Political Liberalism*, pp.5-6.

³⁴ Rawls, *A Theory of Justice*, p.6.

³⁵ John Rawls, "Justice as Reciprocity," in *Collected Papers*, ed. Samuel Freeman (London: Harvard University Press, 1999), p.190 fn.1.

application of justice, its basic structure, and not to the justice of social practices or conventions in general.³⁶ Thus, the conception of justice that Rawls endorses may not be the best conception of justice if applied to other practices. This highlights a characteristic of Rawlsian political constructivism that will be important to this project: different coordination problems call for separate investigations. Rawls is concerned with social justice in the basic structure of society and its problems and solutions. If, however, Rawls wanted to apply his constructivist methodology to issues in medical ethics, he would have to identify a separate concept and different possible solutions or principles (conceptions) to adjudicate answers to the problem. This might involve a different decision procedure than the original position, as different concepts will call for different treatment. Rawls focuses on the basic structure because the concept of justice he identifies is that we need to find a fair way of assigning rights and duties in the basic institutions of society because justice is the first virtue of social institutions. His apparatus of reflective equilibrium and then the original position is designed to guide us toward the best possible conception of justice in response to his concept of justice. What matters here is that Rawls's proposed theory of justice fulfills Requirement N above and it does so by recommending practical guidance for the best rules to regulate social coordination. This means that his conception of justice, that is his theory of justice, is a plausible normative conception if he has identified the correct concept of justice by identifying the correct facts that generate this concept of justice.

III. Hume's Political Constructivism

To better understand the importance of the facts that inform the concept and conception of justice, we now turn to Hume's political constructivism. The aim of this section is to sketch a political constructivist reading of Hume's theory of justice and to further demonstrate how important the role of these facts is for a theory of justice. I do so by first explaining Hume's theory of justice, then arguing that it is in fact constructivist, it both fulfills Requirement N, and endorses an action guiding, practical (opposed to transcendent) concept of justice.

Hume treats justice as a character trait a person may possess. Specifically, justice is a disposition to follow a set of rules. We approve of this disposition from a *general*

³⁶ Rawls, *A Theory of Justice*, p.7.

point of view.³⁷ In the *Treatise of Human Nature* (hereafter *Treatise*) Book III, Hume has two aims: a descriptive aim, to account for how individuals come to adopt the principles of justice they do, and a justificatory aim, to discover why the rules of justice (as established) are virtuous. As a consequence of his broader moral theory that virtues cannot be discovered through reason, but only through sentiments, Hume is not seeking to establish ideal rules of justice. Rather, Hume wants to explain how we arrive at the rules we have via moral sentiments and the general point of view, and then explain how this procedure justifies those rules. Hume observes that no sentiment explains our approval or disapproval of justice, nor our motive to be just: benevolence is too limited and self-interest displays partiality toward ourselves and our families and friends. Hence, Hume concludes that justice, unlike other virtues, is not a *natural* disposition, but an *artificial* disposition. He posits that our moral estimation of justice must depend on conventions of property and their public utility. For Hume, public utility refers to public usefulness.

For Hume, justice is bound to property conventions, though property and justice are not equivalent. The rules of justice are conventions that establish property; the virtue of justice consists of respecting these rules. Hume is clear that property is not natural and neither are individuals' rights to it. Rather, the ideas of justice and property are interdependent. Hume states, "Property is nothing but those goods whose constant possession is established by the laws of society; that is, the laws of justice."³⁸ Without rules of justice, individuals can claim no property, no rights, and no obligations. Hence, Hume concludes in the *Enquiries of Human Understanding and Concerning the Principles of Morals* (Hereafter *Enquiry*), that convention is the sole origin of justice.³⁹

Hume explains the process that justice arises from as the use of judgment and understanding making it natural that as we watch families grow, we see that society

³⁷ It is important in my later treatment of Hume that I take Hume's general point of view to be limited and not universal for arguments developed in Geoffrey Sayre-McCord, "On Why Hume's General Point of View Isn't Ideal and Shouldn't Be," *Social Philosophy and Policy* 11 (1994): 202-228.

³⁸ David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, Repr. from the original ed. (Oxford: Clarendon Press, 1888), p.491.

³⁹ David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, ed. L. A. Selby-Bigge and P. H. Nidditch, 3rd ed. (Oxford: Clarendon Press, 1975), p.183.

could grow in a similar way. Individuals observe that if they stabilize the possession of goods, it will be in everyone's interest, because those individuals will be able to form a society. This stabilization cannot be a promise, but a gradually arising convention which is "a general sense of common interest; which sense all the members of a society express to one another."⁴⁰ So, men enter into a convention to abstain from the property of others. This convention is "the most necessary to the establishment of society."⁴¹ It grants peace and stability and ensures an initial framework in which cooperation and social intercourse are possible.

Individuals comply with the conventions of property (and its ensuing rules) because others do. Each individual ought to comply, because she assumes that others will comply only if she does, so the beneficial outcome of others' compliance is the consequence of one's own compliance.⁴² Because these interactions ground all social relations, "the social role of property is to underwrite and structure all social relations, positions, and conditions. Given this social function of property, justice must be construed more broadly to embrace all basic social relations . . . at bottom, property rights are personal rights."⁴³ They define a broad set of relations between individuals and individuals and their societies. Justice defines a social constitution, not merely a political or economic constitution. From the initial convention, which establishes present possession, the other rules of justice create a society, and then rules dealing with other aspects of justice follow (e.g., criminal justice). It is reflection on the usefulness of these conventions in stabilizing civil society that gives rise to our approbation of justice and, for Hume, there is no stronger foundation for a duty. Individuals reflect on the consequences of general failure to conform to conventions of justice and this gives rise to the judgment that conformity is obligatory, "which checks the inclination not to be just."⁴⁴ Hume's position is that reflecting on justice from the general point of view will lead individuals to favor societal interest over individual

⁴⁰ Hume, *A Treatise of Human Nature*, p.490.

⁴¹ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.186.

⁴² Stephen Darwall, "Motive and Obligation in Hume's Ethics," *Nous* 27 (1993): 415-448.

⁴³ Gerald J. Postema, *Bentham and the Common Law Tradition*, Clarendon Law Series (Oxford: Clarendon Press, 1986), p.102.

⁴⁴ David Gauthier, "David Hume, Contractarian," *Philosophical Review* 88 (1979): 3-38.

interests.⁴⁵ Additionally sympathy with the public utility of justice leads to our approbation and the ensuing obligation.⁴⁶

Somewhat controversially, Hume maintains that rules of justice—whatever they may be—must be followed, as the utility of justice does not depend on the particular convention but on the convention’s existence. He discusses the contingent nature of property conventions and their great divergence within and between societies, but argues that any change in these conventions would have such marginal utility over the current conventions that it is not worth the risk of undermining these conventions. In this way, Hume limits the possibilities of his conception of justice. Justice is respect for rights of others as established by the conventions of property; he never asks whether the conventions and rules are themselves just. He instead relies on the notion of custom by which people are primarily governed and, as “nothing has a greater effect both to increase and diminish our passions,”⁴⁷ it is essential that custom be preserved. Given that these conventions arise as the result of a historical tradition of coordination of interests while generating approval from a general point of view, these customs are particularly weighty reasons to conform, and are a just influence on passions and behavior. That is not to say, however, that he could not criticize many conventions from the standpoint of justice. If a convention does not garner our approbation because of its usefulness, then it still would not be a convention of justice.

In order to determine whether Hume’s theory of justice contains a constructivist methodology, we begin by asking: Does Hume meet Requirement N and is his concept of justice practical or transcendent? First, we must identify his concept.⁴⁸ I propose the following: to define the rules in stabilizing a system of property that assigns rights and obligations appropriately, in order to constitute a society. Next, we

⁴⁵ Ibid.

⁴⁶ NB “sympathy” in Hume is much closer in meaning to the modern “empathy.”

⁴⁷ Hume, *A Treatise of Human Nature*, p.422.

⁴⁸ It is worth noting that the reconstruction of Rawls’s machinery in Hume’s (and later Hobbes’s) project does risk danger of anachronism. That is, how far Hume endorses the structure of Requirement N is not immediately evident, a number of different frameworks could be acceptable interpretations of Hume’s account of justice. Because of this, nothing in my project hinges on this formulation of the concept of justice, its purpose is simply to help bring out the constructivist nature of Hume’s project.

ask, what is Hume's corresponding conception of justice? The answer, given his conservative stance toward conventions of justice, is whatever the current system is, so long as it meets a proviso of stability.⁴⁹ It seems not only that Hume meets Requirement N, but he does so using a concept of justice that responds to facts in the world (e.g., the need for stabilizing property and the need for society), not transcendent principles of justice. This lends plausibility to my position that Hume is indeed a constructivist about justice.

In the discussion of Rawls above, we can see how one moves from a concept to a conception of justice, which is, by taking up the standpoint of a liberal citizen and asking what principles a reasonable citizen has reason to adopt. And "insofar as we regard ourselves as such citizens, those are laws which we have reason to accept."⁵⁰ It is because each individual has a need for some rules or principles of justice, in order to solve the task of justice, that the rules will be binding. In Hume, we find a framework sufficiently analogous to model Rawls's procedure. Hume ultimately recommends that we take up the standpoint of the general point of view to ask what principles are just and agreeable. Those will happen to be ones that came about through a certain process of conventions over time. Insofar as we have sympathy with the society in question, we have reason to want everyone to be bound by property rules.

Despite a number of substantial differences in the theories of Rawls and Hume, the preceding discussions bring out a number of shared structural features in addition to their fact-sensitive concepts of justice. They both endorse frameworks for discovering their conceptions of justice that are not committed to a particular ideal or goal (e.g., maximizing utility or equal distribution of resources). Their theories are primarily concerned with the process of determining the best procedure to yield the best conception of justice. The accounts are concerned with constructing, or in Hume's case justifying, the construction of a conception of justice that is the right conception because of the procedure that brought it about. For Rawls this is the function of the original position; for Hume it lies in the general point of view.

⁴⁹ It is important to note that given the restricted reading of the general point of view that I endorse, there will be different conceptions of justice for each society.

⁵⁰ Korsgaard, *The Sources of Normativity*, p.115.

Hume's theory of justice is a constructivist theory of justice.⁵¹ His theory of artificial virtues is a construction that yields what Hume takes to be just because of the process that brings the principles about. While Hume may not be motivated to be constructivist because of pluralism (as Rawls and Scanlon are), tolerance is a key theme and pluralism is still plausibly incorporated into his account by the general point of view. Hume's general point of view, from which individuals reflect on whether something is useful and agreeable, is not motivated by a single ideal or reason. People enter this reflective position and evaluate virtues, even justice, without necessarily having similar accounts of where the concern or desire to do so comes from. Hume's virtue ethics merely require that we have similar sentiments, not that the reasons we have them be the same. Hence, something very much like Rawls's reasonable pluralism could be captured by the general point of view approach. Hume does speak of different cultures having different rules for the same tasks (e.g., defining property succession) in a way that sounds remarkably similar to Scanlon's explanation of the diversity between cultures, and Rawls's advocacy of tolerance throughout his work. So, while Hume does not endorse any specific pluralism or tolerance within political cultures taking up the general point of view, neither is his theory incompatible with such values. Furthermore, there is no reason that constructivism must yield liberal theories of justice; that is simply the aim of most of its modern proponents.

Another shared feature of Rawls and Hume in their broader theories is the role of reciprocity. Rawls, in his essay, "Justice as Reciprocity," gives a full account of what this role is. Ultimately, for Rawls, justice is not best characterized as a relation of mutual advantage or as impartiality, though his decision procedure for arriving at principles of justice does concern aspects of these. Rather, the relation of justice is characterized by a principle of reciprocity. He explains that the concept of reciprocity occurs when autonomous individuals, "are engaging in or find themselves participating in a joint activity, are among themselves settling upon or acknowledging

⁵¹ NB his entire moral theory is sometimes read this way. While it is true that the general point of view is relevant to his theory of moral sentiments, without the conventions and practices of his artificial virtues, that is, without some objective rules coming out of the general point of view, it seems more adequately defined as an epistemic device, which does not construct the "right" or "good," but instead merely informs us of it.

the rules which define it and which determine their respective shares in its benefits and burdens.”⁵² The principle of reciprocity requires that practices satisfy the principles, which people who participate in justice could reasonably propose when in the circumstances of justice.⁵³ Rawls insists that his principles of justice as fairness, outlined above, are also marked by reciprocity. For instance, Rawls justifies the allowance of inequalities in distribution for the benefit of the worst-off as motivated by reciprocity.⁵⁴ Rawls himself observes that in Hume’s discussion of utility and mutual advantage, it is frequently noted that every man must benefit. He quotes a passage from Hume, “every individual person must find himself a gainer in balancing the account . . . Every member of society is sensible of this interest: Every one expresses this sense to his fellows, along with the resolution he has taken of squaring his actions by it, on the condition that others will do the same.”⁵⁵ Rawls then explains that this taken together with the fact that he also draws from Hume the logical importance of general rules, means “the conception of justice I set out . . . is perhaps closer to Hume’s than any other.”⁵⁶ He later compares this reciprocity to Kant’s second formulation of the Categorical Imperative, which he believes captures the same idea of reciprocity.⁵⁷

IV. Hobbes’s Account of Justice and Methodology

Having addressed Rawls’s and Hume’s theories of justice and the constructivist framework of Requirement N in both of their accounts, I now turn to Hobbes’s account and ask how he fulfills this requirement. We look to Hobbes, because his project, while similar in structure to Rawls and Hume, takes as foundational a completely different set of circumstances and facts in the world. The contrast will highlight the importance for constructivist political philosophy of beginning with the right set of facts to develop the concept and range of plausible principles (or

⁵² Rawls, "Justice as Reciprocity," p.208.

⁵³ Ibid.

⁵⁴ Ibid., p.195-96.

⁵⁵ Hume, *A Treatise of Human Nature*, p.498.

⁵⁶ Rawls, "Justice as Reciprocity," p.196 fn.4.

⁵⁷ The second formulation of the Categorical Imperative is “Act in such a way that you treat humanity, whether in your own person or in any other person, always at the same time as an end, never merely as a means.” From: Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James Ellington (Indianapolis: Hackett Pub. Co., 1993), p.230.

conceptions) of justice. To emphasize this, I first seek to establish his fulfillment of Requirement N—with a concept of justice that is fact-sensitive—in his own project of establishing political legitimacy and principles of justice.

Hobbes's use of the idea of the *state of nature* in his political theory, as one of the best-known pieces of political philosophy, hardly requires recounting here. A few salient points will suffice to make the arguments needed for this project. He argues that the fact of every man's right to everything combined with his psychological egoism lead to a state of nature that is a state of war. Individuals are not constantly fighting, but they are constantly ready to fight because there is no way to secure what little they can claim against the claims of their fellows. Even within such a state of nature, however, there are certain universal precepts of reason or *laws of nature*. The following are the three most important: (1) "That every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre." from this is derived (2) "That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe."⁵⁸ these lead to (3) "That men performe their Covenants made."⁵⁹ Hobbes adds to this that injustice is simply "not Performance of Covenant."⁶⁰ As precepts of reason every person may desire to follow the laws of nature, but they cannot as the state of war they are in is such that there is no reason to trust that other men will do so. Hobbes argues that we can only expect everyone to follow these laws of nature if there is an enforcer of covenants. Hobbes prefers a government led by a single power for this role and calls this government the Leviathan. These three laws in addition to another sixteen make up the laws of justice, which for Hobbes are also the rules of morality. These precepts of reason are the laws of justice only when a government exists to enforce the third law.

⁵⁸ Thomas Hobbes, *Leviathan*, ed. Richard Tuck, Rev. student ed., Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1996), p.92.

⁵⁹ *Ibid.*, p.100.

⁶⁰ *Ibid.*

At present, we are concerned with how the structure of Hobbes's social contract models the constructivist project. In Rawls, the procedure for the move from concept to conception is possible by taking up the standpoint of a liberal citizen and asking what principles a reasonable citizen would adopt. Because Hobbes begins with an initial position not already marked by society or any cooperation, we must imagine taking up the point of view of an individual who lives in continuous fear, and in danger of violent death, plagued by the life "solitary, poore, nasty, brutish, and short."⁶¹ Even so, this individual desires peace and knows that every other individual does as well. This is the perspective of an instrumentally rational individual who knows that she will benefit from cooperation, but that it would be unwise to be the first to cooperate in such a state. Taking up this point of view, Hobbes's concept of justice seems to be: to guarantee promise making and trust so that individuals are secure and enjoy the benefits of mutual cooperation.

Hobbes's solution to this problem, his conception of justice, is a Leviathan government, preferably with a single leader who enforces contracts by whatever means necessary short of breaching the security and possibility of mutual benefit that he is supposed to provide. This will include, but not be limited to, the rest of the laws of nature. On Hobbes's account then, individuals are obligated to be just because it is in their interest and they cannot receive the benefits of cooperation or security if they are not.

We can now see that Hobbes has used a methodology similar to Rawls's constructivist approach of first identifying that which makes justice needed (the problem identified by the concept) and then choosing a solution (a conception) which responds to the concept. He has identified a problem so severe that some solution is needed and desired by all individuals; hence it is responsive to facts about human nature and society. His concept of justice is fact-sensitive. And, given the way he conceives individuals to be motivated, an all-powerful Leviathan government is a legitimate solution to the task of achieving some security and cooperation. It is worth noting, however, that Hobbes actually does discuss alternative forms of government after the initial contract, but suggests a single monarch would be more successful at enforcing covenants. This indicates that he had other conceptions of justice in mind

⁶¹ Ibid., p.89.

and illustrates that Hobbes's account of justice meets Requirement N with a fact-sensitive concept of justice.

Though Hobbes differs in a number of important ways from Hume and Rawls, not the least of which include his somewhat bleak account of justice and human nature, there is a striking similarity. Like Hume and Rawls, it is the procedure of identifying the task of justice followed by the advocacy of a possible solution that dominates his discourse. Rather than focusing on a specific outcome for justice (e.g., maximizing utility or equality), Hobbes focuses on certain features of the world to tease out relevant intuitions and garner agreement on the need for an enforcer of contracts as well as what is necessary to achieve this.

Here one might reasonably ask whether Hobbes's austere conception of justice is really justice. Even understanding the concept at which his project is aiming, there is something decidedly unjust about a government defined by an all-powerful sovereign. So where then did Hobbes diverge from his fellow Constructivists? I would suggest that Hobbes relies upon the wrong set of facts in the world from which to construct both his concept and conception of justice.⁶² Hobbes starts from assumptions of egoism, greed, and limited resources. By comparison, Rawls begins with a preexisting society, limited resources, a plurality of interests, and a baseline of equality. The facts Hume identifies as relevant are similar to Rawls. The next chapter will explore these facts in depth; here what is relevant is their importance. Constructivists motivate their concepts of justice by identifying certain facts in the world that they understand to give rise to a need for justice, and the facts that make a solution possible. This constrains the range of possible principles of justice. If the facts a concept and ensuing conceptions of justice respond to are not the right facts, then the corresponding theory/conceptions of justice will not be relevant or binding. This is because the concept of justice will not respond to the actual circumstances in the world that make any rules or conception of justice needed.

V. Methodological Concerns

Before exploring which facts these should be, I'll here briefly address two more concerns that may arise from the nature of constructivism itself. The first concerns

⁶² I will defend this suggestion further in the following chapter, at present I merely try to emphasize its possibility.

the fact-principle relationship I have been advocating herein; the second, the strong role of reciprocity that marks any constructivist project.

Closely related to his rejection of the constructivist concept of justice is G.A. Cohen's argument against the relationship between facts and principles that I have been supporting, and that Rawlsian constructivism explicitly endorses. In *Rescuing Justice and Equality*, Cohen argues that if there are any fact-sensitive principles in the world, then this principle is normative only in light of its invoking some more ultimate fact-insensitive principle.

Cohen gives little explanation of what exactly he understands a fact-insensitive principle to be, though he does give us two examples. The first example is in the context of his argument for fact-insensitive principles of justice. As Cohen explains his position, an agent observes a fact and then infers a principle from the observation. For example, only when promises are kept can individuals succeed at their projects. The agent then infers: we should keep our promises. But then, the agent might always ask, "Why should we do this?" The answer seems to be a further principle: we should help people pursue their projects. The same question might be asked of this principle until eventually we reach a fact-insensitive principle.⁶³ In this case Cohen identifies the foundational, fact-insensitive principle: "One ought to respect beings, human or otherwise, with certain relevant characteristics."⁶⁴ As Pogge points out, however, this ultimate principle, "directs its addressees to consider certain facts, namely whether beings they encounter do or do not possess the relevant characteristics."⁶⁵ This renders these ultimate principles what Pogge explains as *internally fact-sensitive*. The idea is that any externally fact-insensitive principle can be restated so that "external fact-sensitivities are internalized."⁶⁶ We can see the same holds when we examine Cohen's other example of a foundational principle of justice, his egalitarian: one ought not, "*modulo* a personal prerogative . . . take more wages than the worst off save where such wages are required to compensate for special burdens."⁶⁷ This principle, Pogge points out, refers to facts about "those other welfare-capable beings." Thus,

⁶³ Cohen, *Rescuing Justice and Equality* .

⁶⁴ Ibid.

⁶⁵ Pogge, "Cohen to the Rescue!," p.461.

⁶⁶ Pogge, "Cohen to the Rescue!"

⁶⁷ Cohen, *Rescuing Justice and Equality*, p.401.

reference to the facts is once again built in to Cohen's fact-insensitive principles. There is no reason to suppose Constructivists might not word their principles similarly to appease Cohen. In fact, given the Constructivists explicit commitment to meta-ethical agnosticism and Cohen's lack of clarity regarding what a fact-insensitive principle of justice is, Cohen's position on the concept of justice does not clearly contradict the Rawlsian Constructivist's position.

Rawls himself cites moral reasons to engage in his project. He argues for a natural duty to uphold just institutions and the promotion of civilization.⁶⁸ His natural duties have the structure of imperfect moral duties. Further, the principles or considered moral judgments that Rawls identifies within the reflective equilibrium that guide us in how we structure the original position are derived from fact and reflection in exactly the same way that Cohen claims we come to know our ultimate principles. That is by asking: Why Principle X? then referring to facts in the world to find better, more ultimate principles. In fact, in section ten of his project Cohen explains that affirmation of fact-sensitive principles are only *logically* prior to fact-insensitive ones, and certainly not temporally or epistemically so. Hence he summarizes, "That is why I do not deny (in fact, I would assert) that asking what we think we should do, given these or those factual circumstances, is a fruitful way of determining what our principles are."⁶⁹ This gets at the actual crux of the conflict between Cohen and Rawls. The impetus of Cohen's critique is that he believes principles of justice should be ultimate, objective principles that we try to discover in part by looking at rules of regulation type principles of justice. By contrast, Rawlsian Constructivists want to identify the best principles of justice to regulate actual societies. Hence, Rawls explains his project in the following way.

The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth. . . . The task is to articulate a public conception of justice that all can live with . . . although doing this may involve settling theoretical difficulties, the practical social task is primary.⁷⁰

⁶⁸ Rawls, *A Theory of Justice*, p. 258.

⁶⁹ Cohen, *Rescuing Justice and Equality*, p.247.

⁷⁰ John Rawls, "Kantian Constructivism in Moral Theory," *The Journal of Philosophy* 77 (1980), p.519.

Rawls's goal is not to identify moral truth, but a practical conception of justice. Hence, while Rawls's concept of justice (identified above) is to assign rights and duties and determine the appropriate division of social advantages, Cohen's concept of justice might be: to identify the ultimate principles of justice which apply in all possible worlds. For this concept of justice to be of any use Cohen himself thinks it will need to make trade-offs with other virtues like efficacy of distribution, and baseline sustenance for all individuals. The Constructivists, however, are happy to build these virtues into their principles of justice in the first place.

The fundamental disagreement reduces to the following question: Should justice aim to guide practical tasks or should it aim to comprehend higher principles? In other words, what kind of concept of justice should we identify? This question strikes me as somewhat unfruitful in the current debate given that we come to know those higher principles, by Cohen's own admission, by reference to facts that set out the scope of what justice needs to solve in our societies. In short, the Rawlsian Constructivist may respond to Cohen that a constructivist procedure is still the best method for discovering what our moral principles are, and for justifying those principles to one another.

In conclusion, Cohen may have given us reason to doubt that the concept of justice should be quite the practical endeavor that Constructivists (Hobbes, Hume, and Scanlon included) take it to be, but that does not amount to a reason to prefer his account. Even if one is unconvinced by my (admittedly brief) dismissal of Cohen's claims, as long as some political Constructivists continue to hold that principles of justice can be founded on facts about circumstances of the world, then my project, which is concerned with what those facts should be, will be relevant for them.

I move now to a final, general objection to constructivist methodology, which places reciprocity at the center of the justice relationship. Reciprocity is a feature of most Rawlsian constructivist accounts of justice.⁷¹ It is a feature of Humean and Hobbesian constructivism as well. This feature has invited the objection that constructivism requires that one be already disposed to take up a reciprocal

⁷¹ The source of moral motivation in Scanlon's contractualism is the desire to justify our actions to one another, both this and his formula of reasonable rejection, which he compares to taking up another's view point are both grounded in the notion of reciprocity.

viewpoint. If one is not so disposed, a contractualist justification for moral reasons and constraints on behavior will have no reason-giving force for the individual. Whatever moral rules or principles result from the constructivist procedure would not be accepted as sufficient justification if individuals do not take up this attitude of reciprocity. A committed Utilitarian for instance would have no reason to act according to principles yielded by constructivist procedures, but could plausibly be assumed to be a *reasonable* person.

A line of defense open to the Rawlsian Constructivist is that the primacy of justice in any society makes some set of rules and principles necessary for the stability of that society. Following Scanlon, the fact of the need for stability and adherence to some principles of justice is so strong that fellow political citizens do justify themselves to others by appeal to shared principles, rather than by appeal to the foundation of these principles.⁷² In justifying themselves to one another, by appealing to their own interests, political citizens rely on reciprocity to work out publicly acceptable practical rules of justice.

For constructivist principles of justice to be appealing, we need look no deeper than the *shared need* for principles that refer only to the shared values and standards that ground a concept of justice. Judgments about which political principles are needed or possible respond to truths about facts in the world. In short, the Constructivist claims that facts ground principles, which in turn prescribe rules for dealing with those facts. Just which facts should be relevant is the subject of this thesis.

Conclusion

I hope to have shown herein that constructivism is an appealing method of political philosophy and that it is characterized by, among other things, Requirement N, which states: for a constructivist principle to be normative it must offer a solution to a corresponding recognized problem, where the solution is a conception of X and the problem is named by concept X. Further, Constructivists derive these principles from certain relevant facts about the world and human nature. Since the

⁷² Scanlon has an even stronger defense: if some set of principles cannot be reasonably rejected this means that utilitarian (or any different justificatory system) considerations will also have been taken into account and so would be compatible with principles that come out of this equation.

constructivist conception is derived from the concept, the facts that shape the concept directly determine the range of possible conceptions. This means a theory of justice is constrained by the facts that make its principles appropriate. These facts—whatever precisely they may be—are called the *circumstances of justice*. The remainder of this project is concerned with these facts and the primary role they play for Constructivists theorizing about justice.

Chapter 2

The Circumstances of Justice

The circumstances of justice are the necessary conditions for justice or injustice to be applicable. These conditions result in the conflict that renders human cooperation necessary and likewise makes human cooperation possible, and this in turn makes justice possible. The circumstances demark the range of possible instances in which questions of distributive justice arise. The circumstances of justice delineate the scope of justice. Without the circumstances there is no justice. In John Rawls's terms, this would mean there is no need for or possibility of human cooperation. On David Hume's view, justice would have no merit as a virtue. In view of the social contract theorists, man would have never left a state of nature. Most constructivist political philosophy requires an account of the circumstances of justice or, minimally, relies implicitly on one.

In this chapter, I will pursue two questions. The first asks what it means for some circumstance to be a circumstance of justice. The second asks how successfully theorists have construed them in the past. In the first section of this chapter I will explain exactly what I interpret the role of the circumstances of justice to be, and in light of this explanation offer up a brief methodology for assessing them. Section II identifies the Hobbesian explanation of the circumstances of justice and discusses some problems with it. The following section explains Hume's thorough discussion of the circumstances of justice and then deals with objections to it. The final section offers the same treatment to Rawls's account of the circumstances of justice. In the discussions on Hobbes, Hume, and Rawls I will underscore the *challenge of trust* and attempt to underwrite its importance, as it will motivate my own account of the circumstances of justice in chapter 4.

I. The Circumstances of Justice

In *Theory*, Rawls explains that the circumstances of justice are the normal conditions that make human cooperation both necessary and possible. Rawls then goes on to describe what has become known as the standard account of the circumstances of justice, which consists of *limited scarcity of resources*, *limited benevolence*,

and *equality*.¹ Rawls claims that his discussion “adds nothing essential to [Hume’s] much fuller discussion,”² but he also claims to follow Hart and Lucas. This standard account, however, is not the first theory of the circumstances of justice. Hobbes, in *Leviathan*, implicitly offers a full explanation, as do many theorists writing in the common law tradition. Even in Plato’s *Republic*, Glaucon gives an account of “the popular view of the nature of justice and of the conditions under which it develops.”³ Glaucon argues that in actual humanity, people advance their interests most effectively by cooperating with other individuals rather than through conflict. To engage with questions of constructivist justice at all, one must either take a position on the circumstances of justice or, minimally, suppose some set of circumstances to exist. In a constructivist theory of justice, the circumstances also explain both why and when justice has moral merit. This is because the circumstances of justice are the set of facts in the world to which Constructivists appeal in order to show that some system of justice is needed and that such a system is possible. The circumstances allow Constructivists to appeal to features in individuals and the world rather than fundamental principles to justify the constraints and content of justice.

G.A. Cohen, in “Rescuing Justice and Equality,” argues that there are certain questions that proponents of the circumstances of justice fail to differentiate between. These are: “(1) Under what circumstances is (the achievement of) justice possible and/or necessary? (2) Under what circumstances do questions of justice arise? When are judgments of justice (and injustice) appropriate, or in what place? (3) What is justice?”⁴ He goes on to inquire whether the answer to question (3) depends on the answers to (1) and (2). Cohen is wrong to think that the function of the circumstances can be divided this way. The circumstances of justice are the facts about the human condition by virtue of which we need principles of justice. If these facts were different, establishing principles of *justice* would be unnecessary. These circumstances

¹ Similar attribution of this as the standard account occurs in Hubin, Clayton (1997) *The Scope of Justice, Philosophy and Public Affairs*, p.6-7; Barry, Brian *Theories of Justice* p.152-193 and Vanderschraaf, Peter (2006) ‘The Circumstances of Justice’ *Politics Philosophy Economics*, p.322-323. And of Hume’s account being the most thorough all of the above and Rawls’s *Theory* p.109.

² Rawls, *A Theory of Justice*, pp.109-10.

³ Plato, *The Republic*, trans. Raymond Larson (Wheeling IL: Harlan Davidson Inc, 1986), p.32.

⁴ Cohen, *Rescuing Justice and Equality*, p.109, p.331.

do not determine the content of principles of justice, rather they make certain principles relevant. According to this understanding of the circumstances, which I will locate in the work of Rawls and Hume presently, Cohen is wrong to think that question sets (1) and (2) are different questions for the Constructivist.⁵ To identify under what circumstances questions of justice arise is to ask, When is the achievement of justice possible and necessary? And though responses to these two question sets may not be the only way to identify what justice is (question 3), for a Constructivist, to identify the circumstances, in light of which the achievement of justice is necessary and possible, and when questions of just arise, is a way of explaining just what justice is. This is because responses to these questions tell us what justice should and can do.

To defend my interpretation of the circumstances of justice, I turn first to Rawls. Rawls identifies the circumstances of justice as those facts under which questions of justice arise.⁶ He includes the circumstances of justice with the information that the parties of the original position know their society is subject to. This is because without the circumstances of justice, there would not be a need to choose among principles of justice, that is, no need to engage in reflective equilibrium or to enter the original position (there would be no problem to be named by the concept of justice). And without the circumstances, solutions to the problem of choosing principles would be impossible (no conceptions of justice). The parties of the original position know that they are in a society where the circumstances obtain. If the circumstances were to change, the concept and conceptions that they ground would need to change as well. The circumstances of justice are the facts in the world that establish the problem named by the concept of distributive justice and these (usually with other facts and values) set the scope and task for ensuing conceptions of justice. Because the circumstances of justice define the problem named by the concept of distributive justice, only principles that respond to the problem as delimited by these facts will be principles of justice.

⁵ Cohen as an egalitarian with a Platonic-like idea of principles of justice can certainly locate a difference in question (3) from the other two. But for fact-sensitive theorists concerned with justice qua rules of regulation, (1), (2) and (3) do not separate in the same way as (1) and (2) do for Cohen.

⁶ Rawls, *A Theory of Justice*, p.109.

Hume's view reinforces this normative reading of the circumstances of justice. Hume opens section III of the *Enquiry* claiming that "public utility is the *sole* origin of justice, and that its reflections on the beneficial consequences of this virtue are the *sole* foundation of its merit."⁷ From this, Hume continues his heuristic in support of the necessity of these conditions by imagining conditions under which justice would not exist. He explains:

Thus, the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance. Reverse, in any considerable circumstance, the condition of men: Produce extreme abundance or extreme necessity: Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally *useless*, you thereby totally destroy its essence, and suspend its obligation upon mankind.⁸

Hume, in the *Treatise*, offers a slightly different, and earlier view of the origin of justice: "[J]ustice takes its rise from human conventions;" He explains that,

[Human conventions] are intended as a remedy to some inconveniences, which proceed from the concurrence of certain *qualities* of the human mind with the situation of external objects. The qualities of the mind are *selfishness* and *limited generosity*: And the situation of external objects is their *easy change*, join'd to their *scarcity* in comparison of the wants and desires of men.⁹

These two passages, taken together, indicate that the circumstances of justice make justice possible insofar as they provide the possibility for human coordination, which is necessary for principles of justice to be possible. They contribute directly to the inconveniences that need some solution, that need to be worked out, the usefulness of which renders justice a virtue and not simply human coordination. Hence, in Hume and Rawls, the circumstances delimit both the problem and the solution of justice. Justice is a virtue that carries certain duties and obligations with it only when the particular circumstances obtain.

In Hobbes, the circumstances are the circumstances that lead to justice and the possibility of a civil society. Without the circumstances of justice, neither justice nor morality would arise and society could not be formed. In the work of Hobbes, Hume, Rawls, and other Constructivists, the function of the circumstances of justice is *to*

⁷ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.183.

⁸ *Ibid.*, p.188.

⁹ Hume, *A Treatise of Human Nature*, p.494.

delimit the range of facts about human nature and the world by virtue of which we need principles of distributive justice and which make such principles possible via human cooperation. For Constructivists, the first step to finding a theory of justice is to identify the circumstances that make it necessary and then ask what kind of principles are needed in light of these facts in the world. Possible constructivist conceptions of justice will involve principles that respond appropriately to these facts and meet Requirement N. To be clear, the move from identifying the circumstances of justice to the formulation of ensuing principles of justice will usually involve a number of other facts about the world and values, due to the constructivist procedure that identifies actual principles of justice. The circumstances of justice alone are not sufficient to yield constructivist principles of justice. Instead, the circumstances are facts which must be true for a coordination rule to be a principle of justice. Hence, proponents of this view can identify principles of justice, as opposed to other principles (e.g., of morality or prudence), by asking if they respond to the circumstances of justice. In this way the circumstances of justice determine the scope of justice. It naturally follows that it is very important to identify correctly the facts in the world to which justice must respond.

A number of criticisms have been launched against the standard account of the circumstances of justice as well as against Hume and Rawls individually. Many of these criticisms will be addressed in this and the following chapters. However, as we also must clarify what the facts in the world are to which justice should respond, my method is to proceed by considering the facts that are contenders for the circumstances of justice. These facts will be compared to the facts found in other accounts of the circumstances of justice, and evaluated in light of our intuitions about justice. The next section will consider Hobbes's circumstances of justice and then turn to an important problem his account raises for theorizing about the conditions under which justice exists.

II. Hobbes's Circumstances of Justice

Hobbes's view of the circumstances of justice is not directly addressed in his writing. It is clear, however, that in *Leviathan* his explanation of justice arising from the state of nature naturally includes a position on the circumstances of justice. Hobbes's origins of justice project was intended (in part) to give his view not only of

the obligations and constraints of justice, but also of what is necessary for them to be legitimate obligations. Any constructivist conception of justice concerned with the origins of the duties it promotes involves a *de facto* explanation of the circumstances of justice.

Hobbes's state of nature, as described in *Leviathan*, involves the following circumstances:

- (1) Rough equality, where equality is of body and mind.
- (2) Conflicting interests, which lead to a war of all against all. This is not constant battle, but constant potential of battle where all men are enemies with other men.
- (3) Limited altruism such that each person values his or her own survival more highly than the survival of others. There is some extremely limited benevolence. Wives and children exist but these ties are not strong enough to play any role in forming a larger society.
- (4) Forward-lookingness marks the people in Hobbes's state of nature. They not only want to achieve their ends and adopt whatever necessary to achieve them, but they are also capable of uniting forces for a short time with others to conquer a common enemy.
- (5) Death aversion motivates individuals to survive.
- (6) Moderate scarcity of resources means there are not enough resources that every individual can have what he/she wants and so they fight one another because they cannot cooperate.
- (7) Hope of attaining these resources.¹⁰

These features together comprise Hobbes's circumstances of justice.

According to this formulation, the combination of a (1) rough equality of body and mind, with the limited altruism/possibilities for confederation of (3) means that no one person can dominate the rest, so there is a need for some set of rules to constrain behavior and avoid a state of war. (2) The conflict of interests, which is a desire for the same resources because of (6) a moderate scarcity of these resources and (7) their hope of attaining these resources. This means that individuals would be willing to fight for whatever resources are available; hence, there is a need for some

¹⁰ Hobbes, *Leviathan*, pp.86-89.

rules. All these conditions lead to a possibility of a solution (a conception of justice) particularly because of (4) the forward-lookingness of individuals in conjunction with their (7) hope of attaining resources and (5) individuals' death aversion. These motivate individuals to desire peace and see that it is in their forward-looking self-interest to lay down their weapons, covenant, and instate a sovereign with the power to create and enforce the rules of justice.¹¹ A challenge is that, while a desire for goods and the hope of attaining them may lead individuals to see that cooperation would be good, it is unclear that a desire for more goods coupled with rough equality and man's rational self interest (among the other conditions) would lead to human cooperation. There is no reason to believe others would cooperate in exchange for one restraining one's own behavior. In terms of the rational choice model of the prisoner's dilemma, in the state of nature it is unclear why any individual would choose the cooperative strategy over a non-cooperative strategy.¹² This is the subject of much Hobbesian debate as Hobbes did little to clarify how cooperation gets started, and instead focuses on the all-powerful Leviathan needed to enforce that cooperation.

Interestingly, in his discussion of trust, Hobbes argues that it is irrational to rely on others to keep their covenants in a state of nature and that the person who promises first "does but betray himselfe to his enemy; contrary to the Right (he can never abandon) of defending his life."¹³ The most that reason can do is show us that we would be better off if we could rely on others to constrain their behavior, especially if they did so in a sustained manner. As we cannot rely on this, Hobbes thinks a sovereign is necessary to enforce covenants. If we could ever trust others to keep their covenants, there would be no need for the (decidedly unjust) sovereign. Hobbes understands mistrust to be a hallmark of the human condition and his circumstances capture this. Hence, his preferred conception of justice is a sovereign powerful enough to respond to the problem this mistrust creates. This highlights an important idea. Trust, in particular mutual trust, is central to the possibility of

¹¹ Ibid., p.90.

¹² Nothing I say here hinges on the prisoner's dilemma model of the state of nature. I only use this example from Gauthier's reading of Hobbes to make clear where my concern lies, not to endorse his exegesis of Hobbes.

¹³ Hobbes, *Leviathan*, p.96.

justice. The danger that Hobbes speaks of in being the first to trust or promise illustrates that trust puts us in a vulnerable position. This vulnerability gives rise to a need for human cooperation and justice.

If we momentarily lay aside Hobbes's account of the circumstances of justice and consider what the Hobbesian Contractarian David Gauthier advocates as the circumstances of justice, we see that, even without the Leviathan, the same problem still exists. Gauthier's circumstances of justice involve only equality, limited scarcity of resources, and rational self-interest.¹⁴ It is still unclear how, given such a model, cooperation could ever get started. In Gauthier's work this problem is avoided precisely because he posits these circumstances with the background of a civil society already in place. Society demands cooperation and cooperation demands trust. Hence, Gauthier's named circumstances actually exist in the context of an additional circumstance in which cooperation is already at work. Gauthier is unwittingly relying on a cooperative society to ground mutual trust, not, as he would have it, reliance on mutual self-interest. As Simon Blackburn rightly argues, without some trust, agents in a bargain procedure cannot get cooperation off the ground. Blackburn asks, "When is it 'reasonable to expect reciprocation, even with a small degree of confidence? How does a little bit of trust get into place, in order to kick-start the process of socialization?'"¹⁵

Hobbes thought there was no such force and attempted to make up for this dearth of trust with an absolute sovereign in order to assure mutual reliance. Hobbes's argument for mistrust is comprised of a few examples of pervasive mistrust in humanity. Those examples include instances of people arming themselves when they travel, of people locking their doors when they sleep, and locking chests while in their houses, in spite of laws that punish for theft.¹⁶ He then points to two examples of such inherent mistrust in near state-of-nature conditions: the savage people in the Americas who have no government, and the relation between nations. Hobbes is largely wrong to think that these examples are evidence of humanity's

¹⁴ David P. Gauthier, *Morals by Agreement* (Oxford [Oxfordshire]: Oxford University Press, 1986), pp.115-117.

¹⁵ Simon Blackburn, *Ruling Passions : A Theory of Practical Reason* (Oxford: Clarendon Press, 1998), p.192.

¹⁶ Hobbes, *Leviathan*

lack of trustfulness. While international relations, for instance, may seem marked by states of war and mistrust, it is equally true that they are marked by trust and benevolence. A modern example of mistrust in international relations would be the abundance of failed peace agreements in the Israel-Palestine conflict. These failures would support a Hobbesian attitude that trust would conflict with one's self-interest as it gives the enemy the upper hand. However, treaties are typically honored between nations with a history of trust, for example treaty agreements between Norway and Iceland or the United States and United Kingdom. As Blackburn explains, there has never been a scenario "in which competitive or warring conflict of interest was the *only* relation between human beings. All kinds of kinship relations enable us to practice co-operation and learn to subordinate various of our own interests to other concerns."¹⁷ It is these sorts of relations that allow trust to get started. An example which suggests that, in fact, humanity tends to favor trust over mistrust can be found in the extreme mistrust that marked the Serbian-Bosnian-Croat treaties of the 1990s compared to current treaties and relations between the nations. Treaties repeatedly failed in the past, but there is now little chance of upheaval because a younger generation exists who have been slowly learning to trust or forget the reasons not to trust. There is never a guarantee that trust will evolve, but neither is Hobbes correct that it will not. Examples like Croatia and Serbia and their relations today seem to indicate that it is more likely a fact of human nature that some trust will exist.

For a cooperative society to exist, there must be some trust among individuals. Trust is necessary for the kind of human cooperation present in justice and thus, necessary for justice to be *possible*. Failure to account for trust amounts to a failure to identify the correct circumstances of justice. In the absence of trust in the circumstances of justice, conceptions of justice risk not protecting against the vulnerabilities of trust. Extended voluntary cooperation would not be possible as cooperation would make one vulnerable, and principles of justice would not respond to the need for trust. For future reference, I label this challenge for the various accounts of the circumstance of justice the *challenge of trust*, which is: to formulate the circumstances of justice such that the vulnerabilities of trusting are protected against

¹⁷ Blackburn, *Ruling Passions : A Theory of Practical Reason*, p.193.

and mutual trust is possible, rendering cooperation and conceptions of justice necessary and possible. To return to Hobbes, it seems we not only have reason to reject the Leviathan as an un-just conception of justice, or rather, view it as rules for a civil society rather than as a conception of justice, we also have reason to reject his circumstances which rule out the possibility of significant mutual trust. If, however, we can work trust back into the circumstances, it seems that something very near Hobbes's view of the circumstances of justice could be useful. Hence, we will consider Hume's circumstances of justice in part as a response to this challenge of trust made clear in Hobbes.

Briefly, there is another criticism to which Hobbes's theory is vulnerable. The *problem of exclusion* charges that the circumstances of justice define the scope of justice too narrowly. In Hobbes's case, any individual in the civil state over whom the sovereign rules is afforded the protections (and obligations) of justice; anyone outside of that state at that time will not be. This means that individuals from different states stand in no relation of justice to one another.¹⁸ Additionally, future people could never stand in a relation of justice to us. They would be outside of the circumstance of equality. Another concern is that any time or place without limited scarcity of resources or any other of the conditions set forth by Hobbes would fall outside of the scope of justice. C.D. Broad, for instance, argues (addressing this condition in Hume's work) that we would applaud equal divisions in times of famine and disapprove of other attempts to get what food exists.¹⁹ He takes this to be evidence that a concept of justice would apply in times of scarcity. These issues may make Hobbes's circumstances overly restrictive.

In sum, Hobbes's circumstances of justice should be rejected as a theory of the circumstances of justice. This is because they fail to account for the mutual trust

¹⁸ An objection could be raised against my criticism here that Hobbes was only attempting to establish a foundation for justice within the state, not between states. His example of the mistrust between states and the relation between nations being in a state of war does not mean he was addressing justice between states. Insofar as this may be true, my remarks here can be read as a critique of a possible Hobbesian view, not necessarily a critique of his project.

¹⁹ C. D. Broad, *Five Types of Ethical Theory* (London: Kegan Paul, Trench, Trubner, 1930), pp.95-98. Similar arguments are found in D. Clayton Hubin, "The Scope of Justice," *Philosophy and Public Affairs* 9 (1979), p.9-10 and Peter Vanderschraaf, "The Circumstances of Justice," *Politics, Philosophy and Economics* 5 (2006), p.330.

which makes coordination necessary, and they are overly narrow in scope. Without mutual trust at the center of the circumstances of justice, peace may not be possible. Hobbes saw this and suggested the somewhat unjust solution of the all-powerful sovereign. Modern Hobbesians forgo the sovereign and argue that instrumental rationality and a desire for goods are enough to enable cooperation. The duties that follow are called justice, though they look more like rules for a civil society than justice. Further, they cannot explain how trust could ever arise given the instrumentally rational, self-interested conception of individuals they support. We turn now to Hume, who offers an explanation of the circumstances of justice that takes us a step closer to the inclusion of trust within justice.

III. Hume's Circumstances of Justice

Hume can be read as offering an account of the circumstances of justice in response to Hobbes's failure to include trust in his description of justice. The Humean conditions of justice, specified most fully in the *Enquiry's* discussion on justice, are *limited scarcity of resources, limited generosity, equality, and human sociability*. We now consider precisely how Hume articulates these four conditions of justice.

The Moderate Scarcity of Resources Condition

To explain the moderate scarcity of resources condition, Hume posits a golden age that is opposed to a Hobbesian state of nature. In the golden age there is an absolute abundance of goods and this leads to such an abundance of virtue that justice is unnecessary: "It seems evident that, 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."²⁰ Hume contrasts this with the state of nature in which there is an absolute dearth of goods. He explains that "where the society is ready to perish from extreme necessity, no greater evil can be dreaded from violence and injustice; and every man may now provide for himself by all the means which prudence can dictate, or humanity permit."²¹

It is only within this mean that justice will exist. Hume cites land and air as two goods that need no division because there is such an abundance, but imagines a time in which someday these goods will also need to be divided because they will become

²⁰ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, pp. 183-84.

²¹ *Ibid.*, p.186.

scarce. On the opposite end of the spectrum, Hume uses examples of it being no crime to seize any goods available for survival after a shipwreck or in a famine, because one has nothing to fear from violence and injustice. On this lower bound, his examples make use of the concepts of owners, property, and even an equal division of bread. Hume is denying that such acts of survival would be judged as criminal or injurious because any just distribution would be impossible; he is not denying that notions such as property and equality would cease to exist. Central to this condition is that individuals know that coordination will lead to greater production of goods. They know it is possible to coordinate in such a way that their conflicting interests in procuring goods for themselves have a solution.

The Limited Generosity Condition

Hume supports the limited generosity condition, arguing that if the human mind were so replete with generosity that no man felt more concern for himself than any other, “it seems evident, that the use of justice would, in this case, be suspended by such an extensive benevolence, nor would the divisions and barriers of property and obligation ever have been thought of.”²² Hume contrasts this attitude with the opposite end of the spectrum, a society of ruffians, with no generosity or benevolence, in which a ruffian’s “regard to justice being no longer of use to his own safety or others, he must consult the dictates of self-preservation alone, without concern for those who no longer merit his care and attention.”²³ These examples delimit the scope of the generosity condition.

In the example of absolute generosity, Hume asks why people would build fences between fields when there is no division between our interests, and men share all their sorrows and joys “with the same force and vivacity as if originally” one’s own.²⁴ In response to this question, Hume observes that the whole human race would be like a single family. He argues that we see something similar to this in marriage, where the bond of friendship is so strong that laws do not even need to recognize separate possessions. However, Hume’s virtuous man does revert to the sword to protect

²² Ibid., p.185.

²³ Ibid., p.187.

²⁴ Ibid., p.185.

himself in the society of ruffians.²⁵ For Hume, this is analogous to instances in political society in which a man renders himself obnoxious to the public such that the rules of justice are suspended toward him and it is “equitable to inflict on him” what would otherwise be wrong. That is, he must be punished for his crimes, for acting as though he were not in the circumstances of justice. While men are not perfectly benevolent, neither are they perfectly selfish. They do have a natural tendency to take others’ interests as their own interests, even if the range of people this is true of may be limited to family and friends. The fact is that people are *capable* of interests beyond narrow self-interests and that they generally exist in a state of caring (to varying degrees) about others’ interests.

The Equality Condition

What is known as Hume’s equality condition is explicit in the *Enquiry*, though only implicit in the *Treatise*. Hume explains this condition by imagining a species of creatures rational but weak who had no power to make their resentment felt. As a result of their inability to make their resentment felt they fall out of the scope of justice. Even so, Hume recommends we treat them benevolently and give them gentle usage. The equality condition, unlike the other circumstances of justice, does not exist as a mean with an upper and lower limit. Equality exists or it does not. This circumstance, like the others, offers both the problem and solution of justice. The fact of equality makes violence, attacks, and any number of other injustices possible, but for Hume it also involves the ability to make one’s resentment (a sentiment) felt, and gives people a reason to want to coordinate and form a society. This condition is the most problematic for Hume’s position and has landed him in a good deal of trouble. Its problems will be discussed in detail in the following section of this chapter.

The Sociability Condition

Hume has one more explicit condition of justice. The sociability condition is often overlooked; presumably it is sometimes thought to be a part of the circumstance of limited generosity. As I find this condition to be a singularly important reason to find solutions to the problem of justice and as it appears in both the *Treatise* and the

²⁵ The exclusive use of masculine pronouns in this paragraph and others, which involve a number of quotations from Hume, is intended to preserve the integrity of his original passages and to promote clarity in style.

Enquiry, I consider it an independent circumstance.²⁶ Further, in the context of explaining this condition Hume actually responds to the challenge of trust, as he sees it in what we can only assume is his reading of Hobbes's state of nature. In the *Enquiry* Hume argues, "on the first origin of mankind, we are told, their ignorance and savage nature were so prevalent, that they could give no mutual trust, but must each depend on himself and his own force and cunning for protection and security." That this state of mutual distrust could continue long enough to "merit the appellation of the state, may justly be doubted. Men are necessarily born into a family-society."²⁷ Hume later goes on to propose a counterfactual to man who "possessed within himself every faculty, requisite both for his own preservation and for the propagation of his kind: Were all society and intercourse cut off between man and man," if man were capable of this solitary condition, "it seems evident, that so solitary a being would be as much incapable of justice, as of social discourse and conversation."²⁸ Hence, necessary for human cooperation and justice is human interdependence, human sociability. If humans were not inherently social, there would be no possibility of coordination or justice. Moreover, such interdependence demands that individuals cooperate because self-interests can only be achieved in conjunction with others.²⁹

²⁶ D. Clayton Hubin, "Justice and Future Generations," *Philosophy and Public Affairs* 6 (1976); and Thomas Reid, *Essays on Active Powers of the Human Mind* (Chareleston, Mass: MIT Press, 1969) include it in their discussions of Hume's circumstances. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) includes it in his account which he claims follows Hume and Hobbes. However, Brian Barry, *Theories of Justice*, California Series on Social Choice and Political Economy 16 (Berkeley: University of California Press, 1989); Vanderschraaf, "The Circumstances of Justice;" and Rawls, *A Theory of Justice* do not.

²⁷ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.189.

²⁸ *Ibid.* p.190-91. Similar discussions appear in Hume, *A Treatise of Human Nature*, p.486-8.

²⁹ Interestingly, Rousseau and Kant each have conditions like this in their account of human society, known as man's "unsocial sociability." In Kant, man is driven to be an isolated individual and yet must socialize and this inevitable conflict becomes the driving force of progress and civilization. For a full discussion, see Heiner Bielefeldt, *Symbolic Representation in Kant's Practical Philosophy* (Cambridge, U.K. ; New York: Cambridge University Press, 2003), pp. 131-132.

In addition to these conditions, Hume occasionally references human sagacity, mutual trust, and a few other human characteristics as necessary for justice.³⁰ This indicates that Hume did not view the four conditions as the only necessary conditions of justice.³¹ Though he gives no extensive explication of these supplementary conditions of justice, Hume's position seems to be that the four explicit conditions are merely the most salient features necessary to the development, existence, and merit of the rules of justice.

In Hume, the *essence* of justice, as well as its status as a moral virtue from which obligations arise, is only possible because of its utility for society. And it only has utility in situations in which the circumstances of justice obtain. Both the natural motive to justice (self-interest) and the motive to its moral obligation (sympathy with the public utility of the virtue) are contained within the circumstances. For Hume, the rules of justice are morally obligatory only if his four conditions of justice are met, although, as mentioned above, he may think some other conditions are also necessary.

Justice is a virtue because it underpins society, and we have sympathy with the usefulness of this. We are obliged to be just precisely because justice is useful and agreeable for society. But if the circumstances did not exist to create the problems that need a solution, and if the circumstances were such that there was no solution to the problem, then justice would neither exist nor be obligatory. It is only once justice arises and society is constituted via conventions that it is morally obligatory to be just. The circumstances of justice are such that individuals within them will (generally) want to conform to the rules of justice and want the group to conform as well. It is clear then that Hume's perspective on the role of the circumstances of justice matches my own interpretation, which is *to delimit the range of facts about human nature and the world by virtue of which we need principles of distributive justice and which make such principles possible*. We are now in a position to ask how successful Hume's explanation of the

³⁰ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.189, p. 205.

³¹ This rules out the possibility of interpreting the circumstances as *logically* necessary for justice. For an account that treats the circumstances of justice as the logically necessary and sufficient conditions to justice see Vanderschraaf, "The Circumstances of Justice," pp.322-23.

circumstances is at explaining the necessity and possibility of human cooperation and justice.

IV. Objections to Hume's Account

The standard objections to Hume's view of the circumstances of justice are problems of scope. I will begin with these, and then later move on to consider how Hume's position responds to the challenge of trust. Criticisms arise primarily from the condition of equality.³² I cite Hume's passage explaining the equality condition here for reference:

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, . . . Our intercourse with them could not be called society, which supposes a degree of equality; but absolute command on the one side, and servile obedience on the other. . . . And as no inconvenience ever results from the exercise of a power, so firmly established in nature, the restraints of justice and property, being so totally *useless*, would never have place in so unequal a confederacy.³³

Hume continues in the following paragraph:

This is plainly the situation of men, with regard to animals . . . The great superiority of civilized Europeans above barbarous Indians, tempted us to imagine ourselves on the same footing with regard to them, and made us throw off all restraints of justice, and even of humanity, in our treatment of them. In many nations, the female sex are reduced to like slavery, and are rendered incapable of all property, in opposition to their lordly masters.³⁴

One of the earliest objections to these passages is found Thomas Reid's work. He responds to Hume arguing that under the circumstance referenced above, justice would *not* be totally useless and "surely to be treated with justice would be highly

³² The benevolence and scarcity of resources conditions have criticisms of scope from Hubin, Vanderschraaf, and Broad. However, as these criticisms hinge on interpretations of the circumstances which amount to the claim that it would be good if justice existed outside of these circumstances, instead of showing that it is *possible* for it to, I leave them aside. Further, the criticism of exclusion seems to capture what is most relevant to the benevolence and scarcity of resources criticisms, though they will come up in discussion in Chapter 4.

³³ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.190-91.

³⁴ *Ibid.*, p.191.

useful to the defenseless species he here supposes to exist.”³⁵ This objection has been reiterated and reinterpreted in a number of modern critiques. Postema distinguishes two separate categories of objections on this front.³⁶ First is the *problem of exclusion* which is ultimately the charge that the equality condition excludes individuals from the scope of justice who should, in fact, count within that scope. This problem is exacerbated by a further criticism introduced by Michael Ridge, the *problem of paternalism*. The problem of paternalism emphasizes that duties of benevolence, when unchecked by any sense of justice, can actually result in a justification of paternalism. A second problem for Hume’s defenseless creatures is the *problem of inequality* which is unique to theories of justice that rely on bargaining power. It argues that even if the very weak are in the scope of justice, they will have so few protections that they would be nearly useless.

There are a number of responses to the criticism of inequality. The first simply points out how little Hume is committed to a bargaining-power model of justice. Hume’s conditions of justice outline the problems to which justice is a possible solution, but they don’t define principles adopted within that scope as justice based on bargaining-power. In short, those within the circumstances could adopt any conception of justice within the scope of the conditions. As Gauthier explains, “Hume conceives of the problem of selecting among rules as one of coordination, rather than bargaining. Bargaining . . . [is] suitable only when our differential preferences among possible conventions are strong.”³⁷ Hume himself argues that it is generally best for the stability of society to never change conventions.³⁸ It seems that any theory which considers the circumstances of justice to be the facts that render distributive justice necessary and possible, and not as defining a conception of justice, will be exempt from this criticism. This includes Rawls, whose bargaining position is marked by a veil of ignorance so that no one person has a stronger bargaining position than anyone else. However, Hobbesian Contractarians, such as Gauthier, are susceptible to this criticism.

³⁵ Reid, *Essays on Active Powers of the Human Mind*, p.428.

³⁶ Gerald J. Postema, "Making Resentment Felt: Hume on the Environment of Justice," (The University of North Carolina at Chapel Hill), p.24.

³⁷ Gauthier, "David Hume, Contractarian," p.23.

³⁸ This point is also discussed in Michael Ridge, "David Hume, Paternalist," *Hume Studies* 36 (2010), p.158.

The problem of exclusion is much more pertinent, not only for Hume, but for anyone adopting his version of the circumstances of justice, or what is referred to as the standard account. The concern here is not about how bargaining positions affect one's position in a theory of justice, but about who counts in the theory of justice. Ridge explains that this "is a worry about the grounds upon which any group or individual ought to be included."³⁹ It could be the case that some group is counted as equal, but if it is deemed equal based on the wrong considerations, then the system itself is flawed since it will be susceptible to erroneously including or excluding groups in the future.

Hume's equality condition posits a rational but inferior species that would fall outside the scope of justice. They are "incapable of all resistance" and could never "make us feel the effects of their resentment." The necessary consequence of this is that we "should not . . . lie under any restraint of justice with regard to them."⁴⁰ The problem of exclusion captures that neither the fact of being incapable of resistance nor the fact of being incapable of making others feel the effects of resentment are good reasons to exclude individuals from the purview of justice, particularly given that they are rational individuals. Their rationality indicates that their species would be capable of following the principles that comprise a conception of justice and so would not threaten the stability of the system. In summary, the inability to make resistance or resentment felt is the wrong sort of reason for excluding anyone from justice.

Just how damaging a problem this is for Hume's theory depends on how one interprets the equality with which Hume is concerned. Hume's term "resistance" does seem to suggest he had a thick notion of equality in mind. Certainly, most of Hume's critics read a Hobbesian conception of equality into this condition. Brian Barry, for instance, in his early criticism of Hume, addresses the example of the Native Americans found in the previously quoted passage on equality: "Hume must be accused of drawing back from the full implications of his doctrine. Why does he think the European settlers were only 'tempted to imagine' themselves above justice? Surely, on his theory, they were above justice in their relation to the Indians."⁴¹

³⁹ Ibid., p.14.

⁴⁰ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.190-91.

⁴¹ Barry, *Theories of Justice*, p.162.

Postema, however, insists that Barry completely misses the fact that Hume is pointing out that the European's treatment of the natives was a horridly mistaken judgment.⁴² Barry's exegesis of Hume's circumstances explains that Hume's theory of justice is motivated by a desire to avoid a "war of all against all."⁴³ Indeed, many of Hume's commentators seem to have this notion of Hobbesian equality in mind. That Rawls, for instance, claims that he is following the Humean circumstances but then relies on a Hobbesian explanation of equality suggests that he too understands Hume's concept of equality in a Hobbesian way. If this were what Hume was advocating, equality qua power, it would be a worryingly narrow circumstance of justice. This, however, is not what Hume had in mind and so is not what those who adopt Hume's circumstances (or possibly the standard account) must defend themselves against.

Hume's use of equality is *not* as a condition that motivates a "war of all against all." Rather, it is a statement about when justice will have application. Justice will have application when it evokes our sympathy with the public utility of the virtue, where the public is comprised of all who are a part of the interdependent society that secures the stability of possessions. Those who would call forth sympathy, those with whom we are interdependent, are those who can make their resentment felt. He explains our relation to the creatures outside of the scope of justice in the following passage: "our intercourse with them could not be called society, which supposes a degree of equality; but absolute command on the one side, and servile obedience on the other."⁴⁴ This is not equality, which leads to fear and then motivates men to coordinate as in the Hobbesian tradition. Humean equality is not as strong a notion of equality, nor does it amount to as narrow a conception of justice, as its critics seem to think. This is because resentment in Hume is not akin to power in the way that resistance is. Further, Hume allows *either* condition, resistance or resentment, to be sufficient for justice. This significantly broadens the scope of justice compared to accounts that rely on Hobbesian equality, because while resistance may involve power relations, resentment does not. As Postema explains, resentment in Hume is "a matter

⁴² Postema, "Making Resentment Felt: Hume on the Environment of Justice," p.4.

⁴³ Barry, *Theories of Justice*, p.163.

⁴⁴ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.190.

of holding people to certain expectations about their relations to oneself.”⁴⁵ To appreciate this interpretation of Hume’s notion of resentment, we must first understand what Hume understands resentment to be, and what kind of condition it is.

Resentment for Hume is both a calm and a violent passion.⁴⁶ In either case it arises from a judgment of having been injured.⁴⁷ Hume characterizes the passion of resentment as arising “more from communication than from my own natural temper and disposition.”⁴⁸ He argues that this communication of the passions is achieved via sympathy, which exists in animals to the same degree that it exists in humans. Hume observes that animals exhibit expressions of concern when at play. Although in play they use the same techniques as when they attack, they restrain themselves to avoid harm, “tho’ they have nothing to fear from [one another’s] resentment.”⁴⁹ This brings out a salient feature of Hume’s notion of resentment. Other species are capable of making each other feel their resentment. It is between differing species that Hume doubts the ability to make resentment felt.⁵⁰ According to Hume, the role of sympathy, which is most vivacious and lively when there is a strong continuity and resemblance between others and ourselves.⁵¹ Where this continuity or resemblance is lacking, we will be unable to feel the resentment of others. For Hume, however, even the most self-interested of men would be incapable of such disregard. In the *Enquiry* discussion on self-love, he imagines such a self-involved individual who would still necessarily have some propensity for the good of mankind. He asks, “Would any man,

⁴⁵ Postema, "Making Resentment Felt: Hume on the Environment of Justice," p.11.

⁴⁶ Hume’s taxonomy of the passions divides them along several fronts. One of the divisions is whether they are calm or violent. The distinction is not exact, but roughly, the violent passions are more turbulent and intense. The calm passions are often very strong and exert a steady influence on our deliberation and actions. See: Hume, *A Treatise of Human Nature*, p.276, p.417, p.437.

⁴⁷ Ibid., p.369, p.417.

⁴⁸ Ibid., p.317.

⁴⁹ Ibid., p.398.

⁵⁰ Hume does admit at the beginning of this discussion on the passions in animals that they feel them to a different degree. They judge not by imagination, but only by knowing good and evil, so while it is probably not the same type of resentment that helps motivate justice that Hume is accusing animals of, he seems to think the sentiment is broad enough to apply to them (among themselves) as well.

⁵¹ Hume, *A Treatise of Human Nature*, p.317.

who is walking along, tread as willingly on another's gouty toes, whom he has no quarrel with, as on the hard flint and pavement?"⁵² This sympathy, the resentment of injuries, the happiness we can feel of another's advantages, are not only ubiquitous in humanity, they are also other-regarding. We feel sympathy toward others because of our contiguity and resemblance to them.

Hume's account then, is immune to much of the criticism lodged against the equality condition insofar as it does not exclude those who are not interpreted as equal qua power (i.e. able to compete for goods). This does not entirely allow him to avoid criticism, however. The trouble arises for Hume because the ability to sympathize with others ought not preclude normative relations of justice with others. The justice-status of anyone ought not depend on the range of our sympathy. This is a reason of the wrong kind, even if in practice it is broadly inclusive. To some extent, however, Hume seemed to realize this as well. In his examples of the Europeans' treatment of Native Americans and the subjugation of women, his message is that it was wrong to exclude these groups from justice. Hence, it seems Hume may have also thought that making judgments about who is included within the scope of justice dependent on sympathy can be very dangerous for many marginalized sets of individuals.

The *problem of paternalism* is yet another criticism that arises from Hume's condition of equality. Regarding the rational creatures that fall out of the scope of equality, Hume explains 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."⁵³ Ridge points out that because inclusion in the scope of justice hinges on one's ability to resist and make resentment felt, Hume cannot accommodate the moral intuition that paternalism is justified as "a function of that person's rational competence."⁵⁴ In short the entire species of rational but inferior creatures of whom Hume speaks would potentially fall into a category of individuals toward whom paternalism was justified. Ridge explains that the real problem here arises from the fact that constraints on paternalism must be constraints of justice, not

⁵² Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.226.

⁵³ Ibid., p.190.

⁵⁴ Ridge, "David Hume, Paternalist," p.162.

constraints of humanity. If we are given license to treat such a rational but inferior species paternalistically, as incapable of making good decisions of their own when they may in fact be capable, the treatment is not immoral but unjust. Hume has no grounds for objecting to these wrongs.⁵⁵

Insofar as Hume can be seen (in part) to be responding to Hobbes's position on the circumstances of justice and his assumption of mistrust as a fact of human nature, we may now ask whether Hume is any more successful at responding to the challenge of trust. Interestingly, H. L. A. Hart's discussion of the circumstances of justice offers a great deal of insight to the Humean attempt to incorporate trust into the necessary conditions of justice. Hart characterizes the condition of moderate scarcity as the division of labor in society to explain the motive to cooperation and justice. However, for Hart, this division of labor is only possible *if* there is sufficient generosity to create confidence in the behavior of others and ensure the "predictability necessary for cooperation."⁵⁶ Cooperation is possible if there is sufficient generosity to ground a system of mutual reliance. Without generosity or benevolence, mutual reliance/mutual trust will never unfold and cooperation and justice will not be possible.⁵⁷

Hart is correct in his analysis that some predictability is necessary to expect, rely on, or trust in cooperation. Hume seems to provide some degree of predictability with his benevolence condition. It is not enough, however, to ground the *mutual* trust necessary for cooperation and thus, justice.⁵⁸ Hume initially described his benevolence condition as existing as a mean between absolute selfishness and absolute love. According to his view, if any benevolence exists to any degree between the extremes of absolute selfishness and absolute love, his condition is met.

⁵⁵ See Michael Ridge, "David Hume, Paternalist," *Hume Studies* 36 (2011) especially pp. 162-66 for the full account of this objection and possible Humean lines of response.

⁵⁶ Hart, *The Concept of Law*, p.193.

⁵⁷ There is significant debate on whether mutual trust involves more than mutual reliance, e.g., optimism or good will. At this stage, I remain ecumenical regarding any difference between the two as nothing at present hinges upon the possible differences.

⁵⁸ Though it is worth noting that Hume does criticize Hobbes for precisely ruling out the existence of mutual trust, necessary for justice, in his state of nature. Hume clearly knew this was needed for justice, he simply does not capture it explicitly enough. See *Enquiry* p.189-190 for his objection to Hobbes.

If the other conditions also obtain then there can be justice. I submit, however, that ordinary benevolence is not able to make cooperation warranted or predictable in others. Consider, for example, the benevolence of a priest or philanthropist. This type of benevolence is unidirectional. No amount of unidirectional benevolence will do the work necessary for mutual trust.⁵⁹ The philanthropist can give and give, but can never reasonably form expectations about the behavior or feelings of the recipient of his generosity. Neither can the recipient of such benevolent behavior ever make claims on the philanthropist. This benevolence is the sort involved in *moral patient* cases. It is a dependency relationship, making it insufficient to bring about the trust needed for justice. Trust of the sort necessary for human cooperation and justice, of the sort Hobbes doubted and replaced with a Leviathan, must be mutual if one is to choose the cooperative strategy, that is, to uphold or undertake duties (e.g., refraining from stealing or killing one another). The need to be able to make claims and depend on others to fulfill them makes human cooperation and justice *necessary* and *possible*. Justice is a relationship that involves duties and claims, at its core is the assurance that we can make certain claims in exchange for following certain rules. Hence, the circumstances of justice ought to include some fact about the world that involves mutual trust. This is the crux of the challenge of trust: the circumstances of justice must include some fact that makes mutual trust both necessary and possible. Moreover, to meet a constructivist version of Requirement N, the concept and conception of justice must be sensitive to the fact of mutual trust, which makes us vulnerable and engenders a need for reliable cooperation.

To identify the circumstances of justice, to determine when justice has application, we must identify what individuals require in order to be capable of trusting within a system of reciprocal claim-making. Unlike Hobbes, who knew he hadn't provided a foundation for trust in his description of human nature, Hume thought he had. He was so confident that, given the condition of humans and the world, justice would naturally and inevitably arise in any human groups, it didn't

⁵⁹ NB Hume does not hold that the generosity condition alone is responsible for placing trust into the circumstances of justice. Rather, he discusses generosity as a circumstance that demonstrates that mistrust is not a characteristic of the circumstances of justice. My suggestion is that trust needs to be in the circumstances of justice, so that the problems it raises can be responded to by principles of justice.

matter to Hume which rules of justice existed or how the society was ruled. However, given our rejection of benevolence qua unidirectional feelings or duties in the above discussion, what could Hume have been relying on to ground the mutual trust necessary for cooperation?

In addition to his sociability condition, Hume's discussion involves a number of other factors that appear to assist the benevolence condition in its establishing trust. In the *Treatise*, Hume hypothesizes about the actions of individuals that lead to justice and its rules:

I observe, that it will be in my interest to leave another in possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces suitable resolution and behaviour. . . [T]hat it arises gradually . . . assures us still more, that the sense of interest has become common to all our fellows, and gives us confidence in the regularity of their conduct: And 'tis only on the expectation of this, that our moderation and abstinence are founded.⁶⁰

Hume states that "justice establishes itself by a kind of convention or agreement; that is, by a sense of interest, suppos'd to be common to all, and where every single act is perform'd in expectation that others are to perform the like."⁶¹ Finally, Hume speaks of a "sense of common interest; which sense each man feels in his own breast, which he remarks in his fellows, and which carries him, in concurrence with others, into a general plan or system of actions, which tends the public utility . . . justice arises."⁶² In these passages, Hume speaks of a common sense of interest, not man's own interest that he feels in his breast and sees reflected back to him in his companions. It is this feeling of shared interests that leads to a plan of shared actions which, in turn, leads to the good of those with whom one shares this feeling. When this common sense of interest is known and mutually expressed, gradually trust arises from the regular observance of acts that express this common sense of interest. Finally, expectations arise within the group. These expectations include people's willingness to curb their own behavior in accordance with the common sense of interest. This sounds very much like a rough-grained version of the modern idea of solidarity. To be sure, the word solidarity did not come into English until decades

⁶⁰ Hume, *A Treatise of Human Nature*, p.490.

⁶¹ *Ibid.*, p.498.

⁶² Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.306.

after Hume's death, during the French Revolution. However, his explanation of what makes benevolence do the work of trust, that is, this shared feeling in our breasts that we mutually express to one another, does seem to hold something of this later concept. Postema explains that, to Hume, "[t]he job of the rules of justice is to constitute a people, to make a community out of an aggregate of socially inclined but ununified individuals."⁶³ These individuals, it should be noted, are already in a circumstance of some basic social relations, relations which already provide a foundation of mutual trust.

V. Rawls's Circumstances of Justice

Though Rawls's exposition on the circumstances of justice in *Theory* is intended to model Hume's account, he adds (perhaps not intentionally) two conditions of his own which change the benevolence condition in such a way that yet another solution to the challenge of trust is offered. Rawls first adds to the circumstances of justice the condition that "individuals coexist together at the same time on a definite geographical territory."⁶⁴ The second condition he adds is that "men suffer from various shortcomings of knowledge, thought, and judgment." The consequence of this, Rawls explains, is that "individuals not only have different plans of life but there exists a diversity of philosophical and religious belief, and of political and social doctrines." He explains at an earlier point in *Theory* that the interests of these plans of life are "not assumed to be interests in the self, they are interests of a self that regards its conception of the good as worthy of recognition."⁶⁵ Here a conception of the good is a view of what is valuable in human life. What one determines to be valuable will often be the product of one's experiences, including social and family groups of which one is a member. The limits of knowledge to which Rawls refers suggests that a society that is marked by a pluralism of conceptions of the good will sometimes have incompatible doctrines and conceptions of the good.

Critics such as Hubin have written off the first of these conditions as unnecessary, but the condition of coexistence carries with it a guarantee that people will have an immediate need to coordinate in order to share the same time and space. Hume and

⁶³ Postema, "Making Resentment Felt: Hume on the Environment of Justice," p.105.

⁶⁴ Rawls, *A Theory of Justice*, p.109.

⁶⁵ *Ibid.*, p.110.

Hart touch on the second condition of imperfect knowledge as well. In the *Enquiry*, Hume states,

If every man had sufficient *sagacity* to perceive, at all times, the strong interest which binds him to the observance of justice and equity, and *strength of mind* sufficient to persevere in steady adherence to a general and a distant interest . . . there had never, in that case, been any such thing as government or political society.⁶⁶

On this use of knowledge or sagacity, Rawls's second condition explains why we need conceptions of justice, and why the sense of justice alone is not enough. Hart adds weight to this reading, arguing that, though the facts which make a system of mutual advantages advantageous are generally known, "individuals may obey from a variety of motives." Even so, Hart contends that "neither understanding of long term interests, nor the strength or goodness of will, upon which the efficacy of these different motives toward obedience depends, are shared by all men alike."⁶⁷ He closes his discussion arguing that sanctions and laws are not required to create reasons to be just, but to guarantee that those who are voluntarily just will not be taken advantage of by those who would not voluntarily be just. This condition creates a need for some conception of justice.

Rawls includes the circumstances of justice with the information that the parties of the original position know their society is subject to.⁶⁸ This is because without the circumstances of justice, there would not be a need to choose among principles of justice, which is to say, no need to enter the original position. And without the circumstances, solutions to the problem of choosing principles would be impossible. Thus, the parties know that they are in a society where the circumstances obtain. They know that when they emerge from the veil of ignorance, after participating in the original position decision procedure, the society will be characterized by moderate scarcity, rough equality, and limited benevolence, as well as imperfect understanding, and existence in the same time and territory. At this stage the parties are mutually disinterested as they choose principles of justice. Rawls explains in the following passage:

⁶⁶ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.205.

⁶⁷ Hart, *The Concept of Law*, p.191.

⁶⁸ Because society already exists, society could also be taken as one of Rawls's circumstances, though he never explicitly includes it. I will say more on this below.

We may note also that the motivational assumption of mutual disinterest parallels Kant's notion of autonomy . . . this assumption has been used to characterize the circumstances of justice and to provide a clear conception to guide the reasoning of the parties. . . . the concept of benevolence, being a second order notion, would not work out well. Now we can see that the assumption of mutual disinterest is to allow for freedom in the choice of a system of final ends (*Theory* p.223).⁶⁹

Rawls does not assume that benevolence is the proper motivational assumption in the original position, because it would allow personal preferences to influence choices in the original position. Rather, mutual disinterest is assumed on the proviso that parties know they must choose principles that will be agreed to post-original position, that is, under the circumstances of justice (including benevolence). In the original position the parties arrive at principles without actually being in or being motivated by benevolence. However, Rawls also claims just before the previous passage that “[t]he parties arrive at their choice together as free and equal rational persons knowing only that those circumstances obtain which give rise to the need for principles of justice.”⁷⁰ The principles agreed to in the original position are principles that must respond to the need the circumstances create for such principles. Simultaneously, post-original position, all of the circumstances are necessary for the chosen principles to be endorsed by the members of the particular society. This group endorsement is necessary for the resulting conception to be stable. Change the circumstances and the principles are no longer valid because they do not answer the problems they were needed to solve in a way that makes coordination possible and stable. If the circumstances change, there would be no obligation to abide by the principles of justice outside the original position. So, while generosity may not be Rawls's motivational assumption in the original position, it is present in reflective equilibrium. It is also one of the facts in human nature that makes human cooperation possible and necessary for Rawls.

Finally, in each of Rawls's discussions of how the original position is set up, and what motivates individuals to engage in reflective equilibrium, there is already a pre-existing society in place. We might infer that Rawls treats society as a circumstance of justice since, without it, the motivation to engage in reflective equilibrium or the original position would be lacking. Indeed, it seems unlikely that one would have any

⁶⁹ Rawls, *A Theory of Justice*, p.223.

⁷⁰ *Ibid.*, p.222.

need for distributive justice without at least some degree of social intercourse. Rawls may believe this is already explicit in his related condition of the same time and geographic place. He may, alternatively, believe that Hume's approach (which he is explicitly following) of including a sociability condition already incorporates society into the circumstances of justice well enough that he offers no further explanation of it. I will discuss some implications of this implicit circumstance of justice in the following section.

VI. Objections to Rawls's Account

Like Hume, Rawls's account is also vulnerable to the problem of exclusion. Because of the structure of the original position, his explanation of the circumstances of justice in *Theory* seems to generate two problematic exclusions: the intergenerational and international domains. In excluding other generations from the original position and allowing societies that do not meet his criteria of a just society into the international original position, Rawls makes his theory subject to the concern that intergenerational and international groups are excluded for the wrong sorts of reasons. In this section, I first address reasons for concern regarding intergenerational justice, which stem from the generosity, equality, and limited scarcity of resources conditions. I then move on to the international worries, which stem largely from Rawls's Hobbesian equality condition. I conclude this section by exploring how well Rawls's account(s) of the circumstances of justice respond to the challenge of trust.

Rawls addresses the intergenerational problem in *Theory*. He gives the original position a present time of entry interpretation so that the decision procedure takes place at only one point in time. As a result the parties in the original position know their generation. Rawls thinks this process could take place at any point in time and result in the same outcome because the parties will *virtually* represent future generations. Rawls admits that it is unfounded to simply claim that parties entering the original position have duties toward other generations.⁷¹ One could make the case that the easiest way around this would be to have representatives from across generations enter the original position and keep each representative's generation unknown. Rawls rejects this in the first edition of *Theory* on the grounds that such an

⁷¹ Ibid., p.111.

original position would “stretch fantasy too far.”⁷² Rawls instead proposes that the parties adopt a *motivational assumption* and asks that we “think of the parties as representing a continuing line of claims.”⁷³ The parties here are heads of families wanting to advance the interests of their more immediate descendents. If, according to Rawls, the parties will “agree to principles [which] . . . they wish all preceding generations to have followed . . . the whole chain of generations can be tied together and principles agreed to . . . [Then] we will have succeeded in deriving duties to other generations from reasonable conditions.”⁷⁴ Barry argues that the motivational assumption “fails . . . because it makes justice dependent on actual sentiments of natural concern that people have for their successors.”⁷⁵ Ultimately, Rawls assumes concern and benevolence where natural concern and benevolence do not exist (i.e., the circumstance of limited generosity does not obtain). Hence, decisions made in the original position would not be binding beyond a generation or two when benevolence can be presumed to obtain.

A related problem is that Rawls’s description of the circumstance of equality reverts to Hobbesian wording. He explains that individuals are “roughly similar in physical and mental powers” and “no one among them can dominate the rest.”⁷⁶ This rules out the possibility of equality between generations as the past and present generations will always be invulnerable to decisions of future generations, while future generations will always be vulnerable to the present and past generation. Even if we read Rawls’s conception of equality in a more Humean light (equality qua sympathy with resentment), it is still insufficient to include future people. This sympathy is other-regarding but it exists because of the relations of contiguity and resemblance. The relation to distant future people would lack sufficient vivacity to make resentment felt by present generations. Moreover, it is a central tenet in Hume’s work that cause must precede effect. Therefore, future generations would need to be able to make their resentment felt, and only then could they be in a relation of justice with us. This

⁷² John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971), p.139.

⁷³ Rawls, *A Theory of Justice*, p.111.

⁷⁴ Ibid.

⁷⁵ Barry, *Theories of Justice*, p.189.

⁷⁶ Rawls, *A Theory of Justice*, p.110.

is clearly not possible.⁷⁷ It is unfeasible, then, to be in a relationship of rough equality (equality qua power or sympathy) with hypothetical people whose existence is contingent on our decisions. If, for instance, original position parties do not choose an adequate savings principle for generations, the world's resources may be depleted so severely that future people may not exist, and certainly not within the circumstance of moderate scarcity of resources. Hubin points out that the circumstance of moderate scarcity of resources is especially vulnerable given current trends of resource depletion. Such resources may only exist if original position conveners choose to ensure that they do.⁷⁸ Ultimately, Rawls's approach is worrying because it offers grounds for exclusion from the scope of justice based on one's generation, which is the wrong kind of reason for exclusion. Rawls hopes to motivate concern between generations but it is extremely unlikely that this is possible beyond a generation or two. Interestingly, neither equality, benevolence, interdependence, nor Rawls's condition of existing in the same time and geographic territory mark the present generation's relation to future people. This means that intergenerational coordination falls outside the early Rawlsian circumstances of justice. The options are either to reject the notion of intergenerational justice or to find a set of circumstance that could include it. This is the subject of chapter 6.

Rawls's early work is also subject to the problem of exclusion with regard to issues of international justice. There is a reading of Rawls's international justice that suggests he thinks that equality exists only to an attenuated degree between nations. The upshot of this supposition is that individuals can be excluded from the scope of justice because of the nation they are born in. This is the wrong kind of reason for exclusion. To be clear, Rawls never explains that it is because of the circumstances of justice that he leaves some people out of the justice relation on the international level. However, to justify excluding individuals from the scope of constructivist justice, it must be the case that the relevant facts of the world that make justice possible do not apply to

⁷⁷ It follows from this that Hume's circumstances of justice also rules out intergenerational justice, but given that it would have been inconceivable for justice to be responding to such a need as intergenerational justice at the time, this seems less damaging to his (and Hobbes's) account.

⁷⁸ Hubin, "Justice and Future Generations," p.73.

those individuals or their situation. To some degree, it seems Rawls thought that this was the case with regard to international justice.

The aim of Rawls's original position is to filter out arbitrary biases, while still accommodating both our intuitions about justice and his aim of justifying inequalities so that they can exist only if they benefit the worst-off. It seems that the easiest way for Rawls to ensure this on an international scale is to let all individuals be represented globally in a single original position. Indeed, before Rawls wrote about his international original positions, two other theorists addressed the issue with a Rawlsian framework. Pogge in his book *Realizing Rawls*, and Beitz in his *Political Theory and International Relations*, propose just this Rawlsian extension resulting in cosmopolitan theories of global justice. Rawls, however, rejects this idea in his original essay on an international original position, *The Law of Peoples*, as "too narrow."⁷⁹ Instead, Rawls sets up a two-level original position for liberal societies in which individuals participate in a domestic original position and then representatives from liberal societies come together with representatives from decent hierarchical societies⁸⁰ who have not organized themselves via a domestic original position. Rawls's *decent hierarchical societies* do not have the two principles of justice in their society. This means that those from decent hierarchical societies will not be motivated by the desire to promote liberties and arrange inequalities so that they benefit the worst-off. Furthermore, even if the agreement reached in the international original position were to yield similar principles, the lack of corollary principles at home may lead to nations or peoples achieving nearly equal distribution of primary goods internationally, but it does not follow that fair distribution of primary goods would extend to the domestic level. This is presumably because Rawls thought there was insufficient equality or insufficient generosity for justice to be possible toward even those in decent hierarchical societies. This is the wrong sort of reason to exclude an individual from the scope of justice. Precluding individuals in non-liberal societies from the direct protections of justice *because* of their nation/people is not the kind of

⁷⁹ John Rawls, "The Law of Peoples," in *On Human Rights: Oxford Amnesty Lectures*, ed. Stephen Shute and S. L. Hurley, *The Oxford Amnesty Lectures* (New York: BasicBooks, 1993), p.66.

⁸⁰ See John Rawls, *The Law of Peoples* (Cambridge, Mass. ; London: Harvard University Press, 1999), p.63, for a full account of a decent hierarchical society.

consideration we want to count in favor of excluding people from justice, especially when these individuals possess all the capabilities of being just.

These are primarily problems generated by the equality condition which Rawls included in his first formulation of the circumstances in *Theory*, but left out (perhaps in response to criticism) in *Political Liberalism* and “Kantian Constructivism in Moral Theory.” However, as he did not entirely abandon the notion of equality by moving it out of the circumstances, how far he remains committed to at least some of his original formulation is open to interpretation. In *Political Liberalism*, he endorses a concept of justice as reciprocity as, “a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world.”⁸¹ Rawls, at least minimally, still endorses a notion of justice that requires some equality between individuals. In “Kantian Constructivism in Moral Theory,” he adopts the position that “everyone is equally capable of understanding and complying with the public conception of justice; therefore all are capable of honoring the principles of justice and of being full participants in social cooperation throughout their lives.”⁸² This clearly addresses the issue of the scope of participation, and broadens it to include all with an *equal capability of participation*. Though this more Kantian condition is much thinner and less subjectively dependent on the views of the dominant participants in justice, it is left to conjecture as to whether certain individuals (e.g., the mentally infirm or handicapped) are capable of being full participants in social cooperation in Rawls’s view.

Turning to the challenge of trust, it seems that Rawls’s early view is open to the same criticisms as Hume’s, given that his position aims to follow Hume’s. However, there are a couple of features of Rawls’s position that lead one to surmise that he may have something like a relationship involving mutual trust already in mind. He explains his subjective circumstances of justice, those aspects relevant to the people involved, as involving the fact that individuals have their own plans of life, and conflicting conceptions of the good. This results in people within any given society having a diversity of religious, philosophical, social, and political positions. It is an

⁸¹ Rawls, *Political Liberalism*, p.17.

⁸² Rawls, "Kantian Constructivism in Moral Theory," p.546.

important feature of Rawls's view that sorting out the best conception of justice only takes place within a preexisting society, a society marked by individuals who have various beliefs and social practices already, and where cooperation is both necessary and possible. Though Rawls does not explicitly make society a circumstance of justice, his emphasis on the diversity that marks society makes it clear that he has this in mind. A certain amount of mutual trust must already exist within a pre-existing society.

In Rawls's later work, *Political Liberalism*, he changes his approach to the circumstances of justice drastically, and makes the possibility of trust within justice even more plausible. Here he names only two circumstances, moderate scarcity of resources, and the fact of pluralism, which in a well-ordered society will be the fact of reasonable pluralism.⁸³ The fact of pluralism is essentially the fact that individuals within a society are marked by certain *burdens of judgment*. No matter how altruistic or objective these individuals are they will adhere to irreconcilable religious, moral, and philosophical doctrines resulting from these burdens of judgment. Because of this pluralism, "fair terms of social cooperation between citizens as free and equal should meet the requirements of full publicity."⁸⁴ Only then can people give reasons for beliefs and conduct, confident that such reason-giving will strengthen public understanding. This is because Rawls believes that in a political regime, the *overlapping consensus* will be such that all adults will adopt the same *political conception* of justice. This conception of justice represents an agreement about principles for the basic structure, but does not require that citizens have identical moral reasons for agreeing to these principles.

Where then, does this leave trust? Presumably buried away somewhere in the fact that questions of justice only arise within a preexisting society. A society already marked by a political conception of justice is one in which individuals already agree on the same fundamental principles because the society's basic structure has had "deep and long-term social effects . . . [which] in fundamental ways [have shaped] citizens' character and aims, the kinds of persons they aspire to be."⁸⁵ This requires that mutual trust already be present, for human cooperation could not exist without

⁸³ Rawls, *Political Liberalism*, p.66.

⁸⁴ *Ibid.*, p.68.

⁸⁵ *Ibid.*

it. In fact, it implies the presence of much more than mutual trust. It implies a kind of social arrangement that involves something much more substantive, including shared political values and similar personal aims resulting from these shared values. Rawls's background vision of such a society plausibly incorporates the work of mutual trust. However, it needs to be moved explicitly into the circumstances of justice so that the circumstances are complete. Mutual trust is too crucial a feature of justice to be left hidden within the various other background conditions that conceptions of constructivist justice are offered within.

Conclusion

In this chapter I have shown that the circumstances of justice should be interpreted normatively as the facts that must be true for justice to be needed or possible. I have demonstrated that this interpretation of the circumstances of justice is consistent with how they appear in Hobbes, Hume, and Rawls. I have also established the importance of mutual trust in justice via my discussions of these three theorists. While Hume and Rawls do not give accounts of justice that resolve the challenge of trust given to us by Hobbes, they do give us theories that lend themselves to a solution to that problem with something similar to the concept of solidarity. Just what solidarity is and how it generates mutual trust is the subject of the following chapter.

Chapter 3

Solidarity: A Reconciliatory Account

Recent discourse in social and political philosophy has revived interest in the normative nature of solidarity. The result has been a multitude of inquiries into solidarity with no consensus on the content of the concept. For the notion of solidarity to be of optimum use in determining whether it is a candidate for the circumstances of justice, we must determine precisely what solidarity is. Most accounts of solidarity approach it as an idea embedded in particular uses or situations. These approaches ask questions such as “What does solidarity against oppression look like?” or “How does feminism use solidarity?” I seek to establish a description of solidarity as a normative social relation, divorced from its specific instantiations. My task is therefore explanatory; its success hinges on how well my analysis of the concept helps us to understand the phenomenon of solidarity and how the account produced by this investigation fits with previous discussions of solidarity.

In this chapter I offer what is largely a reconciliatory account of solidarity taken from instances of solidarity, and certain applied approaches to solidarity in the literature. This chapter will also set out a new distinction between two kinds of solidarity, *expressional solidarity* and *robust solidarity*. I will argue that these different kinds of solidarity are two species of the same fundamental idea of solidarity. What differentiates them is the multidirectional or unidirectional nature of the relationship. I begin with a rough definition of solidarity embedded in historical and modern usage, and consider core examples of solidarity to clarify my approach to the concept. I next briefly articulate a few seminal accounts that allow me to extrapolate what I put forth as the four definitive conditions of robust solidarity. I then contrast this kind of solidarity with expressional solidarity in a way that illustrates that the two are rightly considered solidarity. I draw from this analysis an explanation of the source of the normative and moral status of solidarity.

I. What is Solidarity?

Solidarity as a term entered the English language in the 1840s from the French *solidarité*, meaning mutual responsibility. *Solidarité* evolved from the earlier *solidaire*

meaning interdependent or complete. The root derives, however, from a much older notion in Latin law: the *obligatio in solidum*, the unlimited liability of each member of a family or community for shared debts. Comte used the term solidarity to indicate a cohesiveness of communities. Durkheim developed this concept further when he defined two types of solidarity in society: mechanical and organic.¹ Modern notions of solidarity vary from *unity* to *charity* to *sympathy* to *opposition against an out-group*. This proliferation of meanings, unlike many political concepts, does not stem from an abundance of theories, but rather from a notable lack of a compelling, more abstracted account that might unite them. This is coupled with the fact that, in everyday politics and society, people do not hesitate to employ the term as they see fit: to motivate aid, to support troops abroad, or to make international alliances appear stronger. Keeping in mind the semantic history of the term and its myriad uses, I propose the following rough definition of solidarity from which to begin our enquiry: solidarity is a kind of cohesive bond, seen in the capacity to affect the individuals related to that bond. Though somewhat elliptical, this definition will serve as a starting point of inquiry. We might now ask, which cohesive bonds are solidarity bonds? While much of this chapter will be dedicated to establishing an adequate response to this question, here I offer a couple of examples that I understand to be uncontroversial. It is this type of social bond, its existence, and the way in which it generates obligations in *all* of its contexts, that I will explore in this paper.

Example 1: A large group of Western university students organize a fast to show support for Palestinians fasting to protest a recent bombing. The students consider themselves to be acting in solidarity with the fasting Palestinians.

Example 2: Nearly a third of a nation's working class population joins a political movement which uses civil resistance to advance workers' rights and social change. The workers who are members of this movement consider themselves to be acting in solidarity with one another.

Example 3: Monika is a German citizen. She is outraged by EU immigration laws which do not give immigrant workers the same rights

¹ Émile Durkheim, *On the Division of Labor in Society*, trans. George Simpson (New York,: The Macmillan company, 1933).

as EU citizens. As the citizen of a member-state of the EU, Monika feels her nation is supporting unjust policies and feels ashamed so she works to change the policies. She helps organize grassroots movements to promote foreign workers' rights, attempting to sway her own government to alter its position.

The three types of groups in these examples (e.g., protesters, a labor union, and the citizens of a nation-state), represent a range of solidary relations. Solidarity embraces innumerable classifications of relations between individuals. These examples illustrate that the strength of solidary bonds vary greatly from group to group.

These examples constitute two divergent, though equally dominant, uses of the term solidarity in the literature. Both of these uses of solidarity will be fully explained, along with their relationship to one another, in the following discussion. The kind of solidarity in example 1 is the type we find in acts such as joining a march for immigrants' rights, fasting in solidarity with hunger strikes, or global rallies for oppressed minorities' rights. These kinds of acts of solidarity I will call *expressional solidarity*. The kind of solidarity found in examples 2 and 3 I call *robust solidarity*. It is important that expressional solidarity is a species of solidarity. Though it is motivational, expressional solidarity differs significantly from robust solidarity as it does not generate moral obligations (as robust solidarity does). Because I will largely focus on robust solidarity in this project, for simplicity I will refer to it hereafter simply as *solidarity*. If my account of solidarity is successful, it will explain why expressional solidarity is only weakly normative, but is still properly considered solidarity.

II. Leading Accounts of Solidarity

The literature on solidarity offers little to no consensus on a principal account of the phenomenon itself. Indeed most accounts of solidarity consider themselves in conflict with the various other accounts of solidarity found in the literature. My claim is simply that there is much less conflict than the abundance of divergent accounts would suggest. For example, some accounts of solidarity emphasize cohesiveness or fellow feeling, while others focus on obligations or resistance to out-groups. Very few give reference to other attempts to explain the phenomenon and thus are frequently

read as conflicting. This has led to Jean Harvey's observation: "Studying the current literature, however, there seems to be no agreed upon meaning of the term 'solidarity,' nor even a clear consensus as to the kind of item it refers to."² The result is that most taxonomies of solidarity focus on several similar examples of solidarity, which appears to create endemic conflict between these different taxonomies of solidarity. For example, Scholz, Mohanty and, most recently, Kolers define solidarity in opposition to some other group. This is because they focus on those types of solidarity whose aim is to unite a group of people to achieve some end against another group.³ Clearly, not all solidary groups take this form (Scholz notes as much). For example, the family, a community, even some labor unions do not require opposition to be a solidary group. In contrast, global justice accounts of solidarity tend to focus on sympathy or empathy because this is what the theorists need to encourage in order to claim grounds for global rules or laws of justice. Joan Harvey's account of solidarity focuses on empathy and members of the group having a common interest.⁴ Carol Gould's "Transnational Solidarities" also focuses on empathy.⁵ Likewise, sociologists focus on the groupness of the association, because the phenomenon that they are most interested in is the normative element brought on by group membership.⁶ William Rehg, by contrast, views solidarity as a common

² Jean Harvey, "Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship," *Journal of Social Philosophy* 38 (2007): 22-37, p.22.

³ Cf. Chandra Talpade Mohanty, *Feminism without Borders : Decolonizing Theory, Practicing Solidarity* (Durham ; London: Duke University Press, 2003); Sally J. Scholz, *Political Solidarity* (University Park, Pa.: Pennsylvania State University Press, 2008); Avery H. Kolers, "Dynamics of Solidarity," *Journal of Political Philosophy* 20 (2012), pp.365-383.

⁴ See Harvey, "Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship."

⁵ See Carol C. Gould, "Transnational Solidarities," *Journal of Social Philosophy* 38 (2007): 148-164.

⁶ See Michael Hechter, *Principles of Group Solidarity* (Berkeley: University of California Press, 1987).

good which could be described as a specific value, goal, or interest.⁷ Similarly, Shelby places shared values at the center of his account.⁸

These are just a few instances of divergence in the understandings of the concept of solidarity, but nearly all accounts can be classified by what they identify as the core component or components of the concept. Focusing on one or two instance of the relation (e.g., solidarity as political oppression or solidarity as empathy) has resulted in the illusion of conflicting kinds of solidarity with very little overlap or commonality (e.g., solidarity as political oppression, as *opposed* to solidarity as empathy). This is a mistake. The literature on solidarity largely diverges in ways that do not contradict one another but, rather, result from focusing inquiry on a limited number of applied examples regarding certain kinds or uses of solidarity.⁹ There is need and space, however, for an approach that brings the previous literature together to identify a common concept and its normative impact.

It would be impossible here to discuss the perceived conflicts among all of the existing literature on solidarity and examine how they could be reconciled coherently. I instead begin with discussion of Joseph Feinberg's early analytic treatment of solidarity. I will use his explanation of solidarity as a framework by which to classify the central focuses of various subsequent solidarity theorists. I then unite these and other accounts by abstracting from the literature my own four conditions of solidarity, demonstrating that many of the previous accounts of solidarity can be reconciled into a single account that is supplementary to, rather than in conflict with, the majority of the literature discussed herein.¹⁰

Joel Feinberg, in his essay "Collective Responsibility," explains that, "[a] group has solidarity to the degree that its members have mutual interests, bonds of

⁷ William Rehg, "Solidarity and the Common Good: An Analytic Framework," *Journal of Social Philosophy* 38 (2007): 7-21.

⁸ Tommie Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005).

⁹ This is a method explicitly encouraged by Bayertz and Scholz. In Kurt Bayertz, "Four Uses of Solidarity," in *Solidarity*, ed. Kurt Bayertz (Dordrecht, The Netherlands: Kluwar Academic, 1999):3-28, p.4. and Scholz, *Political Solidarity*, p. 20 and ch. 7.

¹⁰ Some conflict, however, will be evident with previous literature.

affection, and a 'common lot'.¹¹ Feinberg's first feature, mutual interest, may be an overlap of shared interests or "it may be a community of interests of the sort that exists when each member's integrated set of interests contains the integrated interest set of each of the others."¹² This is seen, to use Feinberg's example, in a family in which a father's interest set includes his son's achievements and vice versa. This mutual interest that unites the group is found in Tommie Shelby's theory of black solidarity. It is also one of the four uses identified by Kurt Bayertz and defines Sally Scholz's theory of political solidarity. In my own discussion of solidarity, mutual interest plays a leading role as the feature that defines a solidary group.

Feinberg's second feature, bonds of affection with members of the group, follows from his first feature of mutual interests. If one has an interest in other group members' interests, one probably feels sympathy toward their projects and persons, and this is reciprocated within the group. This is a popular idea in the writings on solidarity. Larry May calls the bonds of sentiment a necessary condition to solidarity, arguing that these bonds of sentiment entail a willingness to lend moral support.¹³ Jean Harvey's account puts "empathetic understanding" at the core of solidarity. Recent political theorists have become interested in the role of empathy in solidarity and developed it independently into a basis for global justice.

Cosmopolitans tend to either appeal to this notion of empathy as the mechanism to motivate global redistribution of resources and rights, or they appeal to the collective responsibility made possible by solidarity and the resultant duties we owe the global poor.¹⁴ As theorists of the latter approach capitalize on the notion of collective responsibility as a result of pre-existing solidarity, they do little to explain the solidarity itself, so we set this view aside. The first approach, however, argues that a specific feature of solidarity, empathy (sometimes sympathy), is what characterizes solidarity. This is a special concern for in-group members that goes beyond sympathy to become an actual disposition to "come to the aid of those with whom one

¹¹ Joel Feinberg, "Collective Responsibility," *Journal of Philosophy* 65 (1968): 674-688, p.677.

¹² Ibid.

¹³ Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* (Chicago: University of Chicago Press, 1996).

¹⁴For the responsibility approach see Thomas Pogge and Andrew Dobson among others.

sympathizes.”¹⁵ This aspect of solidarity is central in views that aim to explain how solidarity can motivate groups to action (e.g., Fiona Robinson, Virginia Held, and Carol Gould).¹⁶ Drawing from these theorists, empathy will play a role in my reconciliatory account of solidarity as well.

The final feature of Feinberg’s definition of solidarity—a common lot—is somewhat less clear. He explains only that it is when the group’s goods and harms are indivisible, and that this is when the well-being of the group is shared. This seems expected in robust groups such as family and friendship, but also possible to some degree in weaker groups (e.g., an attack on a nation is a harm to all members of the nation). Shared values or a shared sense of well-being may arise after a solidary group is formed or may in part lead to a group’s formation. Shared values will be values relevant to the purpose of the group; members of a group do not share all values, only those related to the group’s aim. Shared values constitute the core of William Rehg’s account of solidarity.¹⁷ Shelby seems to explicate this feature in both his conditions of a shared value or goal and identification with the group. One of the uses Kurt Bayertz identifies shares similar content to Feinberg’s condition of a common ground (i.e., shared history, feelings, convictions, or interests).¹⁸ Accordingly, I will incorporate the concept of a common lot within my discussions of a shared joint interest and identification with the group in this project.

Tommie Shelby articulates one of the most detailed and analytic accounts of solidarity in the literature. His account is motivated from the perspective of African-American solidarity, though his theory is applicable to all types of solidarity. In addition to *shared values or goal* and *identification with the group* mentioned above, Shelby adds the conditions of *loyalty*, and *mutual trust*.¹⁹ A problem for Shelby, however, is that in grounding his theory in the applied case of “black solidarity,” he becomes so

¹⁵ Shelby, *We Who Are Dark : The Philosophical Foundations of Black Solidarity* pp.68-70.

¹⁶ Gould construes solidarity as *social empathy* and does not advocate universal solidarity in “Transnational Solidarities”. Also see: Fiona Robinson, *Globalizing Care : Ethics, Feminist Theory, and International Relations*, Feminist Theory and Politics (Boulder, Colo.: Westview Press, 1999); Virginia Held, "Care and Justice in the Global Context," *Ratio Juris* 17 (2004):141–55.

¹⁷ Rehg, “Solidarity and the Common Good: An Analytic Framework.”

¹⁸ Bayertz, “Four Uses of Solidarity.”

¹⁹ Shelby, *We Who Are Dark : The Philosophical Foundations of Black Solidarity*, pp. 68-70.

committed to a form of solidarity that requires a prior shared identity, that it is unclear what space is left for solidarity outside such shared group identity. If solidarity requires prior shared identity, then many instances of what we could call solidarity cannot be adequately explained. In an attempt to avoid this mistake, which is common in taxonomies of solidarity, I draw on a variety of contributions from the aforementioned views, and attempt to reconcile central features and core components into a single, united theory of solidarity. If successful, this approach will show that the literature on solidarity does not conflict as generally supposed.

III. Four Conditions of Robust Solidarity

In this section I articulate what I take to be the four jointly necessary conditions of robust solidarity: *joint interest*, *identification with the group*, *disposition to empathy*, and *mutual trust*. Here I seek to establish that these features are necessary for a relation to be considered solidarity, and that my understanding of how they are mutually supportive helps us to explain how solidarity is both motivation and obligation-generating. Though this section aims to treat solidarity descriptively—to explain the features that exist when solidarity is strongly normative—justifying the descriptive features will sometimes make reference to normative aspects of solidarity. My analysis does not, I hope, conflate the descriptive and normative. If my account of robust solidarity is successful, it will explain why expressional solidarity is not strongly normative, but is still properly considered a species of solidarity.

Joint Interest

A joint interest provides the content which defines the solidary group. A joint interest is an interest or aim that is held by all members of the group, but which could not be realized by the individuals alone. Individuals will have an interest in the ends of their solidary group, but individuals cannot hope to achieve this end without the shared aims and interests of others. This condition incorporates the mutual interest requirement in Feinberg's description of solidarity. The joint interest can be something as specific as getting a political candidate elected, or as broad as promoting general well-being of a group, or working out how individuals can live together peacefully. A shared joint interest is not the same as parallel identical interests. While a group of individuals on a train may all have the identical interest of getting to the same destination, this is not a shared joint interest—as relevant to this

discussion—as it is achievable without others. However, if an armed robber stops the train and the passengers are held hostage, they may develop the relevant kind of joint interest in getting out alive, because only if all individuals perform in certain ways will this be possible (e.g., they must not antagonize the armed robber). This condition rules out any sort of crowd or assembly being in solidarity.

Another feature of a joint interest is that solidary groups will have a primary interest that defines the group, as well as secondary interests and aims that members of the group understand to promote the group's defining interest. For clarity, I will refer to the defining interest as the group's *executive interest*. I will refer to interests the group members adopt in order to promote the executive interests as *subsidiary interests*. In reference to example 2 above, the workers' party in question might have an executive interest of creating a capitalist labor economy. Some members of the workers' party may think that this involves a subsidiary interest of retirement benefits necessarily linked to one's labor. However, other members of the workers' party think that the group has a subsidiary interest in not advocating retirement benefits linked to labor because they believe that retirement benefits distract from and undermine the group's executive interest of promoting a capitalist economy. As long as the group's executive interest is shared, conflict in subsidiary interests present no threat to solidarity. It may even be the case that there is some conflict in the interpretation of executive interests. In diverse groups with more abstract goals such as the joint promotion of the well-being of some set of individuals, the executive interest will be sufficiently abstract that it may even involve essentially contested concepts. This presents no problem for the group so long as there is a sufficient amount of convergence on what they must do and how each member works toward the group's executive interest. As Kolers puts it, "What distinguishes solidarity is that it occurs notwithstanding disagreement about [shared interests]; it survives incompletely shared interests."²⁰

One might object that if the executive interest of a solidary group is open to such interpretation by group members, perhaps the identification of a joint interest is merely imputed by outsiders attempting to define a group in a way that its own

²⁰ Kolers, "Dynamics of Solidarity," p.366.

members do not recognize. In such cases, a group may appear to fulfill the conditions of solidarity, but the group members would not recognize a joint interest. The problem is that this is not the kind of group we want to call solidarity.

My response is twofold. First, robust solidary groups do not need to *explicitly* recognize an executive joint interest, but they must all share the aim of said interest to be in solidarity. If the joint interest is only imputed by outsiders, then the group is not a solidary group. Second, a group can exist and not be in solidarity; it is not the case that every group is a solidary group. Solidarity does not exist in all human interactions or groups and a joint interest alone is not enough for solidarity. Conversely, if a group exists, but lacks a joint interest, this is not a solidary group, though it may come to identify such an interest and become a solidary group. After all, there are numerous social groups that exhibit some form of the other features of solidarity (i.e., empathy, group identification, and trust) when divorced from a joint interest. For example, most instances of friendship or neighborliness would involve these features. However, not all such groups could entail obligations. It is the joint interest that preserves solidarity as a relationship which is marked by specific kinds of empathy, group identification, and trust, and it is the unique interaction of all four features that make the generation of solidary obligations possible. Solidarity marks only certain kinds of group relations that involve all four conditions currently under discussion. I will return to these concerns later in this section.

Identification With the Group

This second characteristic of robust solidarity must be bidirectional. Not only does an individual need to identify with the group, to some extent the group needs to recognize the individual. Mason explains group identification as “[committing] oneself to it in a way that normally involves endorsing its practices and seeking to promote its interests, whilst regarding one’s well-being as ultimately linked to its flourishing.”²¹ For a person to be able to commit herself to a group, she must conceive of the group and its practices as valuable. Solidarity involves adopting the group’s interest as one’s own interests, and linking the achievement of such interests to one’s own well-being. This does not mean that every subsidiary interest of the

²¹ Andrew Mason, *Community, Solidarity and Belonging : Levels of Community and Their Normative Significance* (Cambridge: Cambridge University Press, 2000), p.23.

group will be linked to one's well-being. Rather, the group's executive interest, whether it is explicitly identified by all individuals or not, is the goal which is linked to members' well-being. From example 2 above, if Jon, a member of the workers' party, disapproves of the party's subsidiary interest of only promoting the rights of workers who are citizens of that nation (i.e., he wants to promote immigrant worker's rights as well), Jon is still in solidarity with his party, but disapproves of a subsidiary interest and its ensuing actions. He may act within the group to change this subsidiary interest while at the same time be promoting the group's executive interests. Jon still acts in solidarity with the group even though the group endorses a goal he does not promote. Jon may act to prevent the plan to exclude foreign workers because he feels his involvement in the workers' party reflects on him and he would be ashamed if the group were to promote such practices. Conversely, if the workers' party can achieve its ends while at the same time securing working rights for immigrant laborers, we can imagine Jon being proud of this. What this illustrates is that, to some extent, a person can view her moral status as linked to the projects and interests of the group. It is common in all solidary groups that, because of one's identification with the group, one sees one's own well-being and moral standing reflected by the group to some degree.

An important feature of identification with the group is that it requires that each member have some degree of interpretive competence of the group's shared joint interest. This interpretation does not need to be explicit. In some groups this will be understood tacitly. For instance, we can imagine that the workers' party was a post-communist Eastern Bloc workers' party. This party might garner support from individuals outside of the economic community in question. For instance, Western capitalists or members of other Eastern Bloc nations that also want to promote a capitalist market system might coordinate with and take on responsibilities for the workers' party. In this case, those who identify with the group will not necessarily reside within the community's physical territory. It is not shared language or way of life or even history that generates solidarity, *contra* Bayertz, Scholz, and others. Instead, it is an identification with the interest of promoting the group's shared joint interest, whether or not members have actually recognized this interest. Those who do not identify with the executive interest may receive some benefits of the group

because they are close to those who do identify with and participate in the group's efforts. However, they will not necessarily receive such benefits. Such individuals are not properly in solidarity with the group. They do not shape the group or its interests or have any role within it.

Another central feature of identification with the group diverges from the typical treatment of solidarity in the literature. Generally, solidarity is examined in the context of a single group, and an individual will belong to that one group. It is important to recognize, however, that individuals may identify with a number of solidary relations at any given time. In traditional typologies of solidarity, those that do suggest something beyond membership in an individual group tend to discuss a distant relation or sympathy with distant people, not a network of overlapping solidary commitments. In fact, it is possible to identify with two occasionally conflicting groups, as long as the only subsidiary interests of the group—and not the executive interests—conflict. In large groups, such as a nation, a group may be rife with economic and political conflict along smaller group lines (e.g., political parties). Such conflicts may undermine the unity of the larger group and the degree to which individuals identify with the group, but these conflicts and the weakening of identification with the larger group do not undermine solidarity so long as there is still some degree of identification with that larger group as an entity.

Finally, identification with the group will yield some loyalty to the group's goals and, sometimes, the group itself. The extent that one is loyal to the group may depend on a number of factors, including how successful one interprets the group to be at achieving its executive interest, and how one ranks the value of the group's interest among one's own set of values. Another factor may be how one is recognized in the group, and one's corresponding role as a member. There are too many factors involved in group loyalty to outline herein. What is significant is that some loyalty toward the executive interest or the group itself is often manifest.

A Disposition to Empathy

The third condition of solidarity is something more than sympathy with the plight of others.²² A disposition to empathy incorporates Feinberg's concepts of a common lot and bonds of affection. It involves being affected by other individuals' situations or, minimally, being disposed to being affected. In the context of solidarity, empathy involves understanding the kind of social facts with which other members of the group are living (those facts about the social environment related to the group's executive interest, not all social facts) and to understand the *emotional configuration* that arises in response.

Emotional configuration is a useful notion introduced by Lawrence Thomas in the following example. Most men when walking alone at night give very little thought to being raped or attacked, though it is possible. Most women, however, when walking alone at night do think of and fear the possibility of an attack or rape. Thomas explains that the difference in the two attitudes "marks a difference in the emotional configurations between women and men."²³ This does not mean all men or all women have the same emotional configurations. A number of experiences shape the emotional configuration of any individual. However, individuals who identify with a group united around a single executive interest will share salient features of their emotional configuration. They not only share common knowledge regarding events that lead to endorsement of their common interests, but actually share (to varying degrees) the emotional experience involved in having those interest.

A *disposition* toward empathy is met when one's attitude makes empathy readily possible. This will involve, primarily, a willingness to hear relevant information regarding social facts, and a willingness to imagine the emotional experience which results from these social facts. It is important that this only requires social facts directly relevant to the group's executive interest (or future executive interest).²⁴ So, if

²² Taxonomies of global solidarity or solidarity outside simple communities tend to discuss solidarity as sympathy for others' situations; the global cosmopolitan thinkers mentioned above, for instance.

²³ Laurence Thomas, "Moral Flourishing in an Unjust World," *Journal of Moral Education* 22 (1993): 83-96, p.86.

²⁴ Hence, it is possible to actually hate or greatly dislike individuals in one's solidary group and still be in empathy, or minimally, be disposed to empathy toward them insofar as the group's executive interest is concerned.

you and I are in a national solidary group, my social experience in my running club is nothing you will be expected to be disposed to be empathic about. If, however, we are both Americans and I tell you that my family was in the World Trade Center attack, I can reasonably expect you, if not to actually feel empathy toward my situation, to at least understand the social experience of the facts involved and imagine my emotional configuration as a result, and act accordingly.

A disposition to empathy most clearly obtains in examples of solidarity against a shared oppressor or out-group, whether another nation, a political group, a different race, or environmental conditions. An out-group forces recognition of shared emotional configurations. However, empathy is also pervasive in solidary groups that do not form against an oppressor. A community in an underdeveloped nation, for example, in which there is a joint interest of working together to survive and common identification with this community, could be a solidary group. In the experience of sharing a life marked by similar challenges, empathy within the community may be what motivates recognition of a shared joint interest. A disposition to empathy may be the condition that leads a group to identify joint interests and come to be in solidarity.

A disposition to empathy may manifest itself in a number of ways, depending on the strength of the solidary bond within the group. In a strong friendship group or family, this condition may appear as love. In a community, it may appear as a mild concern for the well-being of one's neighbors and a willingness to assist where possible. In a weak group it will, minimally, appear as a tendency to consider members of one's in-group as morally equal.²⁵

Mutual Trust

Mutual trust is the final condition of solidarity. The other three conditions act as intensifiers of mutual trust, and produce the specific kind of trust present in robust solidarity.²⁶ Hence, the stronger the other features, the more robust the trust and corresponding obligations within the group. This trust is not an all-encompassing trust in individuals with whom one is in solidarity, but a goal-specific trust, in which

²⁵ The tendency to see in-group members as equal corresponds with Bayertz's first use of solidarity.

²⁶ Thanks to Mike Ridge for suggesting framing this in terms of intensifiers and these examples.

one trusts the individuals in one's solidary group regarding the group's executive interest. Solidarity-trust is distinct from ordinary mutual trust, though it is a species of mutual trust.

Following Baier, Jones, and McLeod, I take it to be fairly uncontroversial that trust involves: (1) that we be vulnerable to betrayal, (2) that we think well of others in certain domains, and (3) that we are optimistic that others are competent in certain respects.²⁷ In ordinary mutual trust then, we may assume that both parties experience all three conditions. For example, if you make a promise to me to meet for coffee we are both vulnerable to betrayal, that is, being stood up. However, we each think well enough of the other in this domain to trust each other to respect the commitment, and we are optimistic that the other will be competent to show up (e.g., pay attention to time, find the coffee shop, etc.). Instances of mutual trust may be more or less robust than meeting at a coffee shop. For instance, a wedding vow, given the circumstances under which it is taken, seems to intuitively involve a stronger kind of trust and corresponding duties than meeting for coffee. This is because a wedding vow carries certain features with it that other instances of promises and mutual trust do not; for example, commitment to longevity, emotional attachment, the sanctity of a formal vow, etc. These features are intensifiers. In solidarity, the conditions of a shared joint interest, identification with the group, and a disposition to empathy all foster an environment of trust that generates a more robust species of mutual trust than ordinary mutual trust.

Within a group, the agent's having and understanding the aims that she trusts others to achieve depends on other individuals having and understanding those same objectives. In addition those other individuals must understand the agent's intentions regarding an executive interest. To rely on another person doing his part toward a joint interest, the proposition that he intends that they act and that he will perform his part enters the agent's cognitive framing of her own intention that they act. This

²⁷ This largely follows Carolyn McLeod, *Self-Trust and Reproductive Autonomy*, Basic Bioethics (Cambridge, Mass.: MIT Press, 2002) ch.2; Karen Jones, "Trust as an Affective Attitude," *Ethics* 107 (1996): 4-25; and Annette Baier, "Trust and Antitrust," *Ethics* 96 (1986): 231-260.

framing is reciprocated by the other person.²⁸ This reciprocity makes the relevant kind of mutual solidarity-trust contingent on others sharing one's executive interests and this knowledge being shared, but also on there being a mutual disposition to empathy and mutual identification with the group. So, if I know that you and I identify with a group, and that we share its joint interest, and that we share an attitude of a disposition of empathy toward one another, mutual trust of a robust nature is warranted. The other conditions of solidarity act as intensifiers which create a distinct kind of robust mutual trust that differs from ordinary mutual trust, similar to the way that the features of wedding vows distinguish them from ordinary promises like meeting for coffee. The more robust the other conditions, the more warranted this mutual trust, and the more robust the solidarity.

The environment of mutual trust that develops in a solidary group is necessary for people within solidary groups to make claims upon one another and undertake the duties necessary for the fulfillment of those claims. Only if I can trust that you will respond in kind will I make myself vulnerable and constrain my behavior or make sacrifices in such a way as to achieve the group's shared joint interest. So, the success of a solidary group is dependent on the degree of mutual trust among the individuals regarding the group's aims and interests.

A unique aspect of this kind of trust is that a fairly robust level of trust is possible among people who have never interacted. In other kinds of trust, some degree of interaction is usually required for warranted mutual reliance and trust. Ordinary mutual trust usually provides a good reason to believe in an agents' performance of what they are being trusted to do (e.g., they have been paid, they have promised, etc.). Solidarity-trust, however, can involve robust trust between individuals even if there has been no direct interaction. An example of the robust nature of solidarity-trust can be found by extending the example 2 from above. Imagine the workers' party decides that a strike is in order: those who strike make themselves very vulnerable. Minimally, they risk loss of wages and employment. Only if all workers strike will it achieve or contribute to the achievement of the group's political aims. However, to strike, workers must trust that all the other workers, including many one

²⁸ Facundo M. Alonso, "Shared Intention, Reliance, and Interpersonal Obligations," *Ethics* 119 (2009):444-75, p.457.

has never met, will in fact strike. If a worker does not strike, the individual's actions will risk the group's efficacy in achieving its joint interest, and may even result in an alteration in the individual's position of trust within the group.

It is essential to my position on the conditions of solidarity that all of these conditions be mutually supportive of one another. Generally, the stronger the conditions, the stronger the solidary bond. A group will seem to exhibit more of some conditions than others depending on its shared joint interest. In a family or friendship, empathy may seem stronger because the group's interest is related to actually caring about and valuing other members. In the nation-state, however, joint interest will seem like the strongest condition because the goal of living together does not require as strong an identification with the group or empathy as friendship would. Similarly, according to Scholz's political solidarity, which centers on an aim of opposing some out-group, group members would have a more dominant shared joint interest than, say, empathy, because the group exists to achieve that political, oppositional aim. It is important to note, however, that members will have duties because of membership in the group only when all four conditions are met.

Earlier I argued that placing a shared joint interest at the center of a description of solidarity does not risk making the solidary relationship overly inclusive and, in fact, preserves the notion of solidarity as a rare and unique relationship, rather than simply the convergence of interests or recognition of shared norms. A concrete example in light of the additional conditions may help clarify my position. An example of the concern about over-inclusiveness can be found in the history of the American civil rights movement. Two organizations, the Student Nonviolent Coordinating Committee (SNCC) and the Southern Christian Leadership Conference (SCLC) were often thought to be a single group.²⁹ The groups appeared to have similar joint interests in the way necessary for solidarity. Both held an executive interest of promoting equality between African-Americans and other Americans in the United States. The SCLC saw its subsidiary interests as more linked to ending Jim Crow laws and organizing large-scale activities such as marches and protests to create public awareness of endemic racism in the South. The SNCC

²⁹ Thanks to an anonymous referee at the *Journal of Political Philosophy* for this example.

avored shock tactics with less chance of individual recognition, and put voter registration at the forefront of their agenda. Initially, Martin Luther King Jr. hoped that the SNCC would become the youth division of the SCLC, but the groups' differing ideals prevented this. This example is a case in which there was a common joint interest between two groups, and probably a disposition to empathy, but an insufficiently similar interpretation of the joint nature of their projects, a lack of shared identity, and no solidarity-trust. The concern that may arise from placing a joint interest as the defining condition for a group is that this could result in the SCLC and SNCC being identified as a single solidary group. However, given the necessity of the other conditions for the robust solidarity with which I am concerned, the two groups were not in solidarity with one another (though possibly in the beginning of the SNCC it was unclear if solidarity would develop between the two). Central to my account of solidarity (and similar to many other descriptions of solidarity in the literature) is the notion that solidarity is not so easily come by as many other types of social relations.

A related concern is that two groups that do not share executive interests, such as a group of Quakers and a group of Communists, may share a subsidiary interest such as supporting an anti-war effort. In the context of the anti-war effort, could the subsidiary interest become the executive interest of the two groups? Would this mean the groups were in solidarity? My response is that it is possible, but only if all of the other conditions for solidarity are met. So, if the Communist and Quakers began to identify with a central anti-war group and had a disposition to empathy and the right kind of trust for one another, then it would be possible for the groups to be in solidarity. It is crucial to my view that the executive interest of the group is not relative to the group's aims at a single point in time alone, but relative to how the members identify with it, and how empathy and trust relate to it as well.³⁰ The consequence is that the executive joint interest of a solidary group does not change rapidly over time, though some variance—along with the other conditions—is possible.

³⁰Thanks to an anonymous referee for *The Journal of Political Philosophy* for raising this concern and example.

IV. Expressional Solidarity

Finally, before addressing the normative nature of solidarity, we turn to expressional solidarity. Solidarity is often understood as an expression of empathy or concern for others, something which I previously referred to as expressional solidarity. This type of solidarity is frequently found in acts such as marching, conscientious purchasing, and fasting. I have distinguished this type of solidarity from the robust, obligation-generating solidarity with which I have been primarily concerned herein. A strength of my account of the necessary conditions of robust solidarity is that it can explain how both of these species of solidarity are properly considered solidarity. In each of the four conditions of robust solidarity above, solidarity involves mutual or bidirectional conditions (i.e., *mutual* recognition of identifying with the group, *mutual* trust, *mutual* disposition to empathy and a *joint* interest). Expressional solidarity occurs when any one or more of the four conditions is unidirectional. This is because the reciprocal nature of the characteristics of robust solidarity generate reliance upon other members of the group. However, without being able to rely on an individual regarding all four characteristics, the group would risk too much to trust that individual to carry out duties pertaining to the group's executive interest. In the context of expressional solidarity, the features of mutual trust and a joint interest will look slightly different.

A joint interest is no longer joint, but a parallel interest in a group's executive joint interest. Mutual trust will not be mutual solidarity-trust, but a demonstration of oneself as trustworthy in the eyes of the group toward which one has solidarity. The disposition to empathy, though not returned, will involve the same commitment for the individual in both forms of solidarity as will identification with the group.

Examples of unidirectional solidarity would be identifying with a group that does not recognize me, sharing a group's interest when it is not a joint interest, or feeling empathy or trust for group members when none is returned. This type of solidarity does not generate obligations, though some motivation to act will be attached to it. It is sometimes the case that such expressional solidarity is an attempt to gain membership in or understanding of a specific solidary group. Fasting in support of a political group's hunger strike, for instance, seems appropriate because one is trying to gain empathy for the situation experienced by those for whom one is fasting.

Monika, from example 3, may march in a parade for immigrant worker's rights because she wants to express her similar interest and perhaps gain the trust of the group. These are actions that could lead toward membership in the immigrants' group, but only if all four conditions of solidarity are bidirectional. The purpose of expressional solidarity, however, is generally not to gain membership in a robust solidary group, but to offer aid or support to that group.

V. The Normative Aspect

Having articulated what I find to be the necessary conditions for solidarity and given some basic analysis to how they function together, I now turn to the question of how these conditions account for the normative nature of the relationship. Thus far, I have said little about the normative nature of solidarity. Durkheim thought that it was the division of labor that allows the individual to realize their dependence on society, and only after this awareness can morality develop. Other theorists have referred to solidarity as a normative moral relation.³¹ The literature, however, is often unclear about whether solidarity is motivation-generating or obligation-generating. I will offer analysis on the normative nature of the solidary relationship by distinguishing how it motivates and how it obligates individuals as part of a group. I use the term motivation to refer to how committed one is to undertaking some act as a matter of moral psychology. I use the term obligation to mean something that it is wrong not to do. With this distinction in mind, I first ask how the four conditions of solidarity combine to *motivate* individuals to act in solidarity with a group, that is, how is expressional solidarity normative?

When the joint interest of a group is held by an individual who is not a member of that group, it is no longer a joint interest but a parallel interest. Specifically, it is a parallel interest in some group's executive joint interest. For example, imagine the group of Western university students fasting to promote awareness of Palestinians fasting to promote a nonviolent Palestine. A university student may hope that her fasting gains awareness and promotes the interests of fasting Palestinians in Palestine. However, the University students' actions are not marked by joint intention. Neither do the Palestinians rely on her actions in the promotion of their goal. The

³¹ Gould, Scholz, Mason, Hampton and a number of others call solidarity a normative moral relationship. Some speak of solidarity's moral value and some refer to its obligations as moral.

Palestinians do rely on one another to fast—a single person fast is hardly a political statement—for the success of their executive interest, but they do not jointly promote their interest with out-group individuals who show them support. Though in fact, out-group individuals may do much to advance the group's joint interest.

The disposition to empathy in the case of unidirectional, expressional solidarity entails that one is disposed to be empathic with members of the group one identifies with. This condition explains the content of many expressions of solidarity. When one is not actually a member of a particular group, but wants to show support and understanding for that group's plight or position, an excellent way to better grasp that group's reality is to act so as to develop actual empathy with the group (as opposed to sympathy or simply being disposed to be empathic toward that group). Hence, the fasting example above might be explained as trying to better understand the actual experience of the fasting Palestinians. It is important to note that to be moved to act so that empathy might be realized involves already being disposed to be empathic toward that group.

When the feature of trust is unidirectional, an individual will not be trusted or relied on by the group. Such an individual may be allowed to help support the group's joint interest, but the group would not depend on them to do so. However, the desire to gain the trust of or to be viewed as trustworthy by the group is often a motivating reason. This is particularly true when one possesses the other features of solidarity (even if all of them are unidirectional), which involve holding the same interest as the group one wants to support, identifying with that group in light of this interest, and attempting to develop greater empathy with the group. To act in a way that betrays one's own interest, identification, or feelings toward that group would be irrational. Such agents will act in a way that is trustworthy toward the group and its executive interest, even if the group does not recognize or trust them.

Group identification is perhaps the most important factor in explaining the motivation to expressional solidarity. It involves identifying oneself as a member of a group whose practices are viewed as linked to one's well-being. Identification with any solidary group affects how one sees oneself as an individual. Hence, a person will be moved to act in ways that accord with his or her solidary groups and roles insofar as this person values these executive interests. The adoption of a solidary identity is a

reason for individuals to act in ways that promote the executive interest of the group, rather than expressing that value in some other way. So, while an individual will understand themselves to be in this kind of solidary relationship only if he or she already values the group's ends, the fact of the group and its specific goals and interests specifies particular actions to the individual by which to express his or her value of the executive interest.

In the example of the fasting students, the students may have already valued the promotion of rights for marginalized individuals, and that may be why they want to express solidarity for the fasting Palestinians, but they could have expressed the value that led to their solidarity toward the Palestinians in a number of ways. They may have tried to support some other marginalized group, or simply shared information about Palestine and Israel, or they may not have been motivated to act in accordance to that value at all. However, because the students value a solidary group's particular interests, and that group chose a course of action to promote its own executive interest (thus giving the students a group toward which to have expressional solidarity), the students now have reason to act to aid or support the group's particular plans of action. In this case, it motivates them to fast, and to act in ways that support the Palestinian group's interests. Under this description, rational action will involve acting for reasons that support an individual's various identities, including whatever solidary groups one identifies with.

It is important to note that each of these features generate the same motivation for robust solidarity. Robust solidarity is different in that the features also generate obligations because the bidirectional nature of these conditions generates warranted reliance. Before considering these obligations, however, it merits mention that while expressional solidarity usually involves voluntary association, robust solidary groups do not always involve voluntary associations, but are still motivation-generating. For example, how do we account for the motivation of a native-born citizen in the nation-state or of a child raised in a family to act in solidarity with that group? My response is that in involuntary solidary groups, one is motivated because one values the shared group interest, regardless of how one became a member. If it is possible for an individual to stop valuing the interest, either through dissolution of the group or a change in one's personal values, then one could leave the group. Many solidary

groups have this exit capacity. However, membership in groups like the nations or the families in which we are raised are rarely ever relinquished. It is outside the scope of this project to explain why there are some associations and their related values that individuals seem unable to give up. I simply observe that one is motivated to act in accordance with involuntary solidary bonds because one still identifies with the group in a strong enough manner that one cannot cease to value its executive interest.

In light of the four conditions of solidarity, we can piece together an explanation of why they generate obligation when bidirectional or multidirectional in contrast to their motivation-generating status when unidirectional. My aim is to show how a certain kind of obligation is generated within robust solidary groups as I conceive them; it is *not* to identify obligations to be in solidarity. The four necessary conditions of solidarity jointly assure agents that they are warranted in trusting one another regarding the group's executive interest. Mutual recognition of the group's executive interest, members' group identification, and a disposition to empathy for other group members serve as intensifiers that generate solidarity-trust. This trust generates weighty *pro tanto* obligations among members of the group to perform their roles within the solidary group. Insofar as interpersonal, participatory obligations are moral obligations, then solidary obligations are moral obligations.

When an individual signals that he or she is to be trusted regarding the executive joint interest of the group, whether intentionally or through negligence, that individual is then obligated to perform what he or she is being trusted to do. For, following Scanlon's analysis, to reinforce a person's reliance and then disappoint is to act in a way that the other would have reason to object to and thus morally wrongs that person.³² One might reject Scanlon's contractual reasons behind the obligation to honor the expectations one creates. However, it remains that, given membership in a solidary group, one has a *pro tanto* obligation to perform the actions one has led others to trust one to do. If one fails to perform, the solidary group has standing to rebuke or even banish the individual and, minimally, trust will be lessened, as will the likelihood of being identified by the group as a member of the group. One's standing in the group will be negatively affected.

³² Thomas Scanlon, "Promises and Practices," *Philosophy and Public Affairs* 19 (1990):199-226.

The normativity of solidarity involves morality insofar as the interpersonal obligation produced when the four conditions of solidarity are present is a moral obligation. The solidary relationship is not necessarily a moral relationship.³³ The consequence of this is that solidary obligations are more similar in structure to the obligations of promise keeping than obligations of fair play. This is because fair play duties hinge on benefits received, whereas solidary duties involve signals of trustworthiness—and recognition of trustworthiness—with the group. The receipt of benefits is not enough to entail obligation. In fact, many individuals may receive benefits of a solidary group who are not members of that group, for example any member of the labor class who is not a part of the worker's union from the example above.

Solidary obligations are *pro tanto* obligations; one's membership in such a group generates weighty obligations to perform in compliance with the group's interests. One might object that an upshot of this analysis is that I have labeled clearly immoral groups (e.g., pirates or Nazis) as solidary groups. However, this objection stems from an understanding of solidarity as a concept with moral content, but it is not. If a *pro tanto* solidary obligation conflicts with a moral *ultima facie* obligation *ceteris paribus* one ought to abandon the solidary obligation.³⁴ Solidarity as a normative phenomenon can be understood without requiring that the group be moral. Whether or not the group is moral will hinge on the content of the joint interest and the reasonability or rationality of the practices and actions the group chooses in promoting that interest. The fact of a solidary relation has no relevance to whether or not the group itself is moral.

This account of interpersonal group obligation applies to situations in which people have been led, intentionally or through negligence, to rely on another individual. Such reliance is clearly the case in voluntary associations. However, there

³³ This contradicts much of the literature on solidarity, which claims that it is a moral relationship. See among others, Durkheim, *On the Division of Labor in Society*; Scholz, *Political Solidarity*; Harvey, "Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship," .

³⁴ This analysis of *pro tanto* vs. *ultima facie* reasons is compatible with an account of contextualized reasons in which one does not have reason to do something unless there are no contradicting reasons against so acting. For example, a group of pirates may be in solidarity but do not have reasons to engage in piracy because better reasons outweigh the choice to be a pirate.

seem to be grounds to ask whether individuals are obligated to perform acts that promote the shared joint interest in involuntary solidary groups. To have obligations for which one has not volunteered or reinforced seems decidedly unfair and certainly anti-liberal. However, the actions one is obligated to perform in a solidary group are proportional to the strength of the solidary bond for that individual.

Given that a group has an interest in achieving and continuing its shared joint interest, roles, and duties within the group are assigned to members according to the level of trust they hold, which is warranted by the other conditions of solidarity. For instance, in a nation-state, one might reasonably expect that those who volunteer to take on more burdens for the association (e.g., political leaders) might feel solidarity with the nation more acutely than those who hold no role beyond that necessary for basic membership (e.g., native birth or not committing treason against the nation). Those with more burdens and duties have them because they are trusted by others, but also because they have chosen them. In the family, those who voluntarily take on obligations of parenthood have greater duties to the family than children who have no choice in their membership. And if the children, when able to take on more demanding obligations choose not to do so, or do not value the family's shared joint interest (e.g., the value of association and promotion of members' well-being), they can leave it. In the case of both the nation-state and the family, feelings of membership and identification may always linger. However, in the absence of the other conditions this is not sufficient for solidarity. Further, mere disapproval of the policies or workings of the institutions of a group does not warrant exit from the group; disapproval does, however, warrant attempts to change the group from within as in the case with Monika from example 3. To be in solidarity, whether one entered the association voluntarily or not, involves some personal endorsement of the group interest, and leads to corresponding obligations only insofar as other group members believe one can be relied on. I make no prescriptive claims about when a person should be in solidarity. My purpose has been to explain how the relationship itself generates obligations.

Conclusion

Solidarity is a social bond that endures different normative interpretations. The four necessary conditions of solidarity offer a description under which solidarity is a

single concept with two different normative aspects. The fact that all four characteristics of solidarity are essential to both expressional solidarity and robust solidarity and furthermore, that these conditions can explain the normative differences in the two types of solidarity, not only lends the conditions support, but suggests that their interpretation herein is correct.

Solidarity has been subject to a variety of different treatments and inquiries. This has led to the perception of conflict between the various theories of solidarity. I have offered a reconciliatory account of solidarity, positing that diverging conditions does not rule out the compatibility of conditions. In my view, the bidirectional or unidirectional structure of these four conditions of solidarity determines whether the solidarity in question generates obligations or not. I have claimed that despite creating obligations which it may be morally wrong to not perform, solidarity is not an inherently moral relation, however, solidary groups may form around an interest in a manner that sometimes makes them so. We now turn to consider how solidarity is a contender as a circumstance of justice.

Chapter 4

The Alternative Circumstances of Justice

In the previous chapters I have argued that any constructivist theory of justice must respond to the right account of the circumstances of justice in order for the principles of justice it grounds to be normative. In chapter 2, I claimed that the role of the circumstances of justice is *to delimit the range of facts in human nature and the world in virtue of which we need principles of distributive justice and which make such principles possible*. The circumstances of justice delimit the scope of justice, and more specifically, they identify when justice's rules and duties can be applied. Historically, the most prominent accounts of the circumstances of justice have been those of Hobbes, Hume, and Rawls. These accounts are subject to the criticisms of *exclusion* and *paternalism*. I have argued that all of these theorists give accounts of the circumstances that ultimately fall short of fulfilling the function of the circumstances, given the *challenge of trust*. This has been the challenge of formulating the circumstances of justice in a way that the vulnerabilities of trusting are protected against and mutual trust is possible, rendering human cooperation and conceptions of justice necessary and possible. Chapter 3 gives an account of solidarity which includes a shared joint interest, identification with the group, a disposition to empathy, and mutual trust. On this account, mutual trust is already warranted among individuals within solidary groups. In this chapter, I will explain how exactly solidarity fits into the circumstances of justice. I will also offer a new account of the circumstances of justice that avoids the challenge of trust and problem of exclusion and is thus, minimally, a more appealing account than previous accounts. Accordingly, this chapter poses the question, what are the circumstances of justice?

To answer this question, I begin by first offering a very brief general account of what a duty of justice will look like. Only then do I ask in the following section, what facts in the world are required for principles of cooperation to be necessary and possible? The answer to this question constitutes my own account of the circumstances of justice, which I understand to include: the fact of solidarity,

moderate scarcity of resources, and limited human understanding. In section III, I explain how my account has the additional advantages of incorporating positive aspects of earlier theorists' accounts, and avoiding negative aspects of those accounts. I argue for new account by identifying reasons against the standard accounts of the circumstances of justice which I do not adopt myself. In the fourth section I move on to show how this new account responds to the challenge of trust. In the final section I argue that it also largely avoids the problems of exclusion and paternalism that I examined in the second chapter. I close by addressing a possible communitarian critique against my project as a whole. Chapter 5 will articulate exactly where and when I think this means justice should have application.

A quick note on methodology is necessary before beginning this chapter. The nature of this project (and justice itself, I think) is such that I could not claim to have found what is necessarily *the* account of the circumstances of justice. I offer this account as one that is an improvement over the standard account and, therefore, much closer to what Constructivists should be engaging with when they ask questions of justice. Because my criticisms of the standard account of the circumstances amount to criticisms of what the scope of justice should properly be, a number of the arguments in this chapter and the next will appeal to intuitions about the scope of justice. This may seem circular, but is ultimately unproblematic as it is not necessarily the case that because our traditional descriptions of the scope of justice are wrong, our intuitions on the scope of justice will also be wrong.

I. Principles and Duties of Justice

A very brief account of constructivist justice and, more specifically, what its obligations and principles look like is necessary to answer the question of the next section, what facts about the world make human coordination and hence, principles of justice possible? Ultimately, the structure of constructivist justice is reciprocal. This is no new idea and I will do little to advocate it here though I do address it greater depth in chapter 6. For this chapter, it will suffice to point out examples of justice qua reciprocity to give an idea of the structure of principles of justice for Constructivists. Rawls explicitly endorses justice as reciprocity.¹ Hume, in explaining that the merit of justice lies in its being advantageous to a society, also characterizes justice as a

¹ See, for instance, his essay, "Justice as Reciprocity."

reciprocal relation. Hume states that “every individual person must find himself a gainer, in balancing the account . . . Every member of society is sensible of this interest: Every one expresses this sense to his fellows, along with the resolution he has of squaring his actions by it, on condition that others will do the same.”² Kant’s second formulation of the categorical imperative, “[a]ct in such a way that you treat humanity, whether in your own person or in any other person, always at the same time as an end, never merely as a means”³ is read by Rawls as building reciprocity into the foundation of morality and justice. T.M. Scanlon thinks that justice lies within the scope of questions defined as what we owe to each other, where what is owed depends on others’ standing to reasonably reject certain principles. The result of this method is a structure of reciprocally endorsed or rejected principles. Drawing from these examples, it seems that one hallmark feature of a constructivist account of justice is reciprocal claim-making and duties.

Popular theories of rights outside the context of specific theories of justice also support the notion that rules and principles of justice are ultimately reciprocal. A Hohfeldian privilege states that A has a privilege to ϕ if, and only if, A has no duty not to ϕ .⁴ A Hohfeldian claim is structured as the opposite of this: A has a claim that B ϕ if, and only if, B has a duty to A to ϕ . Feinberg similarly stressed that to have a claim right involves having the grounds to demand or claim that to which one has the right.⁵ As Darwall emphasizes, this consists not only in another person having good reasons to do something, “but in the claim-holder’s authority to demand compliance and, perhaps, compensation for non-compliance.”⁶ Darwall offers an analysis of rights that is particularly useful. Rights are reciprocal. Before any claims can be made, before any privileges taken, grounds must already exist that give

² Hume, *A Treatise of Human Nature*, p.190., p.497-98.

³ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. Thomas E. Hill and Arnulf Zweig, Oxford Philosophical Texts (Oxford: Oxford University Press, 2002), p.230.

⁴ Wesley Newcomb Hohfeld and Walter Wheeler Cook, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (New Haven,: Yale University Press, 1923).

⁵ Joel Feinberg and Jan Narveson, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970), p.151.

⁶ Stephen L. Darwall, *The Second-Person Standpoint : Morality, Respect, and Accountability* (Cambridge, Mass.: Harvard University Press, 2006), pp.18-19.

individuals the standing to legitimately make these reciprocal claims on one another. Regardless of whether this standing is the result of membership in a state or community, or participation in some type of trust relationship, the structure is the same: I have no claim against you if you cannot in turn claim the performance of certain acts or behaviors against me.⁷ At bottom, however, the duties, rights, and claims of justice are networks of claims and demands, not only between just two individuals, but also between all the individuals standing in a relation to make such claims on one another. That is, indirect as well as direct reciprocity marks the claims and duties of justice.⁸

A consequence of defining the rights and duties of constructivist justice as bi- or multi-directional is that this structure can be used to distinguish justice duties from moral duties. Bidirectional and multi-directional reciprocal duties will be justice duties, whereas if a duty is unidirectional it will be a moral duty. This is not to say that all moral duties are unidirectional. There may be some that are also reciprocal, but if a duty (excluding duties of prudence or other non-moral duties) is unidirectional, then it is a moral duty. This is *not* because we do not owe moral duties to someone, nor does it follow that other people do not owe those same duties to us. Rather, moral duties are owed to all individuals within the scope of morality *qua* status as an individual⁹ regardless of whether or not those duties are reciprocated by other individuals. Justice, however, is owed to individuals contingently, depending on their justice-status, which includes their ability to fulfill the relevant duties and standing to make relevant claims.

This leaves open the possibility of non-constructivist *moral* duties. For instance, while we may have justice duties not to kill one another, there may at the same time be moral duties that we not harm or kill. I point this out only to clarify that my discussion of the reciprocal nature of duties applies *only* to justice duties; it is compatible with my account for a Constructivist about justice to appeal to

⁷ Ibid.

⁸ For a full explanation and defense of this position see chapter 6, section VI.

⁹ I use the word “individual” rather than person or being in an attempt to stay neutral on who exists in the scope of morality, e.g. persons, animals, etc.

perfectionist considerations regarding moral principles, but not justice principles.¹⁰ It will sometimes be the case that we identify a duty that a group or government has which will not be a justice duty. It may be rare that governments in particular have moral duties that are not justice duties, but it does sometimes occur. J.S. Mill, for instance, explains the distinction between moral and justice duties as being, in part, based on whether they are reciprocal in structure (justice duties) or not (moral duties). He also thinks that legal duties come from both moral and justice duties, not merely justice as is often supposed.¹¹ Humanitarian duties, such as giving aid, may be one such moral and juridical duty. After a natural disaster, a particular state and its constituents may feel they ought to aid the disaster-stricken nation as a moral duty. For instance, after Haiti was devastated by an earthquake, the U.S. government not only gave relief money and supplies, but also lent its troops to help clean up and rebuild. The point here is that my account of the circumstances of justice does not hinge on moral duties in any way. While I think that using the structure of duties and principles to distinguish between justice and morality is both useful and plausible for a constructivist account of justice, it has not been a dominant distinction. What matters for this chapter is simply that constructivism is not committed to reciprocal duties for all of morality.

II. Alternative Circumstances of Justice

Given these observations on the structure of duties of justice, we are now in a position to ask, What are the facts in the world and human nature that make human coordination and thus justice both possible and necessary? What are the circumstances of justice? I propose that the circumstances of justice are: (1) the fact of solidarity in the world, (2) moderate scarcity of resources, and (3) limited human knowledge.¹²

¹⁰ See for instance, Vinit Haksar, *Equality, Liberty, and Perfectionism*, Clarendon Library of Logic and Philosophy (Oxford ; New York: Oxford University Press, 1979), chs. 1-3 for reasons this is necessary for Constructivists. Also, chapter 1, section V of this project addresses this in the discussion of Cohen and Rawls and foundational principles.

¹¹ John Stuart Mill, *Utilitarianism*, ed. Roger Crisp, Oxford Philosophical Texts (Oxford ; New York: Oxford University Press, 1998), p.93. This passage is discussed in further detail in chapter 6, section VI of this project.

¹² Insofar as solidarity is type-identical with its conditions, another way of listing my alternative account of the circumstances of justice would be: capacities for (1)

The Fact of Solidarity as a Circumstance

In the previous section I argued that the structure of a principle or duty of justice is reciprocal. Fichte, in his *Foundations of Natural Right*, attempted to bring a Kantian perspective to rights. He argued that, “I must in all cases recognize the free being outside me as a free being, i.e., I must limit my freedom through the concept of the possibility of his freedom.”¹³ He calls this the principle of right, which is deduced from the concept of the individual.¹⁴ It seems fair here to ask, however, if I limit my freedom through the concept of the possibility of your freedom, does there not need to be some *trust* that you will do the same toward me, that you will limit your freedom through the possibility of my freedom? No single individual limiting freedom because of another’s freedom or autonomy, ensures that the other limit his or her freedom in return. This returns us to Hobbes’s puzzle of what can induce individuals to cooperate, to give up their absolute right to all things. The puzzle exists because Hobbes saw that giving up one’s absolute right to things must only be done with the assurance that one not be taken advantage of in this vulnerable position. That is, the sacrifice of one’s unlimited right to things must involve a guarantee that the vulnerability of that position is not taken advantage of. In chapter 2 the challenge of trust is described as this very challenge of formulating the circumstances of justice such that the vulnerabilities of trusting are protected against and cooperation is possible.

The standard accounts of the circumstances of justice found in Hume, Rawls, and to some extent, Hobbes do not agree on what circumstance creates the need for trust, nor on how that trust can get started so that human coordination is possible. In Hobbes, his circumstances are marked by mistrust, but the Leviathan is needed for cooperation to be possible; Hume likely thought it was generosity in conjunction with his sociability circumstance. In his early work, Rawls agreed with Hume but, later,

mutual trust; (2) identification with the group; (3) a disposition to empathy; (4) shared joint interest in conjunction with: (5) limited scarcity of resources and (6) limited human understanding.

¹³ Johann Gottlieb Fichte, *Foundations of Natural Right : According to the Principles of the Wissenschaftslehre*, ed. Frederick Neuhouser, trans. Michael Baur, Cambridge Texts in the History of Philosophy (Cambridge, UK: Cambridge University Press, 2000), p.49.

¹⁴ *Ibid.*

his rather ambiguous condition of reasonable pluralism appears to attempt to respond to the challenge of trust. I propose that solidarity is the fact in humanity that renders human cooperation necessary and possible because of the role of trust within it. Solidarity not only gives rise to the need for individuals to coordinate outside of particular solidarity groups, it also helps coordination be possible insofar as individuals within solidarity groups are capable of a specific kind of trust which arises in the context of intensifiers where a system of claim-making and duty-bearing is already possible. Hence, in this respect, under the circumstance of solidarity, human coordination and hence, justice is possible.

Solidarity is a pervasive, reciprocal relationship between individuals that makes mutual trust warranted on a large scale, which is necessary for large scale cooperation. This is true not only of small groups involving frequent interactions, but also of large groups which will often have weaker solidary bonds. In chapter 3, I argued that even groups with weak solidary bonds will have some degree of mutual trust and that such trust is ubiquitous. This type of trust is not necessarily trust directed at particular individuals whom we know and interact with regularly; this type of trust is characterized by a network of trust. Each member of the solidary group or community shares some degree of this network-style solidarity-trust with other individuals in her groups. The subject and extent of trust will depend on other aspects of the group. In sum, mutual trust is necessary for human cooperation and justice, and solidarity as a circumstance of justice ensures that the right kind of mutual trust is possible. This in turn renders cooperation and justice qua reciprocity possible.

The fact of solidarity in humanity not only makes the prospect of human cooperation and justice possible, it also makes human cooperation, as necessary for justice, necessary for at least two reasons. First, in a world unregulated by justice, partiality toward one's in-group members would be problematic. If one's duties extend no further than one's solidary groups, economic and social relations would be very limited; something like the family groups of ancient Greece before the rise of the polis. Such extreme particularism would necessarily disadvantage out-group members and create a need for justice to regulate behavior between groups in order to avoid a system based solely on power relations. The necessity of adjudication

between such groups is at least a part of what makes human cooperation necessary. Additionally, protection against in-group vulnerabilities should be protections of justice. In many solidary groups, weaker members are easily taken advantage of, whether in the nation-state, where the poor have a history of being more vulnerable than the wealthy, or in a family in which women and children have a long history of being the vulnerable members. In each of these cases, justice—or fair principles of human cooperation—is needed to protect individuals in such disadvantaged positions. I will give specific examples of this in the following chapter.

It is important that the circumstance of justice I am proposing is the *fact of solidarity* in human societies and not solidarity itself. The fact of solidarity in society is simply the fact that solidarity is pervasive in human society and that nearly all individuals are capable of it. Individuals are constantly participating in a myriad of solidary relations—from families, friendships, clubs, teams, communities, and organizations, to the nation-state and even intra-national groups whose projects and aims extend beyond traditional conceptions of solidarity. It is this fact of pervasive solidary relations that is a circumstance of justice, *not* a preexisting solidary group itself. That is, duties of justice are not contingent upon membership in a group and the corresponding identification with it or feelings of empathy with it. Justice depends upon being *capable* of being in solidarity with some people. Because it is the capacity to be in robust solidary relations that is a circumstance of justice, it is important to note that the capacity for strong solidary relations and weaker relations, such as those in large groups like nations or states, is all that is necessary for this circumstance of justice to be met. The challenge of trust highlights that a condition of justice and human coordination more generally is that people are able to trust one another sufficiently to coordinate effectively. Membership in some solidary relations and the demonstration of solidarity's constitutive features via that membership represent a necessary threshold for relationships of justice. It is only after the necessary capacities for participation in justice are developed, particularly the capacity of mutual trust, that one can be reasonably trusted—or expected—to participate in a scheme of cooperation.

It is not the fact that the nation-state is in solidarity that leads to justice within the state or that makes the state an actor in a scheme of justice. Rather, it is that

solidarity exists in its people, and the need for coordination regarding distributive issues extends clearly to the nation-state.¹⁵ Historically, states have arisen from pre-existing solidary groups (e.g., Israel, Kosovo, etc.), and also from situations that involved a common joint interest (e.g., colonial America's shared interest in not being taken advantage of by the British, which later led to a sense of solidarity on a shared territory).¹⁶ In cases where solidarity already exists among individuals, the mutual trust necessary for human cooperation will already exist. In cases where a shared joint interest leads to the formation of a state, mutual trust may be slow to arise to a degree sufficient to render human cooperation possible and stable. However, as long as individuals are capable of solidary relations, the necessary threshold of mutual trust will be met.

Here one might easily ask, why solidarity? Surely mutual trust is enough to ensure that human cooperation—as necessary for justice—is possible. My response is twofold. First, on my view of mutual trust within solidarity, the other three conditions of solidarity—shared joint interest, identification with the group, and a disposition to empathy—act as intensifiers. They ground the robust nature of trust in solidarity which makes possible a system of indirect reciprocity (i.e., claim-making and duties whose exchange is not tit-for-tat). They also make this trust warranted. In sum, because of the other three conditions of solidarity, individuals are capable of indirect reciprocity, which is often required for the robust human coordination (necessary for justice) to be possible. Mutual trust alone, without the other conditions, could not ensure indirect reciprocity and widespread cooperative behavior beyond the individuals with whom one actually interacts. Solidarity also makes human cooperation and thus, justice necessary in a way mutual trust cannot. Not only do individuals need to be protected from the vulnerabilities of trust, strong solidary groups would have much more power than weaker groups. Justice is needed to

¹⁵ The circumstance of scarcity of resources, for example, requires coordination at a number of levels (e.g., municipality, regional, national)

¹⁶ Note for instance the existence of the weak central state in the Articles of Confederation compared to the stronger central state in the later Constitution in the American colonies. Arguably one reason colonials eventually accepted the stronger central government was that the need for it became more recognizable and the trust among them had grown sufficiently to make a strong central government seem like less of a risk.

temper such power relations. Mutual trust on the other hand, might call forth reasons that human cooperation is necessary, but it does not also lend itself to any possibility of human cooperation. Hence, it is solidarity and not mutual trust that makes the human cooperation necessary for justice, both *necessary and possible*.

The capability of being in solidarity is necessary to make possible the large-scale human cooperation that is needed for justice because it exhibits not only the ability to participate in mutual trust relations, it also shows a capacity for the other three conditions. This is the second part of my response to the question, why solidarity? Constructivist justice demands adaptability. As Requirement N illustrates, whatever renders justice necessary is what makes a principle of justice necessary and useful. As different societal values and principles give rise to the need for different principles of justice, conceptions of justice must respond to this. For instance, for hundreds of years women could not own property. This was rarely viewed as unjust. More recently, moral principles of equality between the sexes and the extension of equal dignity to both sexes have created a need for different conceptions of justice to deal with the problems of arranging the distribution of goods. According to constructivist theories of justice, the conception of justice must be responsive to facts that make distributive justice necessary. However, establishing the best conception of justice also requires that conception of justice to be responsive to other values and principles—which will alter the concept of justice—as well as being able to adapt as these values and principles change. Solidarity involves features, beyond mutual trust, that render individuals capable of being sensitive to such changes in the values and principles of others participating in their scheme of justice, and it is that sensitivity which makes such changes possible. As demands and needs shift, so will the content of justice. Without the capability of solidarity, individuals will not easily be able to adapt to the changes necessary for some conception of justice to continue to meet a constructivist Requirement N over time, hence, they may not be able to engage appropriately in human cooperation over time.

The Circumstance of Moderate Scarcity of Resources

Moderate scarcity of resources is perhaps the least contentious circumstance of justice. The fact that individuals want more goods in conjunction with the fact that they know they can obtain more of these goods via cooperation creates an

environment that makes human cooperation both necessary and possible. Individuals are willing to abide by restrictions of justice in part because they will reap the rewards of greater resources if they do. Similarly, they look to justice as something that a society needs because they want continued possession of these resources. That is, property rights must be adjudicated in some way given that there is not a limitless supply of resources. The need for rules pertaining to ownership, transfer, and other aspects of property possession make some system of justice not only preferable, but also necessary for the society's sustainability. It is my position that resources extend beyond property and include all matter of limited resources. Understood this way, resources will, minimally, include something like Rawls's primary goods, but will extend further to include resources such as time, effort, and possibly others. Any resource which is finite to the extent that it is or could be scarce will qualify as the right kind of resource around which questions of justice can arise.

Following the lead of Hume, Hart, and Rawls, it is my position that this condition exists between the absolute extremes of total abundance, in which case no laws of property would be necessary, and an absolute dearth of goods, in which case there would be insufficient goods for any system of dividing them to have merit or be justifiably enforced. In the case of a dearth of goods, no system of fair trade would be possible, so rules and duties governing it would have little or no normative significance.

The Circumstance of Limited Human Understanding

The fact of limited human understanding as a circumstance of justice is often contested. The circumstance appears most explicitly in Hart's and Rawls's accounts of the circumstances of justice, but as discussed in chapter 2 of this project, Hume makes some mention of it as well in the *Enquiry*. Having examined their work, I articulate here my own understanding of the salient features of this circumstance. In the literature, limited human understanding is often incompletely explained or read as a circumstance unintentionally included.¹⁷

Rawls explains that powers of reasoning and judgment are always limited and sometimes distorted by bias, anxiety, or self-absorption. He claims that these defects

¹⁷ Brian Barry, in his *Theories of Justice*, for instance, seems to interpret Rawls as accidentally including this circumstance.

are the natural human condition and contribute to the diversity of life plans. In the *Enquiry*, Hume argues that if man were sufficiently sagacious, he would always be aware of the strength of his interest, which binds him to the observance of justice, and that if he had sufficient strength of mind to always persevere in steady adherence to this interest, which is sometimes distant, then there would be no need for government or political society. Hart clarifies Hume's position by arguing that as men have unequal understanding of the long-term interests that require justice, and as they also have unequal strength of good will, some system of rules is needed. He adds that it is because of this inequality in understanding the obligations of justice that we must create a system of laws to guarantee that those who are voluntarily just are not taken advantage of. This situation contributes to the need for human cooperation and a conception of justice, whatever that conception may be, so that free-riding is limited. Hart further supports this condition by pointing out that, even though the advantages and disadvantages of being just are generally known, individuals will generally obey for a variety of motives. Even so, "neither understanding of long-term interest, nor the strength or goodness of will, upon which the efficacy of these different motives toward obedience depends, are shared by all men alike."¹⁸ In the absence of some rules and duties, many would succumb to the temptation of their more immediate interests.

In summary, some limited human understanding is needed for individuals to sufficiently discern and endorse rules of justice. For individuals to recognize that a system of justice is necessary, some amount of human understanding of these rules and duties must exist. Likewise, for human coordination to be possible, there needs to be sufficient understanding that a given conception may be a viable solution to the coordination problems of distributive justice. Conversely, imperfect understanding of what constitutes justice and long-term interests of individuals contribute to the need for an explicit system of justice in the first place.

III. Circumstances Rejected

Before defending my view of the circumstances of justice, I first want to consider it in relation to conditions presented in the standard accounts of the circumstances of justice introduced in chapter 2 of this project. In some cases, my conditions

¹⁸ Hart, *The Concept of Law*, p.193.

incorporate aspects of these other circumstances. Compared to these other circumstances, my account is better at capturing what is necessary for human cooperation and justice while avoiding certain pitfalls. The analysis in this section is necessary to put me in a position to argue that the alternative account presented in this project fulfills the role of the circumstances of justice by delimiting the range of facts in human nature and the world by virtue of which the human cooperation necessary for distributive justice is necessary and possible. My reasons for rejecting alternative principles will also clarify how I understand the circumstances to work together and bring out salient features of the solidarity condition.

I begin with *limited generosity* because the reasons for abandoning this circumstance are clearest, having already addressed its shortcomings in chapter 2: those arguments are briefly reviewed here. Limited generosity in Hume, Hart, and the early works of Rawls serves the function of making human cooperation both necessary and possible. Without generosity, individuals would not show concern for others' benefit or well-being, which is a quality necessary to engender cooperation. Limited generosity renders human cooperation and justice necessary because, if we were perfectly generous, there would be no need for rules or a system of forbearances, as people would willingly sacrifice their interest for the advantage of others and almost never dispute whose interest should take precedence. Likewise, generosity will naturally form bonds and duties toward those nearest, such as friends and family. Justice is needed to make sure that those outside of these attachments are treated fairly.¹⁹

My criticism of this circumstance is that generosity in no way makes possible the kind of mutual reciprocity that makes the mutual trust required for human cooperation, that is, which protects against the vulnerabilities of trusting others.²⁰ Feelings and acts of generosity are unidirectional. While a philanthropist may be willing to donate resources or time to other individuals, expecting no return, these feelings of generosity do little to enable the sort of return necessary for human cooperation to be possible or reliable. For one to be willing to take on the constraints and forbearances of justice, with its reciprocal rights and duties, there must be some

¹⁹ Hume, *A Treatise of Human Nature*, p.487.

²⁰ The co-existence of the sociability circumstance does nothing to protect against these vulnerabilities either. It merely suggests that they may already be possible, but this is insufficient for trust to be warranted.

assurance that other individuals are at least capable of feeling some mutual inclination toward such cooperative behavior. Solidarity, and more specifically its condition of a disposition to empathy, assures individuals that others take the same risks. This disposition to empathy, as previously discussed, does not require that actual empathy exist between individuals, rather that individuals' attitudes make such empathy possible. This involves a willingness to hear information regarding certain relevant social facts, and a willingness to imagine the emotional experience of these facts.²¹ The fact of solidarity in society minimally ensures that all individuals who participate in any solidary relation have the capacity for this kind of empathy toward other individuals. Hence, my condition carries the benefits of the limited generosity condition. The fact of solidarity is not an assurance that individuals will feel empathy toward other individuals in a justice group, but it does limit justice to those who are capable of a disposition to empathy regarding the relevant social facts.

Whether or not some limited generosity does exist among individuals in a society is not here put in doubt. Rather, I contend that, given the structure of justice obligations and rights, the feeling that gives rise to the recognition of a need for justice, and the possibility of coordination, is a feeling that involves consideration of what other individuals are experiencing regarding certain relevant social facts. Simple generosity lacks the appropriate structure to make possible the mutual trust necessary to engender cooperation so that a system of claim-making and duty-bearing is possible, whereas solidarity has this structure built into it.

Hume is sometimes credited with admitting a condition of sociability. (I included this in my discussion of Hume.) The sociability circumstance is primarily the fact of human interdependence. As I read Hume, this condition is something like a weaker version of the fact of solidarity. Though Hume's condition may seem broader than the solidarity condition, he explains that if some completely asocial person existed, he would always "to the utmost of his power, challenge the preference above every other being, to none of which he is bound by any ties, either of nature or of interest."²² If we understand this as individuals acting for only self-preferential interests because they have no ties to one another, we see that Hume too thinks that it is necessary for

²¹ This is discussed in chapter 3, section III.

²² Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, pp.191-92.

justice that we already have some other-oriented interests, and stand in certain interdependent relations with others. I argue that the fact of solidarity as a circumstance of justice guarantees that individuals who participate in justice are capable of the kind of relations with others which make mutual trust possible. The fact of sociability indicates only that such trust could be possible. In sum, it does not clearly protect against the vulnerabilities of trusting.

Having abandoned limited benevolence and sociability as viable circumstances of justice, I move on to reasons for rejecting Rawls's fact of pluralism as a condition. In *Theory*, Rawls very closely follows Hume's circumstances, though he explains limited human understanding so that it includes individuals' diverging conceptions of the good. In *Political Liberalism*, Rawls limits his circumstances to moderate scarcity of resources and these diverging conceptions of the good, which he calls "the fact of pluralism as such."²³ This pluralism is the result of what Rawls calls the *burdens of judgment*, which include imperfect human understanding and the different life experiences that shape our normative judgments. These elements combined lead to conflicting, though reasonable, judgments about various political and normative facts. Because of this fact of pluralism in society, fair terms of cooperation should "meet the requirements of full publicity."²⁴ Only when these requirements are met is it possible for individuals to give reasons for belief, confident that this exchange will strengthen public understanding.

The fact of reasonable pluralism is a particularly appealing contender as a circumstance of justice. It easily contributes to Requirement N as discussed in chapter 1. It contributes to the concept of justice in that different plans of life and conceptions of the good are present in a society, and some method of reconciling them, so that *reasonable* plans and conceptions of the good are respected, is needed. On the other hand, it contributes to a conception of justice because the fact of pluralism is such that when it exists (in conjunction with the publicity condition), a certain liberal conception of justice will, ideally, be made possible. Individuals will understand and respect other individuals' conceptions of the good, and be able to address reasons for their beliefs in certain principles. Even if the reasons are not the

²³ Rawls, *Political Liberalism*, p.66.

²⁴ *Ibid.*, p.68.

same, some general understanding of why they represent something valuable will be understood, and what Rawls calls an *overlapping consensus* will result. This allows a shared *political conception* of justice to be found.

The reason for rejecting this circumstance in my own account is that Rawls's fact of pluralism and its corresponding burdens of judgment are, I believe, more clearly captured on my own account of the circumstances of justice. That is, my account not only includes considerations in favor of the fact of pluralism condition, it also explains more clearly why these considerations matter. The burdens of judgment are essentially the condition of limited human understanding (included in both my own and Rawls's accounts), and the fact that all individuals have different experiences which, to some degree, affect their judgments. As Rawls puts it, "in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experience are disparate enough for their judgments to diverge."²⁵ The fact of solidarity actually explains how and why these different experiences matter: because individuals are already normatively committed to some degree to these groups and their values and interests. Further, the divergent judgments to which Rawls refers make justice necessary since in the absence of full agreement, coordination is more difficult. The fact of solidarity as discussed in this project incorporates the issue of divergent judgment. In addition, this understanding of solidarity also recognizes that different groups will have different, divergent interests to advance.

A further reason for rejecting the fact of pluralism is that this condition, and its corresponding burdens of judgment, only contribute to an overlapping consensus which makes human coordination possible when this pluralism exists within a society. (Rawls himself always refers to this condition as existing with a society.) The fact of pluralism limits us significantly if we wish to apply a conception of justice more broadly, beyond a single society. Rawls limits justice to a pre-existing society because he wants to limit his conception of justice to groups of people whose relations "recognize certain rules of conduct as binding and who for the most part act in accordance with them."²⁶ Though a society is a cooperative venture, he also notes

²⁵ Ibid., p.57.

²⁶ Rawls, *A Theory of Justice*, p.4.

that it is marked by conflict, as people are not indifferent to how benefits of collaboration are distributed.²⁷ As society is also a circumstance of justice for Rawls,²⁸ it both makes it likely people will cooperate on terms of justice, because they already cooperate, and gives rise to a need for justice, because the society is already marked by pluralism. Solidarity is also able to ensure that individuals have the ability to cooperate, and similarly gives rise to the need for a conception of justice insofar as diverging solidarity-claims must be adjudicated. It does so, however, without relying on potentially arbitrary social groupings (i.e., pre-existing societies, or shared recognition of rules), because it is the fact of solidarity in the world, not the existence of specific solidary groups, that makes human cooperation possible and necessary. Thus, my alternative circumstances of justice are able to capture the *necessary and possible* required by the fact of pluralism in a society without the potential problem of limiting justice to a single society, or group who recognizes certain rules. Instead, the fact of solidarity makes it much more likely that justice can exist *between* different societies as well as *within* societies.

This last advantage of rejecting the fact of pluralism circumstance is ensured only by also rejecting the *same geographic territory* circumstance from Rawls's *Theory*. Presumably Rawls added the geographic territory circumstance to make it clear that individuals were in a position where they had to find some mechanism of cooperation. But, as with the previous circumstances, this condition once again limits justice to a single group or social unit, and rules out the possibility of international justice. Geographic boundaries, which are contingent on historic events, are not the right kind of reason to limit the scope of justice. As Rawls himself abandoned this circumstance, it will not be given further attention here.

I now turn to the equality condition found in the standard accounts of the circumstances of justice. The equality condition is unquestionably the most contentious of the conditions rejected on my account. The works of Hobbes, Hume, Hart, and Rawls, in *Theory*, have relied heavily on this condition. I have addressed the criticisms to this condition extensively in chapter 2 of this project, and will explain how solidarity avoids those same criticisms in section 5 of this chapter.

²⁷ Ibid.

²⁸ See chapter 2, section VI. Though Rawls never lists a society as a circumstance explicitly, he very clearly relies on it.

Therefore, in this section I only briefly address what equality does for the circumstances and how the fact of solidarity does this at least equally as well.

It is worth recalling at the onset that, in *Theory*, Rawls explicitly follows Hart in taking a Hobbesian position on equality.²⁹ The Hobbesian interpretation of equality is essentially the rough equality of physical and mental powers: “their capacities are comparable in that no one among them can dominate the rest.”³⁰ Hart explains that, although social rules requiring forbearances can be tedious at times, “it is at any rate less nasty, less brutish, and less short than unrestrained aggression for beings thus approximately equal.”³¹ He goes on to discuss international law, and explains that the reason for the “vast disparities in strength and vulnerability between states” is the inequality in brute strength between the states.³² According to these Hobbesian notions of the equality condition, equality makes human cooperation necessary because fear of attack from others motivates coordination and a desire for rules of forbearance. It seems that the fact of solidarity is in a better position than fear to motivate cooperation. This is because solidarity already involves cooperation. As Blackburn contends in a discussion of cooperation arising out of a Hobbesian state of nature scenario, “once co-operation is practised, it can be extended.”³³ But it is not until cooperation has been established and individuals have some practice of cooperating that we could ever reasonably expect individuals to take on the constraints of justice. Ultimately, there is no reason to cooperate or trust others to cooperate if some form of cooperation does not already exist.

Additionally, as Hart’s observations on international relations make explicit, this type of rough equality seems to reduce justice to a system of power dynamics. I don’t deny that power is an important motivator in the need to coordinate; in fact, the fact of solidarity uses power to motivate justice as well. However, power alone cannot lead to coordination. According to the fact of solidarity, these power dynamics exist in a context in which individuals already have systems of cooperation. This makes coordination much more likely, and seems to represent global politics more

²⁹ I discussed the division between the Hobbesian and Humean equality condition extensively in chapter 2.

³⁰ Rawls, *A Theory of Justice*, p.110.

³¹ Hart, *The Concept of Law*, p.191.

³² Ibid.

³³ Blackburn, *Ruling Passions : A Theory of Practical Reason* , p.193-94.

accurately than international relations qua Hobbesian equality. Consider, for instance, the plethora of international institutions designed specifically to aid cooperation: the United Nations, the European Union, NATO, etc. While power dynamics will always be a part of international relations, so will cooperation. Explaining justice in terms of equality endorses an interpretation of justice that seems to rely primarily on power dynamics, and ignores the cooperation that also marks many justice-relations. In short, the fact of solidarity not only avoids the problem of explaining coordination with those one fears, it also explains ensuing conceptions of justice as motivated not by power, but by other-oriented interests and a system of cooperation. Hence, the fact of solidarity makes human cooperation much more possible than the equality condition and equally necessary.

Humean equality, I argued in chapter 2, is somewhat different than Hobbesian equality. Equality in Hume does not appeal to brute force or power or even mental faculties, but rather is about “holding people to certain expectations about their relations to oneself.”³⁴ To a limited extent, this seems like a reasonable demand for justice. If an individual is incapable of fulfilling certain justice expectations (e.g. duties and obligations), then that person cannot participate in a scheme of justice. The fact of solidarity is able to capture this. A person must be able to participate in relations involving mutual obligations in regard to a certain joint interest in order to be in solidarity. Failure to comply with duties within a group will result in that person being demoted or even removed from the group. Being capable of successfully participating in solidary groups entails being able to fulfill expectations as well as holding others to one’s own expectations. This captures the sentiment behind the Humean, making one’s resentment felt. It seems then, that solidarity can carry the advantages of the equality circumstance.

The problem with Hume’s circumstance of equality is that it makes the scope of who participates in justice contingent on actually having appropriate sympathy with other individuals. This is, intuitively, a bad reason for excluding individuals from justice. Similarly, the Hobbesian equality condition excludes individuals and states who do not share equal power or mental capacities with the majority of people in a

³⁴ Postema, "Making Resentment Felt: Hume on the Environment of Justice," p.11.

given group or state. This is also an inappropriate kind of reason for excluding individuals from the scope of justice. This criticism was called the problem of exclusion. Another advantage of my own account of the circumstances of justice over the standard accounts discussed in chapter 2 is that my account avoids these problems. I further consider the problem of exclusion and the related problem of paternalism in section 5 of this chapter, but first, I revisit the challenge of trust from chapter 2 and the challenge it presents for the circumstances of justice.

IV. The Challenge of Trust

Analysis from chapter 2 shows us that responses are needed to two questions to determine whether my alternative circumstances of justice are preferable to the standard account: (1) Does the alternative account fulfill the function of the circumstances of justice by, minimally, ensuring that the mutual trust necessary for human cooperation is met? (2) Does the alternative account avoid the problem of exclusion and the Humean problem of paternalism? A positive response to both questions does not necessarily mean that the alternative account of the circumstances is the best possible account of the circumstances of justice. Affirmative responses will give us an account that is, minimally, better than the standard account, assuming no new problems present themselves. I will address these questions in turn.

Recall from chapter 2 that the function of the circumstances of justice is *to delimit the range of facts in human nature and the world by virtue of which we need principles of distributive justice and which make such principles possible*. This definition is taken from the accounts of the role of the circumstances put forth most clearly by Rawls and Hume. I have argued that Hobbes, Hume, and Rawls each fail to meet this function in their accounts insofar as none of them offer adequate solutions to the challenge of trust. In Hobbes's case, his circumstances make the mutual trust necessary for the right kind of human cooperation needed for justice impossible. Hume gets somewhat closer to responding to the challenge of trust with his addition of benevolence, but still fails to account for the right kind of trust. In Rawls's earlier *Theory*, he is so closely guided by Hume that he is susceptible to the same criticisms. In his later *Political Liberalism* Rawls may plausibly succeed in getting around the problem for trust. However, his two circumstances of limited scarcity of resources and the fact of political pluralism are left sufficiently vague that we know little about why these circumstances are the

circumstances of justice. It is thus unclear whether they really meet the challenge of trust.

We turn now to the question at hand, Does my new account of the circumstances of justice meet the challenge of trust? In other words, Does it protect against the vulnerabilities of trusting and render cooperation, and thus justice, necessary and possible? My response is that it does. Consider Blackburn's argument that without some degree of mutual trust, it is unreasonable to expect cooperation to come into existence.³⁵ Solidarity requires that some mutual trust already exist. Solidarity is a relation between individuals in which a network of mutual trust already obtains. I argued in chapter 3 that to accept the obligations and duties of a solidary group, to be in good standing in such a group, one must be capable of mutual trust. This is because one's position in the group will be compromised if one shows oneself to be untrustworthy. Further, to commit oneself to a solidary relation, one must also be able to trust that other individuals will be able to fulfill their duties and obligations. Otherwise, one would never take on the sacrifices and burdens that are sometimes required for membership. The fact that this type of trust, the right kind of trust necessary for cooperation, exists in all solidary groups makes plausible the possibility of cooperation between groups. It also makes cooperation possible for all individuals who exist within any such relation, even regarding individuals outside those groups.

Solidarity does not only involve mutual trust; coordination and cooperation are also necessary if the shared joint interest is ever to be achieved. The obligations of a solidary group are mutually distributed around a goal. Further, one only has the status of having duties and standing to make claims within a group insofar as one stands in a relation of mutual trust with other members of the group. Both of these features support the reciprocal structure of duties and obligations of justice as outlined in the second section of this chapter. The duties, rights, and claims of justice are multidirectional, between all individuals standing in a relation to make claims on one another.³⁶ Individuals can only be capable of making such claims, and therefore within the scope of such duties and rights, if they are capable of solidarity. This ensures they are also capable of participating in a distribution of duties in order to

³⁵ Blackburn, *Ruling Passions : A Theory of Practical Reason*, pp.191-99.

³⁶ Solidarity generates a system of indirect reciprocity which, I argue in chapter 6, is one of the kinds of reciprocity necessary for justice.

achieve some shared joint interest. Furthermore, they will be capable of behaving in trustworthy ways and be capable of the empathy, shared joint interest, and identification with a group that makes such trust warranted. In sum, the right kind of mutual trust is captured in my alternative account of the circumstances of justice.

In terms of the circumstances of justice, the already existing capability to practice mutual trust means that human coordination and justice are *possible*. In Hobbes, the lack of mutual trust in the circumstances led to his requiring an all-powerful sovereign. In Hume, we saw that the benevolence and sociability conditions provides some assurance that others will be capable of performing in a way that enables human cooperation. From Hume's perspective, if I can count on you being generally benevolent toward me, then my taking on the duties associated with justice is not a significant risk. The problem with the unidirectional nature of this type of benevolence is that it does not give adequate assurance that another even can perform. The fact of solidarity provides this assurance, because it guarantees that individuals within the scope of justice are *capable* of the kind of mutual trust necessary for claim-making and reciprocal duties. Only if individuals were capable of such mutual claim-making would we reasonably hold them responsible for such duties and grant them standing as claim-makers within the scope of justice.

V. The Problem of Exclusion

We turn now to the second question regarding the problems of the equality condition, Does the alternative account avoid the problem of exclusion and the Humean problem of paternalism? In this section, I argue that my alternative account of the circumstances of justice does avoid the problems of exclusion and paternalism. The problem of exclusion is ultimately the charge that the equality condition limits the scope of justice too narrowly for reasons that should not matter for questions of justice. In Hobbes and Rawls, justice depends on certain power relations. In Hume, it is contingent upon actually sharing feelings of empathy/Humean sympathy with other individuals to a degree that resentment may be felt.

Hobbes's theory of justice is subject to the problem of exclusion because he limits the scope of justice to only those who are of equal strength and ability. These are not good reasons for excluding individuals from the scope of justice: obligations of justice ought to exist outside the scope of those with whom we have roughly the same

power. In Hume, the problem of exclusion exists because his equality condition limits who counts within the scope of justice for the wrong kind of reasons. Hume famously imagines a species of creatures that intermingles with men, who are fully rational (so capable of rule-following), but who are “incapable of all resistance, and could never, upon the highest provocation, make us feel the effects their resentment . . .”³⁷ Toward this species, Hume claims, we would lie under no obligations of justice. We do, however, owe them certain moral duties. In chapter 2 of this project, I argued that Hume’s passage, which has come to be known as his equality condition, does not exclude individuals from justice based on power or rationality as Hobbesian equality would have it. Rather, Hume is excluding individuals based on whether they can make their resentment felt. Individuals can make their resentment felt through sympathy,³⁸ which is easiest when there is a strong continuity and resemblance between themselves and others. The trouble for Hume, then, is not that justice will depend on power and rationality, but that justice will depend on our actually having a certain amount of sympathy for the individuals with whom we stand in justice relations. Making justice contingent on the actual presence of empathy/Humean sympathy with other individuals is, once again, not the kind of reason for which we want to exclude individuals from justice. Obligations of justice ought to exist—and surely do exist—outside the scope of our empathy. Finally, I have argued that Hume is subject to an additional criticism, the problem of paternalism with regard to the rational creatures that lay outside the scope of equality. The worry is that if one lies under no restraints of justice toward this species, we cannot accommodate the intuition that paternalism is justified only as “a function of that person’s rational competence.”³⁹

At first glance, it may seem that solidarity is not the right kind of reason for taking someone to be within the scope of justice, as it may generate one of the same problems as equality: it is too thick a demand. To actually stand in a relation of equality with someone requires fairly robust mental, physical, and psychological

³⁷ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.190.

³⁸ Recall that *sympathy* in Hume is closer to the modern notion of empathy than the modern understanding of sympathy.

³⁹ Ridge, "David Hume, Paternalist," p.162.

background conditions. Additionally, equality is such a generally imprecise notion, that it is unclear what exactly is required in such a relation. The fact of solidarity in the world may seem nearly as problematic. After all, the conditions for solidarity as discussed in chapter 3 call for the presence of several factors. Solidarity requires being able to share a joint interest, which involves interpretation of that interest. Solidarity requires a shared identity, which involves recognition of others and valuing whatever that group identifies as its shared joint interest. Solidarity calls for a disposition to empathy, which requires a shared emotional configuration with some other individuals within the group. Finally, in order to be in a solidary relation, an individual must be capable of mutual trust. This involves being able to make claims, and standing to be held responsible by others for duties to the group. If the four conditions for solidarity are considered together, the conditions for solidarity seem too demanding for justice-status to hinge upon. Intuitively, justice seems most needed when the protections of in-group status are not afforded. If justice is contingent upon feelings of solidarity with someone, then, as in Hume's account, my own account would require that certain feelings actually exist for a justice relationship. This, however, is avoided on my explanation because my condition is not *solidarity*, but *the fact of solidarity* in human societies.

To be in a solidary group, one must already share the dispositions and attitudes necessary for solidarity with one's group. My claim, however, is not that justice maps on to solidarity or requires its attitudes and dispositions. Instead, the fact of solidarity merely requires that one share solidary relations with *some* group of people. *It is having the capacity to be in a solidary relation that is necessary for human cooperation, not the actual existence of solidarity.* This is a much thinner notion as the fact of solidarity is ubiquitous. But ubiquity does not necessarily make the fact of solidarity the right kind of reason for inclusion in justice's scope. Rawls, in his "Kantian Constructivism in Moral Theory," makes nearly the same argument about equality as I do here about solidarity. There, he explains equality in the following way: "everyone is equally capable of understanding and complying with the public conception of justice . . . On this basis, together with each person's being a self-originating source of valid claims,

all view themselves as equally worthy.”⁴⁰ Hence, he claims all individuals should be represented within the principles of justice.

The problem with this Kantian form of equality is that it doesn't ensure that those one sees as equal view themselves as equals in return. Reciprocity is implied, and may often be the case, but seeing oneself as having equal standing, and being understood to have equal standing by others, do not amount to the same thing. Justice requires both. Rawls is correct to bring the capability to understand and comply with justice into his circumstances of justice. His error is simply that viewing oneself as equal does not ensure that everyone is viewed this way. One must also have the capacity to view others as having claim-maker standing. To participate in justice, one must be capable of acknowledging oneself simultaneously as a maker of claims, and one against whom claims can be made.

This baseline for participation in justice may strike some as objectionable, as making justice contingent on the wrong sorts of reasons (as so many before me have). However, if we consider cases of individuals who are outside of this standing, I believe it becomes clearer that the fact of solidarity condition is neither too thick a notion, nor the wrong kind of reason. It is only those who are not capable of solidarity, not those who could never be in solidarity, that the solidarity condition excludes from justice's scope. Those who fall outside of the scope of justice will only be individuals whose relationship to those within the scope of justice is that of a moral patient. I consider two examples of such individuals now, and then the case of a sociopath's relation to justice.

In the first example, Patient A is someone in a permanent vegetative state. Patient A is not capable of solidarity and on my understanding of the solidarity circumstance, would lie outside the scope of justice. Though this may seem a repulsive conclusion to some, it strikes me as intuitively correct. Patient A can neither perform duties of justice nor reap the benefits of participation. This is the kind of person we would be right to treat paternalistically as a function of their rational competence. It would not only be impossible to reasonably expect them to fulfill duties, they could not make the right kind of demands either. Such a person will still have moral claims against us—indeed it seems certain that they do—but these will be unidirectional claims that

⁴⁰ Rawls, "Kantian Constructivism in Moral Theory," p.546.

have no reciprocal nature, the sort of claims found in Hume's benevolence condition or Kantian imperfect duties. Society will have moral duties toward these individuals such as to treat them with dignity, to honor their previous decisions about their situation (e.g., no unnecessary measures wishes), and not to cause unnecessary pain. It should be emphasized, however, that these are moral duties, not duties of justice. In recent years civil courts have made rulings on how such individuals can and should be dealt with (e.g., the Terri Schiavo cases which were debated in U.S. courts from 1998-2005). In these instances the court was not asking what kind of duties and rights Patient A had; they asked who had the right to make decisions on Patient A's behalf. Individuals like Patient A may seem to be included in the scope of justice because of the attention given to them by the courts, but they are not. The disputes involve separate agents within the scope of justice who are making claims against each other about who gets trusteeship and the powers that come with it. Patient A herself has no justice rights, but courts may still take an interest in her moral rights being upheld.

Patient A is admittedly an extreme case. There will perhaps be individuals who are not capable of solidarity, but still claim some ability to interact with individuals in the world. In my second example, Patient B is someone who has been in solidary relations in the past but, because of a degenerative brain condition, is no longer capable of such relations. There is something appealing about characterizing this person as within the scope of justice. After all, she clearly used to be. However, as long as she is incapable of the reciprocal structure of claims and duties, she will not have rights and duties of justice, although (as in the case above) she will still have some moral rights. A similar case will be addressed in much greater detail in the following chapter.

There are undoubtedly other cases that may make my account of the scope of justice here seem too narrow or seem to exclude individuals for the wrong kind of reasons. The cases above are meant to illustrate that if one is incapable of solidarity, one is incapable of the kind of human cooperation necessary for distributive justice. These examples, of course, do not encompass the full range of situations in which one is incapable of solidarity, but they give a clear idea of why such individuals are viewed as outside justice's scope. There is another type of person who may seem

excluded from my account, which will certainly raise objections. Some sociopaths, it seems, may never have been capable of solidarity. A sociopath may have been raised in a family, but never felt any solidarity with the other members of the group. Such a person may never have been capable of solidarity, but it seems odd to say they are outside of the scope of justice. In fact, it seems that an important role of any justice system will involve how to deal with such individuals. In these cases, the answers are not straightforward. If someone is genuinely not capable of solidary relations, then that person is not within the scope of justice. Such a person may still be subject to the rules of a criminal system insofar as their actions may threaten the rights of people who are within the scope of that system. In civil issues (e.g., having voting or property rights), a sociopath may rightly be viewed as a freeloader as they make claims without the corresponding reciprocity. Such individuals are extremely rare (Historically, individuals who have committed the greatest atrocities have still usually been members of some solidary groups, for example Hitler, Stalin, Milosevic, etc.) and ordinarily, sociopaths who are outside the scope of justice, would probably be placed by courts into psychiatric care rather than into prisons. Once again such a person would still be subject to a number of moral rights and duties. It is simply their inability to participate in the reciprocal duties of claim-making that excludes them from justice.

Finally, we turn to the problem of paternalism, which was a charge against Hume specifically. Hume argues that a rational species, if not able to make their resentment felt, would fall outside the scope of justice. As Hume puts it, “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.”⁴¹ Paternalism, however, only seems justified as a response to an individual’s lack of rational competence. Further, the constraints of paternalism are constraints of justice. The worry arises because, according to Hume’s view, fully rational individuals could be treated paternalistically and have no standing for objection. This is not a worry for my alternative account of the circumstances of justice. Though rationality will play some role in an individual’s ability to be in solidary relations, many individuals who

⁴¹ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.190.

are not fully rational are capable of solidarity (e.g., children, the majority of the mentally infirm, etc.). So, those who are treated paternalistically would only be treated as such because they are unable to participate in justice—as a function of their rational competence. Those who lack the competence (including basic rationality) to be capable of solidary relations will fall outside the scope of justice. This would include individuals such as patients A and B from the previous examples and infants. Such individuals would still be able to claim the protections of morality. That is, they would still hold moral claims against us, simply not justice claims. In these cases, treating such individuals paternalistically seems justified precisely because they are not capable of making decisions for themselves. In sum, according to my alternative account, paternalism is only justified if an individual's intellectual and attitudinal capacities are seriously impaired. As long as individuals are capable of solidarity, they are afforded the protections of justice against paternalism. This is a thinner condition than Hume's requirement that, to be afforded the protections of justice, one must be able to make one's resentment felt. On my alternative account, paternalism is justified only when individuals cannot make choices for themselves.

In sum, my alternative account of the circumstances of justice seems able to avoid the problems of exclusion and paternalism that plague the standard accounts. In doing so it also avoids some general constructivist criticisms. Allen Buchanan, for example, in his "Justice as Reciprocity versus Subject-Centered Justice," criticizes the constructivist project for reducing rights to contributions.⁴² If equality determines one's justice-status, this is a legitimate worry. A major problem for some standard accounts is that only those who contribute to the cooperative surplus would have any right to social resources as this is a major determinate of equality. While I have excluded some classes of individuals from the scope of justice and ensuing rights and resources, by doing so on grounds of the fact of solidarity, I have narrowed the category of those excluded and also explained why some exclusions are necessary. A desire to include all individuals within the scope of justice does not mean that this is possible. I contend that my account avoids the majority of the criticisms of exclusion while still capturing the intuition that justice does entail reciprocity.

⁴² Allen Buchanan, "Justice as Reciprocity Versus Subject-Centered Justice," *Philosophy and Public Affairs* 19 (1990): 227-52, p.230.

VI. Communitarian Critique

There is still a general criticism of my project as a whole that I have not yet addressed, that of the Communitarian. In this chapter I have argued that the circumstance of solidarity, in conjunction with the circumstances of limited human understanding and moderate scarcity of resources, renders the alternative circumstances of justice much more precise and discriminating than the standard accounts. In the next chapter I will demonstrate in much greater detail how broad the scope of this alternative account is. Before addressing this issue, however, it seems necessary to reject a communitarian criticism against any project that would either support or expand the circumstances of justice within civil society.

The criticism, as found in Michael Sandel's work, charges that justice sometimes works to the detriment of friendship and community. Sandel argues that the existence of the circumstances of justice *can* be morally pernicious. He explains that an increase in justice (or the prevalence of the circumstances of justice) can come about in one of two ways. It can arise when there is injustice, or "it can occur where before there was neither justice nor injustice but a sufficient measure of benevolence or fraternity such that the virtue of justice had not been extensively engaged."⁴³ In the former case there is a clear moral improvement; in the latter, when an increase in justice "reflects some transformation in the quality of pre-existing motivations and dispositions, the over all moral balance might well be diminished."⁴⁴ Sandel's criticism relies on it being true that justice and other moral virtues, such as benevolence and fraternity, are inversely proportional.

Sandel's reason for believing this to be the case is explained when he offers his interpretation of Hume. In *Treatise*, Hume states, "Encrease to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings."⁴⁵ Sandel derives the inverse relationship he sees between justice and benevolence from this passage, explaining that "to invoke the circumstances of justice is simultaneously to concede, implicitly at least, [that] the circumstances of benevolence, or fraternity . . .

⁴³ Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge [Cambridgeshire] ; New York: Cambridge University Press, 1982), p.32.

⁴⁴ *Ibid.*

⁴⁵ Hume, *A Treatise of Human Nature*, pp. 494-95.

prevail in so far as the circumstances of justice do not prevail.”⁴⁶ It should be noted that Sandel concludes this from looking at only one half of Hume’s argument. Hume does explain that if benevolence were unlimited there would be no need for justice. But he *also* explains that if there were *no* benevolence, justice would not be necessary. Hence, it is “limited generosity” and not its absolute abundance or dearth that Hume cites as a circumstance. For neither Hume nor Rawls, with whom Sandel also takes issue, is the virtue of justice meant to replace or fulfill a role that benevolence and fraternity would be equally capable of fulfilling. Rather, it is only when there is a need for some set of principles or rules—and benevolence and fraternity cannot solve the issue—that a need for justice is generated. Even then, however, for Hume and Rawls, there must still be sufficient benevolence that human coordination (and justice) will be possible. Hence, as the circumstances of justice are not inversely proportional to other moral virtues, Sandel’s interpretation is incorrect. Further, his charge that an increase in the circumstances of justice, and thus in justice, can result in a moral loss does not follow. More importantly, the communitarian critique is not pertinent to my own account of the circumstances which puts something very much like fraternity and benevolence right at the core of the necessary conditions for human cooperation and justice.

Conclusion

A final observation about the equality condition merits mention before leaving equality behind. One of the advantages of making equality a circumstance of justice is that it provides a benchmark for treatment of individuals. If people have standing to participate in justice because they are morally equal, it readily follows that the rules of justice should involve treating individuals equally. The fact of solidarity (and my alternative account in general) provides no such obvious correlation. It gives no goal for what principles of justice ought to look like, neither, however, does it prohibit equality as a benchmark of justice. According to my alternative account, a possible conception of justice could still have equality of individuals as a starting point for the rules of justice that would follow. The circumstances merely render some system of human cooperation and justice necessary and possible. They provide content only insofar as they clarify the subjects about which justice is concerned. They do not—

⁴⁶ Sandel, *Liberalism and the Limits of Justice*, p.32.

and should not—transfer values onto those subjects. This, in fact, nearly reverses the roles of equality and reciprocity found in contemporary constructivist theories of justice. Typically, conceptions of justice will make equality a necessary condition of human cooperation, and argue that somehow the conception of justice is one of reciprocity. Instead, I make the fact of solidarity, which necessarily includes reciprocal claim-making and mutual trust, a prerequisite for human cooperation and justice. Equality can still be a feature of a conception or theory of justice, but justice no longer depends upon it.

In this chapter I have proposed an alternative formulation of the circumstances of justice. I began by first, outlining the reciprocal structure of justice rules and rights. I next established my account of the circumstances of justice, which I believe best captures the structure of these rights. I then defended my account against features in the standard accounts. While there can be no test as to whether my account of the circumstances is the definitive account of the circumstances of justice, I have shown that my account is more plausible than the standard accounts. I argued that my account avoids the two major criticisms of the standard account, defined in chapter 2 as the challenge of trust and the problem of exclusion. If I have been successful in both addressing these criticisms and presenting a reasonable argument, then my alternative account of the circumstances of justice should provide, minimally, a better account of the circumstances of justice than the standard accounts.

Chapter 5

The Scope of Justice

In chapter 2, I argued that a problem with the standard accounts of the circumstances of justice, found in Hobbes, Hume, and Rawls, is that they limit justice far too narrowly and this leads to the problem of exclusion. There are a number of cases that fit our intuitions about when questions of justice arise, and corresponding obligations and rights exist, which do not fall within the scope of the standard conception of the circumstances. If the circumstances of justice are articulated correctly, they should, ideally, not only capture a plausible descriptive explanation of when questions of justice arise, but they should provide a plausible guide for cases when it is uncertain whether questions of justice apply. This chapter tests my own characterization of the circumstances of justice by considering whether more of our intuitions about the normative scope of justice are accommodated by this approach than by the standard account. This chapter also considers whether my own account offers guidance when we are uncertain if something falls within the scope of justice.

To test my account, I will begin this chapter by considering situations where questions of justice arise, but which are excluded from the standard account of the circumstances of justice in Hobbes, Hume, and Rawls. In each of these cases I will show how my alternative approach can make room for the case in question and include it within the circumstances of justice. I will follow these inclusive cases with discussion of cases that the standard accounts include in the scope of justice, but which are excluded on my own account. From this discussion will emerge a critical element that marks each of the inclusive situations but not the exclusive situations. Accordingly, the latter half of this chapter asks, what is the principle behind these inclusive cases? This question aims to reveal the types of situations in which justice is applicable; situations where duties and obligations of justice do, in fact, exist. I will answer this question with a discussion of social power as a plausible subject of justice and conclude that even though social power is a good candidate for the subject of

justice, any constructivist subject of justice will still be normatively constrained by the scope of the circumstances of justice.

I. Inclusive Cases and the Circumstances of Justice

It is important to keep in mind in the discussion of Hobbes, Hume, and Rawls that it is not their larger theories of justice that I am addressing herein, but merely their descriptions of the necessary conditions for questions of justice to apply. It will sometimes be the case that their accounts of the circumstances of justice are more inclusive than their theories of justice, or that their respective theories of justice attempt or claim to be more inclusive than their circumstances of justice allow. I largely lay aside any problems of scope generated by their theories of justice and focus only on the scope of justice found in their respective descriptions of the circumstances of justice.

Case 1: Because of the growing demand for new electronics in the West, more e-waste is being generated every year. Many European nations have more waste than they can manage to make safe or store, so they pay undeveloped African nations to take their waste or sell them unusable electronics at minimal prices so they can be stripped for their elements (e.g., iron, silver, gold, etc.). Over time, lead from recycling and dump-sites leaks out of the old cathode ray electronics, enters stream and well water and introduces lead into the water source for a small African village. Many members of the community (and recycling plant workers) begin to experience the harmful effects of lead poisoning.

Intuitively, case 1 seems to belong fully within the scope of justice; it simply seems to be a case in which there is a need for justice but no mechanisms of enforcement. It is important that we not mistake the *need* for justice for the *possibility* of justice. We now turn to various accounts of the circumstances to see if this case is compatible with any of them.

For the sake of chronology I look first to Hobbes and ask whether this case would fall under the scope of justice on his view. Recall that in Hobbes, the circumstances of justice—his story of when it is the case that the obligations of justice exist—involve certain conditions: limited scarcity of resources (including the conflict of interest that follows), rough equality (between individuals), individuals who are instrumentally rational, and individuals who desire peace. With these conditions in mind, case 1 falls outside the circumstances of justice.

Hobbesian equality prohibits this case from being included in the scope of justice. Insofar as one reads Rawls's use of the equality condition in his *Theory* as Hobbesian equality, Rawls would also exclude this case from the scope of justice. In Hobbes, equality refers to equality of mind and body, which includes both limited confederacy and cunning against others. In case 1 there is no equality between the wealthy European nations and the underdeveloped African nations. While it may be possible for the African nations to join in confederacy with one another or with some other nation, it is doubtful that such a union would do anything to lessen the disparity in hard power between the nations participating in case 1. Hence, case 1 is out of the scope of the Hobbesian and early Rawlsian circumstances of justice.

Whether Hume would consider case 1 an instance in which questions of justice have application is not as definite. Recall from chapter 2 of this project that what is called the equality condition in Hume is not equality as such, but the ability to make one's resentment or resistance felt, where resentment is a passion that is experienced via Humean sympathy or empathy. In short, the application of justice to this case depends on whether the stronger party (the European nations) actually feels enough empathy with the weaker group that the weaker group's resentment is felt by the stronger.¹ So, it could be the case that this instance is included in Humean justice; however, it may not be. Inclusion would depend on the empathy of the Western nation. This kind of contingent status seems as intuitively unappealing as leaving the African village out of the scope of justice because of its lack of equal power. However, as Hume's commentary on women and Native Americans in the *Enquiry* makes clear that he disapproved of the way that the Natives were treated by the Europeans, we might conclude that Hume thought empathy should be extended to the Natives and, by extension, to most humans. Unfortunately, his analysis of making resentment felt does not prescriptively support this. Hence, we must conclude that, even if Hume found such exclusion wrong, his theory cannot support this judgment. In sum, it seems that the African village people would not stand in a relationship of justice to the European nations.

¹ When I speak of the state feeling empathy or sympathy, I mean something like, when sufficiently many of a state's citizens feel empathy toward someone/something that it is required for the state to act in response to that empathy.

We turn now to my alternative account of the circumstances of justice to see if it would include case 1 within the range of instances in which questions of justice apply. To begin, limited human understanding and limited scarcity of resources definitely obtain. While there is certainly disparity in the economic resources involved, they still exist to the degree that there are enough goods to provide for everyone's survival given some cooperation, which is the lower threshold of this condition. The fact of solidarity requires a little more consideration. I mentioned in chapter 3 that a cosmopolitan response to such a global problem is to simply claim that solidarity exists and therefore duties of justice also exist. On my interpretation of solidarity, however, there is no solidarity between the two groups; the wealthy European nations and the poor African village have few connections or associations. This, however, does not exclude the case from justice. On my view the *fact* of solidarity in the world is what matters. That both groups are *capable* of forming solidary bonds, and consequently are capable of trust and the obligations and claims that come with such relationships, is all that is necessary for human cooperation to be possible.² This condition is met in case 1.

In sum, my alternative description of the circumstances of justice is better able to fit our intuitions on this case than the standard accounts. One could here object that, as it is not possible to enforce any rules to control the impact on the local Africans, it is not possible to include this in the scope of justice. My response is that this objection confuses the circumstances of enforcement with the circumstances necessary for human cooperation and ensuing duties of justice to exist. The European nations in this case do have duties toward the African villages in question. This would be true even if the African village never makes claims against these nations or, if they did make claims, if no enforcement mechanisms ever existed to require the performance of those duties. We move now to a second case which considers interpersonal relations and the scope of justice.

Case 2: A couple, Jack and Jill, move in together and decide to split the cooking and cleaning duties evenly as they both have demanding jobs and neither can spare the

² Recall from chapter four that the capability of solidarity is distinguished from feeling empathy insofar as it requires merely some understanding and an imagination that is able to affect one's attitude, not that one feel empathy with others as in Hume.

extra time. Jill hates cooking and Jack enjoys it so Jack is allotted the job of cooking the meals, while Jill is given the task of cleaning up after them. Over time, Jack cooks less and less, making more of a mess when he does cook. Jill slowly takes on more of his share of the cooking as well as having to clean more when he does cook. Jill becomes increasingly overwhelmed by the amount of work she now has to do, but says nothing as she doesn't feel she has any standing to complain. She rationalizes that she is, after all, the woman in the relationship.

Initially, case 2 may strike some as outside of the scope of justice. This arises, I think, from recent trends in thinking about justice only in the context of institutions. But even a simple practice such as the co-dependency of cooking and cleaning can be an institution. This case will appear to most people as involving some sort of injustice. That Jill feels she has no standing to speak up and try to change the situation she is in is unjust in a very important way. On the standard accounts of the circumstances of justice, however, this case seems to be excluded from justice's scope.

With regard to Hobbes's circumstances of justice, the parties are rational and forward-looking. We can assume they desire peace. This may, in fact, have something to do with Jill's discomfort in saying anything to Jack about neglecting his share of the chores. Jack and Jill seem to be roughly equal, even if there may be some background cultural conventions that lead them to view themselves as unequal. So far, it looks like Hobbesian justice may have room for this case. But there is one final condition to consider: limited scarcity of resources. Hobbes's concrete examples of limited resources include cattle, wives, children, others' persons, and other physical goods.³ In case 2, *physical* resources are not in dispute, apparently excluding the situation from Hobbes's justice. In fairness, there is a risk of anachronistic error in forcing Hobbes's state of nature to apply to the scope of all justice. Had Hobbes mentioned any non-physical resources, we might more plausibly extend his scope of resources. As he did not, and as I believe my interpretation to be a plausible reading of Hobbesian justice, case 2 appears to fall outside the scope of Hobbesian justice.

Turning to Hume's account of the circumstances of justice, we can assume that the equality condition is met in case 2. The two individuals living together in the above situation certainly seem likely to have sufficient Humean sympathy with one another that each could make his or her resentment felt by the other. The sociability

³ Hobbes, *Leviathan*, p.88.

condition is met. Yet, it is unclear whether the limited scarcity of resources condition is met. Hume, like Hobbes, seems concerned primarily with the resources of physical property. His examples of resources in the *Enquiry* represent “external conveniences:”⁴ fare, fountains, beverages, clothes, and land (and possibly labor including land’s tillage and navigation). In the *Treatise* he speaks of property as the *objects* in a relation to oneself. However, Hume also explains that in a state of abundance of goods, no labor would be required; instead, “[m]usic, poetry, and contemplation form his sole business” and “every other social virtue would flourish.”⁵ Hence, on the upper bound of the resources condition, there is an absolute abundance which involves so much leisure that there is no need for justice. Leisure is not the kind of resource Hume is explicitly concerned with distributing. Nevertheless, his mention of such abundance of resources that “conversation, mirth, and friendship [form one’s] sole amusement,”⁶ does at least carry the implication that time and leisure—having time for friendship and mirth—are considered resources. In sum, it is unclear whether Hume would extend his understanding of resources beyond physical goods, but certainly it is possible.

Interestingly, it is the limited generosity condition that clearly rules case 2 out of the scope of Humean justice. On the overabundant generosity side of the limited generosity spectrum, Hume argues that, in such a state, “the whole human race would form only one family . . . without regard to property.”⁷ He continues that it may be difficult to find examples of this in the world, “but we may still observe, that the case of families approaches towards it” until the distinctions of property is lost. He insists that “between married persons, the cement of friendship is by the laws supposed so strong as to abolish all division of possessions.”⁸ For Hume then, it seems that the domestic alliance in case 2 actually has too much generosity for justice to be useful and consequently it would fall out of the circumstances of Humean justice.

In Rawls (who is guided by Hobbes and Hume), the conditions of equality and generosity are met in case 2. This case involves individuals who exist in the same time

⁴ Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.183.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p.185.

⁸ Ibid., p.185.

and geographic territory and between whom mutually advantageous cooperation is possible. We can assume that the individuals have conceptions of the good which they wish to pursue. In fact, this could be a reason Jack is neglecting his duties at home. He thinks they interfere with his pursuit of his life plans and his conception of the good. Whether this is the case or not, it is plausible that this condition obtains and, for the sake of the argument, we will assume here that it does. We are left, then, with the question of moderate scarcity of resources. Although Rawls claims to follow Hume, he states that “moderate scarcity [of resources is] understood to cover a wide range of situations. Natural and other resources are not so abundant that schemes of cooperation become superfluous.”⁹ In his discussion of the circumstances of justice, Rawls only explicitly addresses “natural and other resources,”¹⁰ which is unsatisfactorily vague. Later, however, in his original position, he is concerned with the distribution of primary goods (i.e., rights, liberties, income, wealth, and the bases of social self-respect). His description of natural primary goods is even broader, including intelligence, imagination and health. So, while Rawls’s discussion of the circumstances leaves it doubtful that he would include this broad list of resources from the original position, rather than the restricted list of his circumstances of justice, it is at least possible. The lack of clarity in what Rawls considers to be the full range of relevant resources leaves it, at best, unclear whether case 2 would be included in the Rawlsian ambit of justice. The inclusion of case 2 in Rawlsian justice ultimately depends on how committed Rawls was to the Humean view of the circumstances, as opposed to the wider conception of goods implied in his discussion of the original position.

According to my alternative description of the circumstances of justice, case 2 would be included in the scope of justice. We can assume that the fact of solidarity obtains, as does limited human understanding. My own explanation of the moderate scarcity of resources explicitly includes not only physical goods and resources, but is broadened to include Rawls’s primary goods, time, and any other similarly scarce, valuable resources.¹¹ In case 2, time is the resource being abused. As Jack neglects his

⁹ Rawls, *A Theory of Justice*, p.110.

¹⁰ Ibid.

¹¹ I intentionally keep this as the slightly vague “any similarly scarce, valuable resource” as I intend for scarce resources to represent the idea that resources can

obligations and makes Jill's chores harder, he is essentially depriving Jill of her finite resource of time—and probably the bases of social self-respect. The problem is that Jill feels she has no standing to address the issue and assert her right to her own time. According to my alternative account of the circumstances of justice, while Jill may not feel she can assert this right, according to a previous agreement she does in fact have this right and the standing to claim it. Jack, minimally, owes her reasons in support of his behavior. It is likely that an alteration in the agreement or his increased efforts to restore their practice of sharing the cooking and cleaning is in order. The situation has all the characteristics necessary for human cooperation to be possible in such a way that justice is possible. According to my account, case 2 is an example of injustice.

Case 3: In the initial drafting of a new Nation-State's constitution, the drafters decide that all white males will have the right to vote for their representatives and on some legislation. In particular, this excludes women and the non-white slave class within the society. Some women and members of this slave-class are upset that they are not allowed to vote. Nothing is done to change the original decision. This is simply a matter of who participates in politics and who does not. Women and non-white slaves have always been excluded. No real protests ever arise despite some of the marginalized individuals being angry about their situation.

Case 3 will strike most individuals as a gross injustice, probably because it is such a familiar case. The US constitution, among others, was drafted within a similar context and only after decades of protest was the right to vote extended to the non-white slave class or women. Few people can now reflect on this reality and not still be enraged at the past injustice. But would this situation fit into the standard account of the circumstances of justice?

This case appears to satisfy the Hobbesian conditions of forward-looking rational individuals who desire peace. We can assume there is a moderate scarcity of resources in this situation. There is a marked lack of clarity regarding the equality condition in case 3. Intuitively, it seems obvious that the slave-class, the women, and the white men in this case should all be considered equal.

exist in a state of scarcity and that any such scarce resource could, potentially qualify as the kind of scarce, valued resource necessary for justice consideration. I do not want to offer a list that may be interpreted too narrowly as the only possible scarce resources relevant to justice.

Initially, this may strike some as similar to the situation in case 2 in which Jill had standing to claim a right, but simply did not *feel* that she could. The right still existed, however, so it may seem that equality, even unrecognized, would still exist. Equality, however, is a much messier notion than a right.

A right will either exist or not. This is not to imply that there is universal agreement on when rights do exist. Nevertheless, if one can show that a right does indeed exist, it follows that the right can be claimed. To show that a right exists, theorists will tend to appeal to salient facts about a given situation, including facts about human nature. Equality, however, often is a much more subjective notion and how one views others all too frequently determines who counts—or does not count—within some justice-group. In case 3, the white men do not view the slave-class or the women as sufficiently equal and it is unclear if these men are positioned in such a way that they could have known the women and slaves are equal. In modern debates it is popular to speak of equality as moral equality but it is in no way clear that this is what Hobbes had in mind. Hobbes speaks of equality in mind and body such that no person can rule the others. While this may be true regarding the women in case 3, it is not true regarding the slave-class who are in fact ruled and owned. At best, it is unclear whether Hobbes would consider case 3 as meeting the equality condition with regard to the women, though even if he does he would clearly still exclude the slave class.

Hume's conditions of sociability, limited benevolence, and limited scarcity of resources are met in case 3. What is called his equality condition is where his account excludes case 3 from justice. Hume makes justice dependent on making one's resentment or resistance felt, which is a function of one's sympathy with another. Case 3 excludes the slave class from this sympathy; therefore case 3 is outside the Humean scope of justice. Given Hume's commentary on women and Native Americans in the *Enquiry*, we can assume he thought such exclusion was wrong and that sympathy should be extended to most, if not all, humans. However, as his analysis of making resentment felt does not prescriptively support this, we must conclude that at least the slave class of case 3 would have no grounds of *justice*—only humanity—to object to their exclusion from voting.

I now turn to Rawls. Excluding the equality condition, Rawls's other conditions all seem to be met in case 3. There is the possibility of cooperation and limited human understanding, the fact of pluralism seems to mark the people, and we can assume that there is limited generosity. This brings us to Rawls's equality condition. Rawls's explication of equality in the circumstances requires that "no one among them can dominate the rest."¹² We are left with the same problem presented by Hobbes's account: women may or may not be included and slaves are definitely not. Case 3 is exactly a case of one group of people dominating others, which would exclude the case from the scope of justice. However, if we turn to the conception of equality (qua moral equality) found in Rawls's "Kantian Contractualism in Moral Theory," the case may be included in the scope of justice. There he says, "everyone is equally capable of understanding and complying with the public conception of justice; therefore all are capable of honoring the principles of justice and of being full participants in social cooperation throughout their lives."¹³ Rawls clearly wants to avoid the implications of the equality circumstance of justice. Though Rawls explains equality in this later work as though it was an inclusive idea, this is clearly not always the case. Not everyone is capable of complying with rules of justice and participating in social cooperation. In still allowing equality to mark the participants of his theory of justice, he opens his account to worries of exclusion. In his later work his exclusions are limited to those who actually cannot participate in social cooperation or honor principles, but the reason for this is left unstated. (Largely because Rawls avoids the problem by stating the role of equality inclusively.) It appears that Rawls may want to include case 3 in the scope of justice, but he doesn't give us reasons why equality is inclusive, and why when it isn't—and equality cannot always be inclusive—that is right. In sum, this case could fall into the Rawlsian scope of justice, depending on how far one understands Rawls to follow Hobbes. At best, however, we are lacking reasons for inclusion on his later view.

¹² Rawls, *A Theory of Justice*, p.110.

¹³ Rawls, "Kantian Constructivism in Moral Theory," p.546.

Finally, we turn to my alternative view in which case 3 clearly falls within the ambit of justice. Case 3 displays limited human understanding and we can assume that limited scarcity of resources also obtains. The fact of solidarity is also present. In fact, the exclusion and lack of equality could be understood as an in-group/out-group divide with solidarity—specifically, white male solidarity—actually causing the divide. Additionally, all of the individuals in question will be capable of solidarity and, even if a few are not, it is still the case that the society is marked by the fact of solidarity. In sum, case 3 falls clearly within the scope of justice on the alternative account. This allows us to explain why excluding women and slaves from the privileges of a legal system is unjust.

II. Exclusive Cases and the Circumstances of Justice

Thus far, I have given three examples and corresponding analyses to show that my alternative circumstances of justice include many cases that intuitively fit with our understanding of when justice is applicable, but which the standard accounts do not allow. These examples answer the demand for the circumstances of justice to include the full range of situations we understand to be just or unjust. This effort is in tension, however, with a demand to exclude situations that do not give rise to questions of justice. Justice, after all, must have merit apart from other obligations. Finding a balance between these two demands within the alternative account of the circumstances of justice will show, minimally, that the alternative account is a plausible account of the circumstances of justice. Accordingly, I now turn to two examples that will generate mixed intuitions regarding whether they should fit into the scope of justice. I will show that they are excluded from my alternative view and offer analysis to support this exclusion.

Case 4: In a famine-struck nation in which hundreds of thousands of individuals have already died and many more will soon die if they cannot get food, the government seizes certain rough food sources (e.g., grains, milk, and clean water). It redistributes the goods to the most needy individuals to prevent their dying. The government tries to give some compensation to the farmers from whom the food was seized, but it cannot afford to fairly compensate them. Hundreds of farmers take a fairly large

loss compared to what they had hoped to sell their products for. However, thousands of lives are saved or sustained through the redistribution.¹⁴

This case will strike many as falling within the scope of justice. It is, after all, the government who is acting on behalf of its citizens. According to my alternative description of the circumstances of justice, this case would not fall within the purview of justice. The case meets two of the conditions of my alternative account: the fact of solidarity and the limited human understanding conditions. It fails, however, to meet the limited scarcity of goods condition. This condition, recall, exists as a mean between a lack of the minimally necessary goods, when coordination is not possible, and an abundance of goods, when coordination is not needed. In this case, the dearth of goods is such that whatever rules of justice do exist in this nation (regarding the institutions of property and food), it is not wrong for the government (or any other individuals or group of individuals) to disregard them in order to feed its citizens (or fellow citizens). On my view, this means there is a moral consideration—namely, the moral right to life—that is stronger than the rules of justice in this situation. According to my understanding, we have justice rights and duties which correlate with some moral duties, however, justice duties (e.g., I may have a duty not to steal from you) exist at least partly *because* you have this same duty regarding me. It will sometimes be the case that morality trumps justice. The reverse will also sometimes be true in cases where the need for some justice duty is stronger than the need for a particular moral duty in a given context.¹⁵ For instance, Robin Hood may have had a duty of morality to give to charity, but this can hardly be said to trump his justice duties not to steal, even if he did so to give to charity. If I am right, that justice duties are reciprocal, and moral duties have a different—usually

¹⁴ This case is similar to a case given by Hume and which has been addressed repeatedly in literature on the circumstances of justice as a situation that should be within the scope of justice. See for instance, Broad, *Five Types of Ethical Theory*, pp.96-98, and Hubin, “The Scope of Justice,” pp.9-10. Hume, however, actually uses the example to show that a dearth of resources falls outside the scope of justice, in Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, p.186. I use this example to respond to a possible criticism of my own account, namely, that it is too narrow because limited scarcity of resources should not make any difference to the normative application of justice.

¹⁵ For clarity, I understand justice to be a subset of morality. So that duties of justice are a species of moral duties, but a different kind that can be weighed against other moral considerations.

unidirectional—structure, it will sometimes be the case that governments ought to enforce moral as well as justice rights and duties.¹⁶

I am claiming that case 4 falls entirely outside the normative application of justice and that justice's duties and rights are in this case suspended, at least with regard to rules of property and resources. There seem to be grounds for an objection here, that after the government has seized the farmers' property, regardless of whether this act is unjust, justice is now more necessary than ever.¹⁷ The farmers *need* justice to receive fair compensation, and the starving citizens *need* it to ensure they each get a share of the goods that have been seized. And human cooperation is still *possible* because there are a number of just ways to distribute the seized food. For example, every person could get an equal amount, or an amount based on need, rather than simply seizing the food and killing others to ensure that one has enough for oneself and one's family.¹⁸

My response to this objection is in two parts. First, the claim that under the conditions of case 4 justice is more necessary than ever (or as necessary as ever) may be true, but in this situation justice (or more specifically the human cooperation necessary for justice) is not *possible* and so it cannot be delivered. Equal distribution or distribution of resources according to need is not necessarily a distribution of *justice*, only a distribution that aims at achieving the *moral* end of keeping the most people alive (the reason the food was seized in the first place). The intuition that an equal distribution is better than killing others to ensure you have enough to sustain yourself is well-founded, but this is because it is morally wrong to end someone's life—or put her life in danger by stealing her food—not, in this case, because there are corresponding justice duties not to do so.

The second part of my response to this objection is that there may still be some duties of justice that obtain, given that some human coordination is possible. For instance, once the grain has been seized and redistributed, I may refrain from stealing your grain so that you will refrain from stealing mine, and we may even

¹⁶ See chapter 4, section I and chapter 6, section VI for full discussions of the structure of moral vs. justice duties.

¹⁷ See Vanderschraaf, "The Circumstances of Justice" and Hubin, "The Scope of Justice," among others that give arguments along these lines.

¹⁸ This is actually Broad's suggestion in Broad, *Five Types of Ethical Theory*, pp.95-98.

make an agreement of some sort to act in this way. There is no reason to think that these duties toward one another are not justice duties. They are reciprocal duties that we all hold in common with one another which exist under the circumstances of justice. Notice, however, that once the grain has been redistributed the limited scarcity of goods condition is met. If it is not met, if several families are still starving, and they steal from other families so that they too can eat, I think it fits many people's intuitions to say that this is not an act of injustice, but survival. Survival seems to supersede justice, probably because a moral right to life seems to supersede justice rights to property.

In sum, in case 4, the government's seizure of the farmers' foodstuff and its ensuing redistribution is not, on the alternative account, within the scope of justice. Stronger moral considerations would take precedence. However, this does not involve an indefinite suspension of justice. When all three conditions of justice are met, justice will apply, provided its duties and rights, that is the right kind of human coordination regarding specific goods is both necessary and possible.

Before putting aside the discussion of the parameters of justice according to my alternative account of the circumstances of justice, I turn to one final case.

Case 5: Sam is twenty. She has a genetic degenerative brain disease. Until the age of eighteen she functioned as normally as anyone else. She went to school and did well; no one knew the condition existed. In the last year she has declined significantly. She has lost enough motor function that she is now confined to a wheelchair and even needs help eating. She still shows signs of experiencing some emotions, but even these are usually reflective of her state of bodily comfort. Sam's parents receive some government assistance to take care of her. Recently, the government tax service charged her for not paying taxes; a judge ruled her incompetent and exempted her from all legal duties.

Case 5 will strike most people as correct: significantly disabled individuals should not have to pay taxes or meet other civic requirements like serving on a jury. The fact that Sam receives government assistance to help with her medical care does not seem to alter this. According to the standard accounts of the circumstances of justice, Sam may be considered as within the scope of justice. It is unclear whether she meets the equality condition, but she may. In the later work of Rawls, she would be seen as morally equal. On Hobbesian equality, she may be

considered to be in confederacy with those who would act for her. On Humean equality, we can imagine people would have enough sympathy with her that her resentment could still be felt. On the Hobbesian and Humean accounts of the circumstances of justice, Sam would be likely to be included in justice's scope. Interestingly, it is on both of Rawls's accounts that case 5 is excluded from the circumstances of justice.

On Rawls's early account, the circumstance of limited human understanding excludes Sam from the ambit of justice. After all, without some effective degree of cognitive competence, one would neither understand why the rules of justice are needed nor how to follow such rules. Sam could do neither. In the formulation of the circumstances of justice found in Rawls's *Political Liberalism*, however, he abandons the limited human understanding condition but adopts the fact of pluralism. He explains the fact of pluralism as the divergence of life plans and conceptions of the good, in addition to taking one's plans to be worth pursuing.¹⁹ Sam, however, has no life plans or conceptions of the good. On the Rawlsian scope of justice, she would not be included. However, most theorists who deal with the standard account criticize Rawls for including his early condition of limited human understanding. Those theorists prefer to include merely limited scarcity of resources, limited generosity, and equality. According to this popular version of the standard account of the circumstances of justice, Sam falls within the ambit of justice.

Based on my alternative explanation of the circumstances of justice, Sam would be excluded from the scope of justice because she is not capable of solidarity. The fact of solidarity makes human coordination possible in the way necessary for justice, because it requires that individuals exhibit the necessary capacities for taking on responsibility in a reciprocal relationship. Sam, however, cannot experience the capacities to trust, to be empathic, to take on duties or have interests, etc. Sam pays no taxes, serves on no juries, and owns no property because she cannot fulfill any duties of justice. Her society does not owe her assistance with her medical treatment for reasons of justice; rather, they offer it to

¹⁹ Rawls, *Political Liberalism*, p.66.

her because it is a good thing to better someone's quality of life.²⁰ If the case were altered and Sam had accidentally killed someone while driving, having had a seizure before her initial diagnosis, at best we could call the situation tragic; we could not call it *murder*. What distinguishes murder from what the animals might do to one another is the fact of solidarity: the capacity to trust and be trusted, to feel empathy or be disposed to it, to take on obligations and to claim them against others, and the various other abilities required by the capacity of solidarity. Rawls's circumstance of pluralism, which involves the ability to plan, is one component of this, but it does not clearly explain what in particular makes something a wrong of justice.

One might object that if Sam is killed, it would still be murder, and so she is still in the scope of justice. My response is that the wrong captured by this intuition responds to the violation of the moral duty not to kill, and does not represent a justice duty. So, in Sam's case, the state provision of some medical care has the unidirectional structure of a moral duty, and is not a reciprocal justice duty. Even the fact that Sam had to be ruled incompetent in a court does not bring her into the scope of justice. In this instance a judge made a formal acknowledgement that she was no longer within the scope of justice. The fact a judge made the decision is simply because the justice system within Sam's community gives judges the authority to decide such things; it could equally be recognized by any other member of her society that Sam is now out of the scope of justice and has no obligations to the state.

Regarding this case, both my own and Rawls's later account of the circumstances of justice definitively exclude Sam from justice. Rawls's approach seems well-motivated but his reasons are not clear enough to guide us in other cases in which it is unclear whether it falls within the scope of justice. It is not *only* Sam's inability to plan and value her plans that excludes her; it is that she is wholly incapable of making claims or fulfilling duties held against her. She no longer trusts

²⁰ What I have in mind, however, is a system of rights and duties in which some moral duties that a society generally considers to be important enough are enforced by the system of governance already in place for the enforcement of societal duties. This does not mean moral duties become duties of justice. Consider, if the government altered its policy and stopped assisting families of the severely handicapped it would be seen as very unfortunate and even wrong, but not as unjust.

individuals to perform in particular ways toward her either, though she may rely on them. In sum, on my alternative description, we can see that Sam is—and should be—excluded from the scope of justice, though she is still subject to all moral duties, some of which may still be mandated by an enforcing body such as a government.

Through the course of the preceding discussion, I have illustrated the general scope of where justice applies within my alternative depiction of the circumstances of justice, as well as how my account can be used to assess situations, and whether they are appropriate for the application of justice. These five cases do not represent a comprehensive list of all the possible kinds of cases where the scope of justice is called into question. Rather, they represent a sample aimed at demonstrating that my alternative explanation of the circumstances of justice fits much more plausibly than the standard accounts with many of our intuitions about when justice should apply. For example, my account clearly includes individuals, international situations, and marginalized classes of individuals not traditionally viewed as equal, while the standard accounts have excluded such cases. Other examples, including groups of people traditionally left out of the scope of justice, will also be included in my proposed account. This illustrates that our intuitions on inclusion fit more closely with my alternative circumstances of justice than with the standard accounts. In contrast, I have excluded some persons from the scope of justice that the standard view may not. For some, these latter cases may not fit quite as well with our intuitions of justice; for many they still will. I have shown a concrete, though controversial, example of excluding severely mentally handicapped individuals from the scope of justice, and have given reasons explaining this exclusion. Hopefully, my reasons have more appeal than the Rawlsian reason for doing so. My account also explains why justice systems usually exempt individuals like Sam from any legal duties. Even if this final case does not fit precisely with our considered intuitions about justice, I believe my account of the circumstances has better addressed the tensions for inclusion and exclusion, and provides a more useful guide when our own intuitions about justice are unclear.

III. Diagnostic: the Subject of Justice

In the first half of this paper I offered a defense of the scope of justice set out by my alternative account of the circumstance of justice. This discussion anticipated the criticism that my description would not fit with our intuitions about when justice obtains. Another criticism one may make of this project is that using the circumstances of justice approach to define the scope of justice is mistaken, and an alternative methodology should be encouraged. In this section I explore the leading alternative method of defining the scope of justice, and defend the circumstances of justice approach to delineating the scope of justice against this.

In political theory it has been popular to define the scope of justice by seeking to establish a subject matter of justice, rather than the circumstances of justice. Though the debate became most heated after Rawls claimed the basic structure (the constitutionally endorsed and economic institutions) as subject, the question has been at the center of political debate much longer than this. I believe, however, that this method is subtly misguided as will presently become clear. That is not to say that there is no use in determining a subject matter of justice; however, establishing a subject of justice will not accurately forecast whether questions of justice have application or not. A good account of the circumstances of justice should be able to accurately address questions of application, as well as accommodate a plausible subject of justice. Hence, my analysis in the following section supports a specific, plausible subject of justice, but ultimately rejects the methodology which determines the scope of justice via the subject of justice, rather than by considering the circumstances of justice.

Examples of the scope of justice in the first half of this chapter have explicated the parameters of my approach to the circumstances of justice and, in doing so, have provided us with the means to ask a diagnostic question: What organizing principle do the cases of inclusion have in common? Put another way, what common characteristics are present when the alternative account of the circumstances of justice obtains? An answer to this question will illuminate a subject of justice that conforms to my explanation of the circumstances. If the answer seems plausible, this will lend more weight to my account as a plausible—perhaps even the right—account of the circumstances of justice. Thus, my purpose here is not to provide a full defense of the subject matter of justice. It is rather to

see if, given the parameters of justice I laid out in chapter 4, and the examples given in support of these parameters in the first half of this chapter, we can arrive at a subject of justice that also supports my alternative description of the circumstances, and then evaluate this subject's ability to elucidate when justice has application.

One distinct theme running through cases 1 – 3 above (the cases included in the scope of justice), is that each of them occurs within the context of some broadly conceived practice. This is no new idea in constructivist explanations of justice. In fact, the three thinkers who constitute the standard account of the circumstances all rely on practices in different ways to form their own accounts of the subject matter of justice. In Rawls's case practices constitute the basic structure, which ought to be made to coincide with the principles of justice that come out of the original position. This means constitutionally endorsed institutions must conform to the principles of justice, and they should be changed if they do not. For Hume, justice is concerned with property conventions and promising. In both cases, justice applies to certain conventions that are just because of the way they arose, and legitimate only after they have been tested by time. Because they arise in answer to a need for coordination and rules governing the issues of property and promise-keeping, in conjunction with the fact that they do solve this task of stabilizing property and promise-keeping, Hume finds that the conventions simply are just. In Hobbes, promise-keeping is the core of his theory. Justice involves keeping one's covenants. These covenants include not only the covenants to endeavor peace and respect a sovereign, but the agreement to obey whatever rules the sovereign sets out. Until the practice of covenant making is in place in civil society there is no justice. For Hobbes too, justice is a practice.

The circumstances of justice do not require an appeal to particular practices. It is the concept of justice that makes practices a central feature of justice, that is, part of the task of justice is to respond to the problems that arise because of the wide range of practices. Even so, the motivation behind Rawls's adoption of the basic structure as the subject of justice is still appealing. He argues that the basic structure is that with which social justice is primarily concerned because of the profound effect of injustices at this level. If we consider why the effects are so profound, it seems that it is not the fact of *constitutional* coercion or the fact of the *state* that explains this. Rather,

it is the fact of these institutions' coercive power over people, which is to say the profound effects they have on people. Though Rawls never says it explicitly, we can extrapolate from his work that the problem with which justice is most concerned is some form of institutional power.²¹ But with what kind of power, specifically, is justice concerned?

With this analysis of Rawls's basic structure in mind, we can return to my examples above and find that cases 1 – 3 share a theme of social practices, albeit at a variety of levels. By social practices, I mean practices whose phenomenology requires more than one individual for it to be performed at all. Their being social automatically excludes from our consideration practices such as the practice of waking up at six in the morning or practices to develop skills, such as woodcarving, which require only one individual, though they may sometimes involve more than one individual. Even if there is more than one individual involved, what distinguishes a social from a non-social practice is that the non-social practice involves no dependency on others' participation for the practice to continue. What is particularly striking about the social practices in the first three cases is the rich opportunity for coercion, for the abuse of power with which Rawls was so concerned. Diagnostically, when the circumstances for justice exist, the problem that justice must solve (to meet Requirement N) is to protect individuals from coercive power in social practices. The discussion will now turn to an analysis of the plausibility of social power as the subject of justice. I will argue that social power is a plausible contender for the subject of justice that fits well with my account of the circumstances of justice.

G.A. Cohen responded to Rawls's allocation of the basic structure as the subject of justice with the criticism that this subject is too narrow. In fact, Cohen believes that all acts and choices of individuals should be the subject of justice because the opportunity for coercion is so pervasive. In "Power in Social Organization as the Subject of Social Justice," Aaron James responds to Cohen's criticism. James offers a compelling defense of Rawls, and an insight into social power, that fits well with my account of the circumstances of justice, and the proposed subject of justice currently under discussion. James argues against Cohen on the grounds that the structure of

²¹ A similar line of reasoning is found in Aaron James, "Power in Social Organization as the Subject of Justice," *Pacific Philosophical Quarterly* 86 (2005):25-49.

principles of justice demands that justice takes place in social practices. However, James does find it useful that Cohen clarifies the fact that, in focusing on justifying his use of the basic structure, Rawls never got around to justifying the rationale behind his practice-based conception of justice. That is, “[Rawls] has not identified the form of importance characteristic of social practices in virtue of which we treat the class of principles for their guidance and assessment as a class of principle of a special moral kind.”²² James then attempts to bridge this gap by offering up social power as the subject of social justice.

Traditionally, according to James, the state has been cast as the paradigmatic subject of justice. This is because the state has *creative power* to realize goods through the coordination of actions: goods such as freedoms, protections, efficiency, etc. Additionally, the state claims *power as control*. This includes behavioral, exclusionary, and distributive controls as well as dangerous power. Examples of these kinds of power are: the power to penalize and to constrain, the power to decide who votes or is a citizen, the power to distribute wealth and create prerogatives of office that lead to corruption.²³ James insists that each of these social powers is present in some form in a variety of social practices that mark all societies, such as games, labor movements, school-yard cliques, academic networks, etc. In each of these social practices, James explains, it is the activity of the group as a whole, not specific members, that creates these forms of social power. Social power is created by the structure of coordination, which is never subject to the will of a particular agent. James here answers the question he set out to address, Why is it that “justification to persons in the context of a social practice might have a distinctive kind of significance in virtue of which a distinct concept of right is appropriate[?]”²⁴ He responds that there is need to justify a social practice to a person because that person may be subjected to some form of power, whether it be coercion, constraint, exclusion, inadequate or unequal provision, precaution, or protection. What is unique about seeking justification for a group’s social practice is “that no particular person can directly regulate how the relevant form of power is exercised.”²⁵ When an individual

²² Ibid., p.39.

²³ See Ibid., p.32. for more on these types of power.

²⁴ Ibid., pp. 41-42.

²⁵ Ibid., p.42.

abuses power (e.g., carelessness, recklessness, or negligence by a doctor), that person can be directly asked for a justification of his or her actions. A group cannot be asked. Someone subject to the power of a group's social practice must demand justification from the group as a whole. For the practice of making and assessing such demands, there is justice.

With this analysis in mind, we now ask whether social power, as conceived by James (and probably also Rawls), is a plausible subject of justice, and whether it is a plausible description of when the circumstances tend to obtain. Certainly, when the fact of solidarity exists, social power is a factor. In chapter 4, I explained that solidarity leads to a need for justice, not only because there is a need to regulate interaction between groups, but also a need to regulate abuse of power within groups. Minimally, we can say that when the fact of solidarity obtains, there is pervasive opportunity for social power (and its abuse). This power is compounded by the existence of a moderate scarcity of resources—particularly on my broad conception of resources, which includes time, the Rawlsian primary goods, and any other scarce, valuable resource. These involve what social power will typically abuse: one's time, social self-respect, income, etc. Limited human understanding will of course exacerbate these issues. In fact, if we imagine a society in which we could all understand any abuses of power whenever we saw them, it seems that society would be better positioned for stopping and preventing such power abuses, and have little to no need for principles of justice.

It appears then that in instances where my account of the circumstances of justice obtains, my description of the circumstances is compatible with a subject of justice that is in turn compatible with Rawlsian and other Constructivists' accounts of the subject of justice—social power.²⁶ Furthermore, social power has strong intuitive appeal as the subject of justice insofar as it supports the notion that any form of coercion requires justification to the individual being coerced. This value has been a cornerstone of liberal political philosophy since Hobbes. Indeed, any political theory that requires voluntarily submitting to obligations of justice, or having duties because of some benefit received by the individual, can be seen as attempting to capture the

²⁶ For instance, social power seems equally compatible with a Scanlonian account of justice.

intuition that coercion requires justification. There is room to accommodate this intuition in any account that leaves open the possibility of social power as a subject of justice. Minimally, this supports the alternative account of the circumstances by allowing an appealing subject of justice.

Having isolated at least one possible subject matter of justice that is compatible with the alternative formulation of the circumstances of justice by considering features that merit inclusion, we now turn to exclusive cases. Here we will ask, is social power still a feature? After answering this, we ask whether this matters and begin to see the limits of defining the scope of justice with the subject of justice instead of the circumstances of justice. Looking at the two examples of exclusion above, it seems that in at least one case, social power is present. In case 4, when the famine-stuck nation redistributes farmers' food stores to feed starving people, there is clearly an exercise of social power. The government is exerting its power to re-appropriate goods. In this case there may be a need for justice, but no possibility of justice. Whether or not case 5 contains any practices involving social power is less clear. Certainly Sam's family is a social group, undoubtedly marked by practices, and the government who assists her is exhibiting social power by redistributing taxes paid by others to Sam's family for her benefit. The presence of social power in this case depends on how precisely we define social power. As it is not the point of this discussion to defend social power as the only possible subject of justice, or to complete a full taxonomy of power, I will not explain social power as anything beyond a display of power (types of which are listed above) in a social practice.²⁷ Sam does seem to be subject to a number of kinds of social power. Regardless, I maintain that Sam still does not fall within the scope of justice.²⁸ As noted above, my reasoning is that the circumstances of justice must obtain for human coordination to be both necessary and *possible*.

We are now in a position to ask whether it hurts my account of the circumstances of justice if instances of power in social practices fall outside the scope of justice? Does

²⁷ For more complete accounts of power including social and collective power, see James, "Power in Social Organization as the Subject of Justice."; Alvin I. Goldman, "Toward a Theory of Social Power," *Philosophical Studies* 23 (1972), 221-268.

²⁸ NB James would disagree with me here; he seems to think all power in social organizations should be considered the subject(s) of justice.

this indicate that I have been unduly exclusive with my alternative rendering of the circumstances of justice? My response is that I have not. It is important to keep in mind that my purpose here is merely diagnostic. I think my alternative account fits very well with a notion of the subject matter of justice that is intuitively appealing for Constructivists about justice. That an appealing subject matter fits with my view of the circumstances of justice lends it plausibility, but the account does not hinge on this being the subject matter of justice. Neither does it hinge on there being an identifiable subject of justice. In sum, it does not matter for my account if the plausible subject matter of justice exists outside of circumstances in which human coordination is possible and necessary, which in turn defines when justice has application. It only matters for the plausibility of my account that the subject is present in all cases of inclusion.

To illustrate why exclusionary cases will sometimes have social power present, but should not be accommodated within the scope of justice, consider the following example regarding social practices of etiquette. If in a particular time and culture, men always open the door for their female counterparts and, just once, a man fails to do so, it seems the female counterpart may be justified in asking why he did not. She may even feel disrespected or rebuffed for having been forced to open the door herself. However, she has no grounds to claim the right not to be made to open doors for herself against him. Etiquette, of course, is not the only example of a social practice involving social power that does not accommodate the application of justice. This is simply an obvious case, intended to illustrate that not all social practices involving power should be included within the scope of justice.

If my analysis so far is correct, if there are practices of social power outside the scope of justice, then it follows that even when the subject of justice exists, this is not enough for justice to be applicable. The argument for the subject of justice approach to the scope of justice goes something like this: the subject matter indicates a strong need for justice and whenever the subject of justice exists, questions of justice will arise. This is not enough. Justice only has application—its duties and rights are obligatory—when the circumstances of justice exist. Theorists must first appeal to some circumstances of justice and work out a theory from there. Rawls, for instance,

does this, and merely constrains his circumstances of justice with his subject of justice because he is concerned with a smaller subset of justice, not all of justice.

An objection one might make here is that my diagnosis is wrong, social power is not the subject of justice, and therefore my argument that social power exists outside the circumstances will not show that the subject of justice approach is inadequate to illuminate when questions of justice arise. My response is simply that until some definitive explanation of a subject of justice exists, this will be impossible to prove. I have argued that social power in practices is a plausible subject of justice, but it is outside the scope of this project to show it is *the* subject of justice. I have shown only that even an extremely appealing and somewhat popular subject matter of justice cannot adequately outline when questions of justice are applicable. This does not make the search for a subject of justice useless; it merely separates it from the task of the circumstances of justice, which is to identify when justice has normative application.

Another objection to my position on the necessity of the circumstances of justice in defining the scope of justice is that this approach, and the subject of justice approach, come from methods of political philosophy that are at odds with one another. To some extent this is true. Certainly, Constructivists need circumstances of justice to distinguish justice duties from other duties (e.g., moral or prudential duties). Those Constructivists that add a subject of justice, such as Rawls, rely on the circumstances of justice to set out the scope of distributive justice, and then constrain it with their subject of justice to delimit the scope of their particular theory of justice, rather than all of distributive justice. It is, however, still the circumstances of justice that actually define the scope of distributive justice. In contrast, those who use a more fundamental principle approach, such as Cohen (as discussed in chapter 1), must constrain that fundamental principle somehow. For instance, if—like Cohen—one were to maintain that justice applies to (that is, the subject of justice is) the choices individuals make within legally coercive structures, the same criticism discussed above—over inclusiveness—applies. Cohen explains that he thinks justice applies to the choices left open by rules of legally coercive structures, “because [such choices are] neither enjoined nor forbidden by them.”²⁹ Such a broadly inclusive account of

²⁹ Cohen, *Rescuing Justice and Equality*, p.116.

when principles of justice apply risks categorizing choices about subjects wholly irrelevant to justice as within its scope. Cohen justifies this inclusiveness on grounds that principles of justice cannot be applied to practices without also being applied to the actions that constitute those practices. Particular actions, however, can—and sometimes should—be assessed according to different kinds of moral principles. An example would be principles that tell individuals how to act given that a just or unjust practice is in place, principles such as Rawls’s natural duty of justice, which is a moral principle to further just practices.³⁰

In this section, I have established that there is a straightforward diagnostic of what unites the cases that appear within the scope of justice. This diagnostic is in line with a popular intuition that justice concerns social practices, and the exercise of power within and between them. I have shown that where the circumstances of justice obtain, this subject of justice will also obtain. However, it seems that this particular subject of justice will also obtain in a number of cases which lie outside the circumstances of justice. Even though this particular subject of justice seems plausible, the preceding discussion demonstrates that the subject of justice is still dependent on the scope set out by the circumstances of justice.

Conclusion

In this chapter I have addressed the tension between inclusion and exclusion in the circumstances of justice. I analyzed cases that are included on my alternative account, showing why their inclusion is intuitively appealing. Next, I explained why some cases that seem to be within the scope of justice are, in fact, not. I then argued that there is one key feature that all of the inclusive accounts have in common: social practices that involve power. This is a plausible subject of justice; Rawls, Hume, Hobbes, and others have proposed similar subjects of justice. I explained that an attractive subject of justice lends plausibility to my description of the circumstances of justice, though the circumstances are by no means tied to this subject of justice. I then demonstrated that this subject of justice applies to situations outside any reasonable ambit of justice (e.g. practices of etiquette), allowing us to conclude that those accounts of justice which attempt to establish justice based on a subject of

³⁰ Rawls, *A Theory of Justice*, p. 258. NB James also argues along a similar line, but emphasizes differences in kinds responsibility rather than simply different kinds of moral duties, (i.e., moral vs. just).

justice alone will be too inclusive. There may be reasons to continue to seek out a subject of justice. For instance, a subject of justice may help explain the kinds of problems the circumstances of justice are concerned with or it may help in establishing the content of a conception of justice that meets the requirements of stability and publicity. However, this project argues that any subject of justice will be constrained by the kind of coordination necessary for justice being both necessary and *possible*, which is to say it will be constrained in scope by the circumstances of justice.

Chapter 6

Intergenerational Justice?

Do questions of justice apply to intergenerational relations? The problem of anthropogenic climate change has incited prolific debate on the question of what we owe future generations. The question is particularly interesting for philosophers because two of the dominant approaches to normative theory seem to predict wholly unintuitive and unappealing solutions. According to straightforward accounts of consequentialism, the greater number of people that will exist in the future, coupled with the fact we could do much now to improve their future welfare, suggests we should invest nearly everything we produce in future people's well-being. The consequence of this is the unappealing prospect that we ought to neglect our own sustenance needs to do so. This over demanding position stands in stark contrast to constructivist theories, which at their most conservative, imply we owe nothing to future generations as there is no mutually beneficial reciprocity possible between current and future people. For the Constructivists, the problem is one of scope, as it is difficult to imagine contingent people having legitimate claims of justice against us. In this chapter, I explore how serious the problem of intergenerational duties is, and how it should impact our theories of justice.

I will focus on constructivist problems in dealing with duties of justice toward future people, though non-constructivist theories will also be addressed. I proceed by first examining whether the intergenerational problem can fit into my own account of the circumstances of justice. A negative response to this, however, does not rule out the state having duties to future people. To show this, I examine the reasons people have wanted to include intergenerational problems in the scope of justice, namely the person-affecting reasons including harms and urgency. This discussion will reveal that even the most successful attempts to include intergenerational problems within the scope of justice fail. Drawing on the perfect/imperfect duty distinction, I will show that exclusion from the scope of justice does not exclude

intergenerational concerns from the scope of moral and juridical duties. I explain how the resistance to classifying intergenerational problems as moral problems rests on false assumptions about the distinction between perfect and imperfect duties. The consequence of this is that, while I am committed to the claim that there is no such a thing as *intergenerational justice*—as traditionally conceived—I can still countenance a certain kind of moral duty legitimately held and enforceable by the state, that can perform the function that led us to search for intergenerational justice in the first place.

I. The Nature of the Problem

In chapter 1, I introduced the necessity of Requirement N (i.e., for a conception of justice to be normative it must offer a solution to a corresponding, recognized practical concept.) A concept corresponds to some task that justice needs to solve and the conception is some way of solving it. In political constructivism, if the rules of justice do not respond to the task, they are not normative. Hence, it is important that we are clear on the problem that needs to be solved so that we can consider whether or not possible solutions might fit into the scope of justice.

The intergenerational problem of anthropocentric climate change is unique because it is not a question of simply coordinating savings or benefits and burdens between relatively close generations. Climate change is caused by greenhouse gas emissions now, the most serious effects of which will not be felt for another century. Because of the delay in the effects of rising CO₂ levels in the atmosphere, various tipping points that accelerate the climate change process will not occur for some time. Emissions now slowly warm the atmospheric temperature and begin to melt surface ice. Ice melting releases more green house gasses which in turn causes the earth to reflect less heat back into the atmosphere, so the earth warms even more. As tipping points are reached, the warming accelerates exponentially, along with the impact on ecosystems and species that depend upon them. The only way to avoid these outcomes is to act now, before these tipping points are reached. In short, to avoid the negative effects that current emissions will have on the surface of the earth, the costs of carbon abatement must be incurred now. This makes the problem an intergenerational coordination problem about the earth's finite resources, which include an atmosphere compatible with human life that does not inflict significant

amounts of suffering and death as a result of the destabilization of the earth's living conditions. This necessarily involves coordination either with or regarding people who will not exist until long after we are dead, and with or regarding all individuals that will exist during our lives.

II. The Circumstance of Intergenerational Justice?

In the previous two chapters I have stated, explained, and defended my reformulated account of the circumstances of justice. I argued that the circumstances of justice are: the fact of solidarity in the world, moderate scarcity of resources, and limited human knowledge. I now ask whether problems of intergenerational distribution of resources can be addressed within this view of the circumstances of justice. To show that they cannot, as this is no small bullet to bite, I will examine reasons why it may seem that intergenerational problems fit within the purview of my account. I ultimately argue that they cannot. This analysis will prove useful later in understanding the unique kind of moral problem that I argue the intergenerational problem really is.

Regarding issues of international distribution, the circumstance of limited human knowledge is easily met. There is no reason to assume any substantive change in human cognition or understanding over time such that this condition would not be met, so I lay it aside.

The moderate scarcity of resources condition poses an interesting challenge for the intergenerational problem. In chapter 4, I explained that this condition satisfies the necessary and possible nature of the circumstances of justice because individuals want more goods and know they can obtain more goods via cooperation. On my interpretation of this condition, resources extend beyond property or material goods, as described in traditional accounts of the circumstances of justice, to include any finite resource which is or could be scarce. Finite resources include something like Rawls's primary resources as well as time, energy, etc.

On the standard view of the circumstances of justice, this circumstance has ruled out intergenerational justice on the grounds that if we do not conserve now, there will not be sufficient resources for future people. Justice, therefore, will not be possible with many future people. We are not in a relation of justice, and we do not owe distant future people obligations of justice. It may seem that my expanded account of

resources could get around this problem. Even if there are insufficient physical resources in the distant future, if people exist they will have sufficient resources of time, energy, and the social bases of self-respect, together with Rawls's other primary goods, such that they will be capable of justice. This at least leaves open the possibility of having a justice relationship with them. However, if we consider the reason that this circumstance makes human cooperation both possible and necessary (that individuals want more goods and know that if they cooperate, they can obtain them), it seems that cooperation is impossible. Future people can never cooperate with current people to ensure or even attempt to ensure a greater share of resources than they would otherwise have. In short, we can see that future people will likely still meet the circumstance of moderate scarcity of resources among themselves; however, they will not meet the necessary and possible constraint insofar as coordination of resources across distant points in time is impossible. This means that in relation to present day people, people in the distant future do not meet this circumstance of justice. Thus, they cannot stand in a relation of justice to us.

Even though the moderate scarcity of resources condition rules out the possibility of justice applying to our relation with future people, it is still worth considering just how the fact of solidarity condition affects this relation. In chapter 3, I explained that solidarity is constituted by four conditions, so one might take this condition to involve the capacities for (1) mutual trust, (2) identification with the group, (3) a disposition to empathy, and (4) a shared joint interest. Recall that it is the fact of this condition, not a preexisting solidary bond that is necessary for justice to apply. Justice depends on individuals being capable of being in solidarity with others and this capacity is pervasive in humanity.

Can we reasonably claim that future people possess the capacity to be in solidary relationships? At first glance, it seems that the fact of solidarity will apply to future people. Given the ubiquity of solidarity in humanity at present and in all past societies, it is reasonable to assume that future people will be similar enough to us, whatever the changes in the world, that they will still be marked by the fact of solidarity. On consideration, however, this seems unsatisfactory. In the examples I offered in chapter 5 as instances inclusive of solidarity, there was an implicit similarity in the cases. The fact of solidarity always existed in contexts in which questions of

justice arose in a common time period. When this element is removed and we are concerned with a set of people, some of whom will never actually be able to be in solidarity with one another, is the fact that most people are capable of solidarity sufficient for justice? Disappointingly, the answer is unclear. Though it will be the case that the fact of solidarity will obtain for future people, it is unclear that it could serve its purpose of ensuring that individuals are capable of claim-making and obligation fulfilling with one another across time. For individuals at any given time, the condition will be met. However, if individuals exist at drastically different times, they will never be able to make claims upon, and owe reciprocal duties to, one another. In fact, it seems that only expressional solidarity could exist across generations and, while this motivates many people to act on the climate change problem even now, it is not the robust kind of solidarity necessary for a system of duties and claim-making to be in place. This rift between distant generations, all of whom—in their own time period—are capable of solidarity and share justice relations with other generations living at that time, is sufficient to cast doubt on the existence of the circumstances of justice. If it is unclear that justice could be applied to the situation, it seems doubtful the situation will generate duties and claims of justice for its parties. For reasons generated by the moderate scarcity of resources condition, in conjunction with the fact that solidarity may not be able to ensure the existence of justice between distant generations, we may conclude that intergenerational problems of distribution are not justice problems. I will address ways they could become problems of justice near the end of the chapter.

Before moving on, it is worth mentioning that intergenerational coordination problems do not fit into the scope of the standard accounts of the circumstances of justice either. On Hobbes's account there would be insufficient equality since future people can never be in a state of nature (or war) with present-day people. Hence, there would be no need to coordinate regarding intergenerational problems. Those needing to coordinate will always be the present generation and will never be affected by the powers of future people. In Rawls's early approach there exists the same Hobbesian equality problem, as well as the same moderate scarcity of resources problem as in my own account. The latter problem also plagues Rawls's later work. Rawls tries to get around these issues via a motivational chain, but ultimately meets

with very little (or no) success.¹ On Hume's approach to the circumstances of justice it would be impossible for future people to ever make their resentment felt regarding past/current people. In conclusion, intergenerational justice is a problem for all of the accounts of the circumstances of justice, and hence for most political Constructivists.

Each of these accounts contains further impediments to including intergenerational problems within the scope of justice. However, I put aside additional impediments. The discussion presented thus far is sufficient to conclude that there is no account of the circumstances of justice, including my own, that can count intergenerational issues as within the circumstances of justice. I will demonstrate, via discussion of various attempts to circumvent the problems of non-identity and non-reciprocity, that Constructivists are in good company, as there is no clear way to formulate the climate change problem as a problem of justice. To consider whether this is an issue for constructivist approaches of justice, or simply a revelation that some of our intuitions about justice are wrong, we must next ask, What are the reasons in favor of considering intergenerational resource coordination problems as problems of justice?

III. Considerations for Intergenerational Justice

Brian Barry, in his article "Circumstances of Justice and Future Generations," cites two reasons that theorists have been tempted to consider intergenerational coordination problems as within the purview of justice.² The first is that most theorists understand duties of justice to have higher priority than duties of humanity. Intergenerational problems are the kind of problems that need this high priority. They involve not only the quality of future people's lives, but also potentially numerous lives lost, and a variety of other harms involved as the earth's climate begins to shift drastically. So, intergenerational problems are often considered to be problems of justice because of their urgency and priority.

¹ Rawls has a supplemental, rarely acknowledged approach to intergenerational justice involving "natural duties" that will be addressed later.

² Brian Barry, "Circumstances of Justice and Future Generations," in *Obligations to Future Generations*, ed. Richard I. Sikora and Brian M. Barry (Temple University Press, 1978).

The second reason that theorists are inclined to treat intergenerational problems as justice problems is because justice is often associated with the notion of dues or reparations. There is a real sense among theorists, activists, and the general populace that we are harming future people by bringing them into a world in which their lives will be worse off than they may otherwise have been.³ Different versions of a harm principle have been formulated to make sense of the particular harm being done to future people. Some of these will be addressed shortly.

The consequence of the priority and harm arguments has been an extremely popular movement in climate ethics in the past decades, which aims to develop a theory that has the political implication of direct policy change by appealing to the direct obligations we owe future people. These theories have met with varying degrees of success. Each of these attempts to explain direct obligations toward future people stands to be rejected for independent reasons. Exploring these arguments may seem contradictory to my position that the circumstances of justice are a necessary foundation of justice. However, as my larger project aims to find an account of the circumstances of justice that meets many of our intuitions about when justice applies, and to help guide us when it is unclear whether justice applies, it is worth considering if any of the more popular approaches to intergenerational justice are defensible. If they are not, it will lend plausibility to my own theory of the scope of justice insofar as no existing account of justice can be seen to accommodate intergenerational problems. In this respect, my account of the scope of justice would not be worse off than others; in the next sections, I seek to establish this. I begin by addressing the defenses of intergenerational justice that stem from the notion that we are harming future people. I then move on to the related non-reciprocity problem, which can be seen as an attempt to give rights to future people because of the urgency of the problem.

IV. The Non-Identity Problem

My aim in this section is to highlight the problems inherent in attempts to explain intergenerational justice as intergenerational harms. This discussion starts with an explanation of the non-identity problem, and shows why it cannot be ignored. I next consider the seemingly more successful *threshold harm principle* attempt to avoid the

³ I lay aside reasons stemming directly from relationships with nature.

non-identity problem, but show that this too is insufficient to establish that current people have normative duties of justice toward future people.

The non-identity problem, though not first formulated by Parfit, was given this name by him and popularized by his thorough treatment of the problem.⁴ It simply refers to the fact that a person's identity is contingent on actions that contribute to that person's biological conception. This will include a myriad of circumstances throughout the course of history and is not limited, as we may be tempted to imagine, to the events of a person's parents and grandparents alone. It follows from this that the decisions a generation makes that affect these circumstances, and hence who will be conceived, cannot harm the individuals later conceived, because had those exact choices not been made, those particular people would never have come to exist.

In short, it is logically and metaphysically impossible for future people to be worse-off people who could have been better-off people.⁵ For example, if Connie represents a person born into a world where we chose conservation policies, she would be a better-off person. If Dennis represents a person born into a world where we chose to destroy the environment, he would be worse-off. But it could never be the case that Dennis could have been Connie, because the policies that led to Dennis's and Connie's relative states of well-being also led to their existence. Hence, Dennis has no claim against past generations that they choose a conservation policy.

This applies as well to the number of people present in any given generation. Parfit's repugnant conclusion illustrates that population size is also dependent on the circumstances that brought that generation into existence; therefore, no generation can claim against earlier generations that they ought to have reduced the population. This is the "No-Difference View" introduced by Parfit, which argues that it makes no difference how we act toward future generations, given that the size and composition

⁴ The nonidentity problem was discussed first in T. Schwartz, "Obligations to Posterity," in *Obligations to Future Generations*, ed. Richard I. Sikora and Brian Barry (Philadelphia: Temple University Press, 1978): 3-14.; Robert Merrihew Adams, "Existence, Self-Interest, and the Problem of Evil," *Nous* 13 (1979): 53-65.; Gregory S. Kavka, "The Paradox of Future Individuals," *Philosophy and Public Affairs* 11 (1982): 93-112.

⁵ David Heyd, *Genethics : Moral Issues in the Creation of People* (Berkeley: University of California Press, 1992), p.63.

of any future generation depends on our policies now. So, we cannot be said to harm them with our choices.⁶

This view poses a major challenge to our second reason for including intergenerational problems within the scope of justice. While we may have the intuition that future people are harmed by our ineffective climate policies, it is not clearly the case that this is so. There have been a number of attempts to circumvent this challenge; some of the most successful include careful consideration of what is meant by harm. Other discussions involve exploring different notions of having a right, which will be addressed in the following section.

The first method of avoiding the non-identity problem suggests that we identify a notion of harm that does not require that future people whose well-being is in need of protection actually have interests and a well-being to protect, for it makes no sense to grant rights to protect contingent well-being. A more successful version of this approach has advocated a threshold conception of harm. The idea here is that an action harms a person if it is a consequence of that action that some person falls below a normatively defined threshold.⁷ Ideally, this kind of harm principle would be unaffected by the non-identity problem because the harm does not require comparing the less well-off state (e.g., Dennis from above) with the state of well-being of a more well-off hypothetical person (e.g., Connie). The threshold notion of harm will apply to any individual's actions if they contribute to making some other person unable to realize a certain level of well-being. (I lay aside attempts to define that normative threshold as it is outside the scope of this discussion.) Meyer and Roser have recently defended a strong sufficientarian account of the current generation's duties to future people, and future people's corresponding rights (as opposed to a

⁶ Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), pp.351-79.

⁷ Lukas H. Meyer, "Past and Future: The Case for a Threshold Notion of Harm," in *Rights, Culture, and the Law : Themes from the Legal and Political Philosophy of Joseph Raz*, ed. Lukas H. Meyer, Stanley L. Paulson, and Thomas Winfried Menko Pogge (Oxford ; New York: Oxford University Press, 2003), p.148. Also see Seana Valentine Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999): 117-148.; Jeff McMahan, "Wrongful Life: Paradoxes in the Morality of Causing People to Exist," in *Rational Commitment and Social Justice: Essays for Gregory Kavka*, ed. Jules Coleman (Cambridge: Cambridge University Press, 1998): 208-248, pp.223-29. and to some extent an early version of this thinking can be found in Kavka, "The Paradox of Future Individuals," p.105, though he rejects it.

weaker version that is closer to prioritarianism). At its core is a subjunctive-threshold notion of harm, which purports to avoid the non-identity problem. Instead of defining harm via actions, the subjunctive-threshold conception of harm simply relies on our being able to positively define a level of well-being, such that a person's right to a supra-threshold state is violated by our refraining from acting now to ensure it is not violated.

At first glance this seems like a plausible way around the problem of future people not having rights claims against us due to the non-identity problem. If future individuals have welfare rights to a certain state of affairs, even though these are personal rights, it may seem we have a way of attributing rights to future people and our corresponding duties. But this is not as straightforward as it appears. In my previous non-identity example of Dennis and Connie, Dennis exists below the threshold of harm; Connie exists above the threshold of harm. In a world in which we have chosen the environmental destruction policy and Dennis comes into existence, it is not clear he has a claim right against people of the past (our current generation) that he exist in or above a threshold of harm. Had we (his predecessors) not chosen the policy of destruction, he still would have never come to exist. We, therefore, return to the non-identity problem, that he would have no claim against us not to have been harmed. This reveals that while Meyer and Roser may be right, to some extent, that we have a duty not to bring individuals into existence in a state of well-being below some normatively defined threshold, it does not follow from this, however, that we have this duty *because* we have harmed future people by bringing them into such an existence. This point is central to my criticism. I do not deny the wrong that they attribute to bringing people into sub-threshold states. I only deny that these people, once they exist, then have corresponding claims against us for having brought them into existence in this state.⁸

An example of the kind of duty we have toward such future people would, instead, look something like my duty not to cause unnecessary stress to people I interact with—if I can avoid doing so at little cost. Instances of this kind of duty would be

⁸ An argument similar to my own against the threshold conception of harm can be found in: Makoto Usami, "The Non-Identity Problem, Collective Rights, and the Threshold Conception of Harm," *Tokyo Institute of Technology Department of Social Engineering Discussion Paper*.

giving correct directions when asked, being kind and gentle with young children, being polite in everyday interactions. These kinds of duties are general duties of goodness. As long as they do not fall below a threshold of respect, they do not constitute a harm that generates some right to be held against us. It seems that these are duties we ought to perform if at all possible. According to Meyer and Roser's account, we may plausibly have some duty of goodness not to intentionally bring people into existence in a sub-threshold state. It does not follow from this argument, however, that we have duties to these individuals *because* of their corresponding right that we not bring them into such existence. In conclusion, even the threshold notion of harm seems not to get around the non-identity problem, or closely linked repugnant conclusion.

V. The Non-Reciprocity Problem

The non-identity problem is closely related to the non-reciprocity problem. The non-reciprocity problem is simply that the intergenerational relationship necessary for the coordination problem of climate change precludes any kind of meaningful reciprocity on which duties and rights of justice could be founded, or the right kind of coordination achieved. The core idea is that some contribution is required for individuals to be part of a justice relationship, as contribution helps define the scope and content of justice benefits and restrictions: hence, justice as mutual advantage. Such theories generally seek to ground reciprocity on considerations of self-interest (e.g., Gauthier, Hobbes) or fairness (e.g., Rawls). The former is *bargaining style* justice while the latter is usually constituted by both direct and indirect reciprocity, though on some interpretations it includes generalized reciprocity. I will clarify these categories now before addressing specific attempts to get around the problem of reciprocity.

Kinds of Reciprocity

In chapter 4, I offered analysis, as well as a number of accounts of rights and theories of justice, that supports the idea that reciprocity is central to justice. I did not, however, expand on what kind of reciprocity justice might require. I will do so now. Direct reciprocity is found explicitly in the works of Gauthier, Hobbes, and Rawls among others. I understand it to be uncontested that justice accommodates direct reciprocity. An example of direct reciprocity is: Smith has a claim on Jones

that Jones ϕ iff Jones has an obligation to Smith to ϕ . This is exactly the structure of the Hohfeldian Incident of a claim, which is echoed by Feinberg, Hart, and others.⁹ We might state this more formally as: A is obligated to B to ϕ iff B has a claim against A to ϕ . Direct reciprocity involves clear conditions of what fulfilling the duty will involve. Both the act and the person to whom it is owed are definite. Finally, direct reciprocity is marked by the fact that A and B each have the standing that the relationship of claims and duties could be reversed. If A has the standing to claim some act against B, then B has the standing to claim some act against A.

Indirect reciprocity is a strong candidate for justice. This is a form of reciprocity that may be compatible with intergenerational climate change duties. Heath, for instance, proposes that this kind of reciprocity is within the circumstances of constructivist justice (discussed below).¹⁰ An example of indirect reciprocity would be: Jones has a duty to pay taxes to fund benefits for others iff others also pay taxes to fund benefits from which Jones will benefit in turn. In chapter 4, I mentioned that Darwall claims that rights are reciprocal. Before any claims can be made or privileges taken, grounds must already exist that give individuals standing to legitimately make these reciprocal claims against one another. Regardless of whether this standing is the result of membership in a state, community, participation in a trust relation, or something else, the structure is the same.¹¹ Many instances of large-scale community reciprocity represent indirect reciprocity. Such reciprocity captures the mutual advantage aspect of justice. That is, a person ought to undergo some definable burden in exchange for receiving a reciprocal, roughly proportional benefit in the future. More formally (for later reference), indirect reciprocity would look like this: A is obligated to X (some specific person or members of a group of which A is also a member) to ϕ iff X benefits A by ϕ -ing. In indirect reciprocity, the beneficiary of the obligation is a member of some group or scheme with the standing to benefit A and whom A also benefits. It does not matter who specifically receives the benefits of A's obligation, only that it is someone who is benefiting A in the defined manner. The

⁹ Feinberg and Narveson, "The Nature and Value of Rights":243-260; Hart, *The Concept of Law* .

¹⁰ Joseph Heath, "The Structure of Intergenerational Cooperation," *Philosophy and Public Affairs* 41 (2013): 31-66.

¹¹ Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability*, p.19.

duty is discharged only when some fair allocation of taxes has been paid or pensions paid into a scheme, or whatever is required. Many accounts of constructivism appear to allow this kind of reciprocity to be sufficient for justice to obtain. Here, indirect reciprocity will be considered adequate to meet the reciprocity requirement of justice duties.

The final form of reciprocity that is sometimes considered a contender for justice is generalized reciprocity. Page and Arneson both think this is a promising model for intergenerational justice.¹² An example of this kind of reciprocity is offered by Schumaker; “a stranger does a favor for a traveler on journey. The traveler laments that because she will never see the stranger again, she will not be able to repay the debt. The stranger replies, ‘just do the same for someone else; others have done the same for me.’”¹³ the idea here is that generalized reciprocity is a network of favors and counter-favors in the context of voluntary cooperation. More formally, generalized reciprocity may look like this: A has an obligation to Y (some non-specific person) to perform some beneficial act iff X (some other non-specific person who is not Y) has benefited A by some act. Note that generalized reciprocity is owed to non-specific people because one is the recipient of a non-specific person’s beneficial act. It is left undefined what one must do to discharge such a debt. Even if it should be discharged to some person in particular, it would not be a matter of tit-for-tat, but would simply require some effort to benefit some other person. There is not necessarily mutual advantage in this sort of exchange, though there are, of course, advantages. These duties look like imperfect moral duties or social norms, as the lack of clarity regarding the content, extent, and even beneficiary is not compatible with the mutual advantage which reciprocity in justice is intended to capture. I will seek to underwrite this idea below when I discuss perfect and imperfect duties.

For reference, the structures of the three kinds of reciprocity which are sometimes put forward as contenders for the kind of reciprocity relevant to the intergenerational justice debate are as follows:

¹² Edward Page, *Climate Change, Justice and Future Generations* (Cheltenham: Edward Elgar, 2006), p.103.

¹³ Millard Schumaker, *Sharing without Reckoning : Imperfect Right and the Norms of Reciprocity*, Editions Sr V. 14 (Waterloo, Ont., Canada: Published for the Canadian Corporation for Studies in Religion/Corporation Canadienne des Sciences Religieuses by Wilfrid Laurier University Press, 1992), p.27.

DIRECT RECIPROCITY: A is obligated to B to ϕ iff B has a claim against A to ϕ .

INDIRECT RECIPROCITY: A is obligated to X (some specific person or members of a group in which A is a member) to ϕ iff X benefits A by ϕ -ing.

GENERALIZED RECIPROCITY: A has an obligation to Y (some non-specific person) to perform some beneficial act iff X (some other non-specific person who is not Y) has benefited A by some act.

Escaping the Non-Reciprocity Problem

If we understand reciprocity as direct reciprocity, then the climate change problem will fall outside the scope of justice. This is because it cannot be the case that contingent people are in a position to either make claims or fulfill duties toward us, particularly not in the strictly tit-for-tat manner involved in direct reciprocity. The relationship must always be unequal, as present day people can directly affect future people but the reverse is not true. This rules out mutual advantage qua direct reciprocity, because current people could not receive direct advantages in exchange for their sacrifices. In this section, I will explore four attempts to circumvent this problem.

One response to this problem is to endorse a non-reciprocal theory of justice, something like the subject-centered views I argued against in the previous chapter. The idea supporting these theories is that, rather than relying on a contribution of some kind, subject-centered theories identify some particular state in defining the scope of justice. When that state obtains, these theories presume that justice obtains. This state will be some property of the individuals in question, or the state in which they exist—for instance, needs, capacities, or even social relationships.¹⁴ The appeal of this approach for intergenerational justice is that reciprocity is not the core, but it can still be let in through the back door, so to speak, by allowing principles of fairness and reciprocity to shape the rules of justice that fall within the scope defined by the subject-centered theory. Subject-centered theories can also contend that reciprocal dispositions are the social glue that guarantees compliance, but maintain that this grants reciprocity itself instrumental value, at best.¹⁵ So long as future people will

¹⁴ In the previous chapter I discussed the appealing theory of social power as the subject of justice as an appealing stepping-stone to rejecting subject-centered approaches to justice.

¹⁵ Page, *Climate Change, Justice and Future Generations*, p.111.

have human interests, they can be viewed on some of these theories as having entitlements to resources.¹⁶ To some extent this may be true; however, we have good reason to ask why we should consider such duties of justice rather than common duties of morality. The structure of these duties models a unidirectional moral duty such as I outlined in chapter 4.¹⁷ I will return to this explicitly in the following sections. For now it is sufficient to note that, in addition to advocating a justice duty that has the structure of a moral duty, this approach seems to reopen the criticism against subject-centered views that I discussed in the last chapter—that subject centered views do not define instances of when justice ought to be excluded. I have shown that even rules of etiquette may be construed as appropriate rules of justice according to at least one plausible subject centered view of justice. These discussions aimed to establish that subject-centered theories of justice are overly inclusive, and extend the scope of justice beyond its normative limitations. The intergenerational problem is another example of overextension.

Another attempt to circumvent the non-reciprocity problem is the stewardship model. This approach says that the current generation has a duty to protect the environment for successors, in return for having it entrusted to them by their predecessors. Roughly, this broad theory of intergenerational justice hinges on there being generalized duties and benefits between generations. For instance, generation F was benefited by generation A by being left viable resources, so generation F owes generation X to preserve and pass on those resources. This is a theory of generalized reciprocity, which I understand to generate moral duties but not duties of justice. More specifically, the problems with this model in general are (1) it is not clear that the benefits given by past generations were contingent on benefiting future people, (2) it is not clear that unintentional benefits are something for which we owe reparations to others, and (3) even if the benefits were intentional, as Nozick argues, “One

¹⁶ The property of human interests being attributable to an individual is what motivates a number of theories of climate change duties. For instance, theories that future people have a right to resources simply because they will exist is one such a notion, because that right is granted qua human interests and status. Hence, my criticisms here are against more than just those explicitly subject-centered theories.

¹⁷ An example of a moral duty might be that Anne has a duty to give to charity. The structure is: A has a duty to ϕ . There is no clear beneficiary or explanation of what discharging ϕ involves as it does not hinge on others' duties.

cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment."¹⁸ Page points out that not everyone agrees with Nozick, but it seems fair to say that many do.¹⁹ Sufficiently many that the burden is on the Stewardship theorists to show that there are cases in which involuntary benefits can give rise to obligations toward people who did not ask for the benefits. Hence, it seems that advocates of this model have a heavy burden of proof still to meet.

Another altogether different approach to dealing with the non-reciprocity problem argues that indirect reciprocity does exist with future people insofar as we have mutually beneficial schemes of cooperation with them and could have more. Joseph Heath in "The Structure of Intergenerational Cooperation," argues that the circumstances of justice—which he interprets as mutual advantage alone—do include intergenerational cooperation.²⁰ He explains that if we alter the classic, iterated prisoner's dilemma model of cooperation just slightly, we can have cooperation that extends across generations. Heath stipulates a multiplayer prisoner's dilemma with eight players who are reshuffled for each game. The trigger strategy prescribes cooperation unless a player defects, then it prescribes that everyone subsequently matched with that player defects. This strategy is an equilibrium: players refrain from defecting so others will not defect on them in subsequent rounds. This equilibrium of selfish cooperation can be sustained by indirect reciprocity so long as actions are made sufficiently public.

Heath then offers a version of this game to illustrate how it will apply to intergenerational cooperation. The eight players are instructed to either pay \$5 into the account of the person on their left or to place \$2 into their own accounts each move. At the end of each round the amount of each player's account is noted and the game repeated. The cooperative strategy in this game is to pass \$5 into the account of the player on one's left. If everyone does so, everyone gets \$5 and the group has \$40 at the end of each round. Keeping \$2 is defection; if everyone defects, the group gets just \$16. However, if only you defect, you get \$7 that round and the person to your left gets nothing. The trigger strategy prescribes cooperation unless a player defects, and then prescribes always defecting against that player; thus the cooperative

¹⁸ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p.95.

¹⁹ Incidentally, Rawls and most liberal theorists make similar arguments.

²⁰ Heath, "The Structure of Intergenerational Cooperation," p.44.

equilibrium is sustained. This game, Heath notes, features an absence of mutuality between the players.²¹

To relate this game to the intergenerational problem Heath asks that we next suppose that, at the end of each round, the person at the end of the circle (the eighth position) is asked to leave the game. We call this *dying*. If the other players then move a chair toward the end, this is *aging*. When we introduce a new person to fill the now vacant chair, this is *being born*. The difference in this version of the game is that the oldest player cannot be motivated to cooperate and so will defect. But the expectation of defection does not threaten equilibrium because the player in the seventh position has nothing to gain by defecting (because if she does so she will only get \$2 the next round). The person in position one has nothing to gain by defecting either since no one will cooperate with him later if he does not cooperate now. Cooperation now achieves a lower level of total payment for the group at \$37 per round.²²

Heath claims that such a system of cooperation is sustained by indirect reciprocity between overlapping generations. The system ties together all possible players—not just contemporaries—in a single cooperative system. This is because cooperation depends on the expectation players have that all future people will cooperate. This is illustrated by the fact that if, in a given round, it is found out that the game will end, all the players would chose defection that round to get \$2 instead of nothing. Hence, cooperation in the game is sustained not only by the participation of contemporaries, but also by the expectations of future generations.²³ Heath later points out that this is actually the structure of a number of money based schemes right now—in particular, pay-as-you-go pension schemes. These schemes generally involve paying in a percentage of one's income every month; that money goes to older generations that have paid into the same scheme. The system works only because of the expectation that younger generations will continue to pay in when they have the option to join due to the expected pay-off in retirement money. Heath argues that like the game above, such schemes are a system of cooperation with a defect strategy to not opt-in, and risk saving for one's own retirement (with a possible consequence of over- or

²¹ Heath, "The Structure of Intergenerational Cooperation," pp. 45-46.

²² Heath, "The Structure of Intergenerational Cooperation," p.46.

²³ Heath, "The Structure of Intergenerational Cooperation," p.48.

under-saving). Further, the cooperative arrangement could not be sustained if there were a closing-off point. It must run indefinitely, otherwise younger generations would not pay in. Because there is no closing point, Heath says that “the total set of cooperators must include future generations, including those yet unborn, and this means, in turn, that the ‘circumstances of justice’ obtain between us and them.”²⁴

Heath is right that such cooperative schemes do use indirect reciprocity across generations. This demonstrates that it is possible that a coordination system of mutual advantage could obtain between future generations and ourselves. However, his argument does not show that this system of mutual advantages could in fact obtain now regarding the problem of climate change for two reasons. First, I previously defined the structure of indirect reciprocity as: A is obligated to X (some specific person or members of a group in which A is also a member) to ϕ iff X benefits A by ϕ -ing. Heath’s example of a pay-as-you-go pension plan fits this structure perfectly: A is obligated to pay 5% of her income to X (who is some set of older people no longer working) if and only if Y (some younger set of people) will benefit A (and those of her retirement age) by paying 5% of their income toward sustaining her when she no longer works. Cooperation as a dominant strategy depends, of course, not only on the trigger strategy, but also on there being a cooperative system in place. No one has an obligation generated by the cooperative system to opt-in. Importantly, in Heath’s examples of both the pension scheme and the initial eight-player intergenerational game, the players are able to claim benefits (either a pension or greater wealth accumulation) at some later point because they already undertook the duty of paying into the system. This is where Heath’s argument comes apart from the unique problem of climate change.

Heath has shown us, quite persuasively, that some intergenerational cooperation for mutually advantageous reasons (e.g., reasons not motivated from fellow feeling or generosity alone) is possible, and can achieve a stable equilibrium of cooperation. However, his analysis only extends to cases in which there are some advantages received for having cooperated. The problem of climate change is one such that advantages cannot not be received by the current (older) generation in the scheme, so

²⁴ Heath, "The Structure of Intergenerational Cooperation," p.51.

there is no self-interested reason for them to opt-in to such a cooperative system in their lifetime.

Here, one may object that the current generation has already received benefits or advantages because emissions have been a market externality; that is, we have not paid the fair market cost of emitting. In fact, Heath doesn't explain exactly how he sees this example of indirect reciprocity fitting into a system of mutual advantages. His discussion of pensions and currency (where money is treated as an exchange for goods at a date later than it was earned) suggest that his response to the older generations' unwillingness to curb emissions would be for the younger generations to stop exchanging money for goods with them, and stop pension or other benefit payouts. In short, if older generations don't curb emissions, younger generations should withhold advantages that the younger generations make possible for them. This would be a system of indirect reciprocity that extends across generations.

This approach, however, faces a significant problem. The second reason that this type of indirect reciprocity cannot at present be applied to the problem of climate change is its injustice. It would be decidedly unjust to threaten older generations' pension benefits—plans they had previously paid into under an agreement that they would receive benefits later in life—based on their non-cooperative behavior (defection) in another arena, the environment, which was never part of the original pension agreement. A related concern arises regarding whether it is morally permissible to penalize (defect on) players or generations who emitted most before the dangers of emissions were known. After all, to hold someone responsible for a harm which they had no idea they were causing is questionable at best. Even if there were some way around these two moral problems, it would certainly be socially and politically difficult to impose a system of indirect reciprocity which would require such important sacrifices by current generations—loss of premiums paid into the pension system, loss of future retirement benefits, and great sacrifices in ways of living. In fact, this would inflict such an onus on current people that the coercion necessary by the state to impose and enforce such a system would likely be beyond the reasonable limits of coercion allowed in any liberal state.

In this section I have cast doubt on the likelihood of the right kind of reciprocity existing in our relationship with future people. However, an appealing feature of

political constructivism is that it tends to limit these reciprocal duties of justice to a subset of morality that in no way denies or undermines other kinds of principles of morality. Rawls addresses this in *A Theory of Justice*. Outside of his motivational chain account of justice toward future people, Rawls outlines a compelling independent argument for intergenerational considerations in his discussion of distribution between generations. His idea is that current people have “a natural duty to uphold and to further just institutions and for this the improvement of civilization up to a certain level is required.”²⁵ Human actions that predictably result in these institutions being threatened, or civilization dropping below a certain threshold of well-being, would be wrong because they violate our duty to maintain the circumstances of justice such that social justice is possible and necessary.²⁶ Rawls begins the explanation of these natural duties by contrasting them with obligations. Natural duties include: a duty of mutual aid; a duty to not be cruel; and a duty to help one another with or without a personal commitment to these actions. Natural duties hold between individuals regardless of their institutional relationships. Another natural duty is justice: not its rules and obligations, but simply to be just. Rawls is very clear that natural duties are not what he calls obligations, but duties which hold unconditionally. Looking at Rawls’s list of natural duties, we see that these are moral duties, not duties of justice. In fact, each of Rawls’s examples of natural duties, and the corresponding contrast to obligations of justice based on direct reciprocity, corresponds to the perfect/imperfect moral duties distinction. In the next section I offer an explanation of why Rawls’s distinction of natural duties and obligations corresponds to some views of perfect/imperfect duties, and advocate viewing our duties to future people as natural duties or imperfect moral duties. In addition, I explain why looking at the intergenerational problem in this light has been criticized in the past and why that criticism has missed its mark.

VI. Perfect vs. Imperfect Duties

Imperfect duties are acts owed to others even when others lack a corresponding right to demand those acts. Conversely, perfect duties necessarily involve individuals with standing to demand that the duty be performed. The perfect/imperfect

²⁵ Rawls, *A Theory of Justice*, p.258.

²⁶Page, *Climate Change, Justice and Future Generations*, p.119.

distinction has been upheld differently by a variety of thinkers since the Stoics. I look to this distinction because I will argue throughout the rest of this chapter that duties toward future people are not perfect duties (or duties of justice), but imperfect duties (of morality more broadly construed). To articulate what I understand the distinction to be, I look to Mill and Kant and their influential explanations. Mill offers an extremely straightforward distinction between perfect and imperfect obligations, which I mention not only because it so clearly corresponds to my own analysis of the structure of duties, but also because it will provide a useful framework from which to view Kant's more complicated approach.

For Mill, "duties of perfect obligation are those duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right."²⁷ For Mill, as well as myself, justice is marked by the reciprocal duty-right form of a perfect duty.²⁸ Mill thinks that the rest of morality consists of imperfect duties. However, the fact that Mill assigns all other moral rules to the category of imperfect duties does not make these the kinds of duties that can be neglected or ignored. Mill explains that "it is a part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing that may be *exacted* from a person, as a person exacts a debt. Unless we think that it might be exacted from him, we do not call this a duty."²⁹ Mill here is speaking of moral duties and justice duties. The burdens of imperfect duties are as serious as the burdens of perfect duties, though there may be instances when these duties cannot be fulfilled and no one can claim this against the duty bearer. Perhaps most telling of all Mill's discussion on this distinction is his comment introducing the distinction as two "ill-chosen expressions."³⁰ They are ill-chosen precisely because they carry with their labels the idea that duties of an imperfect nature are optional or less than binding, whereas duties of a perfect sort are

²⁷ Mill, *Utilitarianism*, p.94.

²⁸ It is unclear in Mill whether he considers only direct reciprocity as a contender for justice or would also include indirect reciprocity. However, given my structural analysis above that indirect reciprocity does generate clear rights and duties, it seems fair to treat indirect reciprocity as sufficient for justice duties and perfect duties on Mill's account.

²⁹ Mill, *Utilitarianism*, p.93.

³⁰ *Ibid.*, p.94.

always binding. This, however, is false. For our uses of this distinction—as applied to the intergenerational problem—it is interesting to note that Mill cautions against all the duties of justice being duties of law, as expediency and prudence sometimes contradict this. He likewise holds that “the idea of a penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong.”³¹ This conception of wrong includes the wrong of not fulfilling imperfect duties. Hence, it appears that Mill thinks that legal duties are informed by both perfect and sometimes imperfect duties.³²

Kant’s discussion of perfect and imperfect duties is somewhat piecemeal compared to Mill’s, though it does generally correspond to Mill’s account. Kant typically characterizes perfect duties as negative duties owed to someone and imperfect duties as positive, meritorious duties.³³ Hence, perfect duties prohibit acting on certain maxims or performing certain vices. In particular, violating a perfect duty comes from a maxim that is inconsistent with universalizability. When a perfect duty is violated, someone is wronged. Perfect duties, for Kant, are subject to external law.³⁴ Imperfect duties, however, demand that one support certain rationally obligatory ends, for instance one’s own perfection or others’ happiness. These duties of virtue are not subject to external law on Kant’s view, because they pertain to an end, and it is having that end which is an internal act of the mind. Further, the violation of an imperfect duty contradicts no external right. Imperfect duties do not tell us how and when they ought to be fulfilled, and hence there is some room for exception.³⁵

Kant explains the content of imperfect duties as involving either the “end of men” or the “end of humanity in our own person.”³⁶ For our own purposes, it is the former category that we are interested in. Kant clarifies this duty to promote the end of

³¹ Ibid., p.93.

³² In my discussion of structure in chapter 4, I argued the same.

³³ Lara Denis, "Freedom, Primacy, and Perfect Duties to Oneself," in *Kant's Metaphysics of Morals: A Critical Guide*, ed. Lara Denis (Cambridge University Press), p.174.

³⁴ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary J. Gregor, Texts in German Philosophy (Cambridge: Cambridge University Press, 1991), p.64.

³⁵ Ibid., p.64.

³⁶ Ibid., p.65.

humanity by pointing out that all human beings seek their own perfect happiness. He continues:

Now, the human race might indeed exist if everybody contributed nothing to the happiness of others but at the same time refrained from deliberately impairing it. This harmonizing with humanity *as an end in itself* would, however, be merely negative and not positive, unless everyone also endeavours, as far as he can, to further the ends of others. For the ends of any person who is an end in himself must, if this idea is to have its full effect in me, be also, as far as possible, *my* ends.³⁷

The duties that arise from this notion of humanity's end, though contingent, are not to be taken lightly. They are not optional, though they do allow some latitude in how and when one must act to fulfill these ends, which are duties that we are to treat as our own. Even so, Kant explains that "a wide [imperfect] duty is not to be taken as permission to make exceptions to the maxim of actions, but only as permission to limit one maxim of duty by another."³⁸ Imperfect duties in Kant, as in Mill, are obligatory; they are not optional and they are not to be taken more lightly than perfect duties. They simply are not owed to particular individuals and so there are not rights holders to demand them. Consequently, the beneficiaries of these duties of virtue are left somewhat to chance and circumstance. That does not, however, make them any less required or less important morally.

Imperfect duties as described by Kant and Mill seem to fit perfectly with the intergenerational problem of climate change. Imperfect duties capture the element of urgency that motivates individuals to think the intergenerational problem of climate change is a justice problem insofar as imperfect duties are no less urgent than perfect duties for Kant and Mill. Imperfect duties avoid reliance on person-affecting principles, and thus escape the non-reciprocity problem and the non-identity problem. Imperfect duties explain why we have the intuition that we harm future people by not choosing policies of environmental conservation—because we fail to promote future people's ends. This reveals that we *morally* wrong them, not that we violate their rights by not choosing policies of conservation. That is, we wrong future people in the same way that we wrong the global poor by not giving to charity; we do not harm future people by violating duties to conserve which they can claim against

³⁷ Kant, *Groundwork for the Metaphysics of Morals*, p.231.

³⁸ Kant, *The Metaphysics of Morals*, p.194.

us. Further, we should not expect such moral duties to be constructed from the circumstances of *justice*. By treating duties to future people as imperfect moral duties and not as justice duties, we avoid the non-identity and non-reciprocity problems.

Recall Rawls's argument (cited at the close of the previous section) that current people have "a natural duty to uphold and to further just institutions and for this the improvement of civilization up to a certain level is required."³⁹ Insofar as Rawls's natural duties are also unidirectional imperfect duties, and that these duties are relevant to humanity's end of furthering just institutions and a decent civilization, we are in agreement. Our duties to distant future people are imperfect duties: they are moral duties, not duties of justice. However, because intergenerational problems are problems that refer to the ends of humanity (or any theorist's equivalent), these are still problems that we can legislate solutions to. So, it is in no way detrimental to future people or harmful to the environment that intergenerational coordination problems are not problems of justice. Practically speaking, imperfect moral duties can have the same impact as perfect justice duties.⁴⁰

It seems then that using imperfect duties is a plausible way of thinking about obligations to future people that avoids the non-identity and non-reciprocity problems. I will discuss this later in more detail after I have explained what a possible account of imperfect duties toward future people might look like. I have suggested that imperfect duties are the way around some of the problems that plague traditional approaches to the problem of intergenerational justice. While it is outside the scope of this project to articulate a comprehensive theory of imperfect duties of intergenerational morality regarding climate change, I will offer a few suggestions for developing such a theory with the aim of showing that such a position is plausible.

An imperfect duty that needs to be discharged is not defined by a set amount of burden. An imperfect duty is unidirectional. It is owed to people, but not to specific persons. The people we owe an imperfect duty to may owe that same duty to us as well. Crucially, however, it is not *because* we owe them some duty that they owe it to us in return. Like Kant, I understand an imperfect duty to be one that a person cannot always be fulfilling and in which there is some leniency as to how one fulfills

³⁹ Rawls, *A Theory of Justice*, p.258.

⁴⁰ I will further develop this claim later in this chapter.

it. Following both Kant and Mill, imperfect duties must be discharged. The imprecise terms of what is involved in fulfilling an imperfect duty do not weaken its import. Imperfect duties generally serve an end. Kant identified this end as *perfect happiness*. As this is quite a vague conception, I will provide a more useful interpretation of this end later in this discussion. What matters at present is that we are looking for an end that can warrant the changes in current practices necessary to justify the adoption of policies of conservation regarding climate change.

I have advocated eschewing justice and turning to morality for a solution to the climate change dilemma. One approach that can offer guidance in how to address the climate change problem as an imperfect duty is the useful (and constructivist) Kantian notion of a kingdom of ends, as formulated by Thomas Hill. Hill argues that the Kantian kingdom of ends could parallel the decision procedure of the original position for moral (not justice) problems. Hill's discussion illustrates that imperfect duties can be well-founded and weighty. Though Hill promotes the Kantian kingdom of ends formula as a useful device for working out moral principles, Hill is clear that Kant does not think that the kingdom of ends is the best approach to making everyday moral decisions. Rather, Kant thinks of it as a heuristic to model the appropriate moral attitude for "deliberating from basic moral values to moderately specific principles."⁴¹ Like Rawls's original position, Hill thinks that normative conclusions derived from the kingdom model follow from hypothetical choices. Specifically, "one *should* act according to the 'laws' one *would* adopt if one were legislating in the kingdom."⁴² If we follow Hill's advice on the kingdom of ends, we should be able to derive constructivist imperfect duties regarding climate change.

Kant, like Rawls, recommends that in thinking about the kingdom, "we abstract from the differences" between agents as well as from their particular ends. Hence the kingdom is at least somewhat objective. In Kant, rational agents value because they are autonomous. This allows Hill to insist that the decision procedure for Kant's kingdom can be found in Kant's idea that members of the kingdom are ends with dignity above all else. In calling the legislators in the kingdom "ends in themselves," Hill argues that Kant means three things: "'dignity' is an unconditional value," this

⁴¹ Thomas E. Hill Jr, "Kantian Constructivism in Ethics," *Ethics* 99 (1989):752-770, p.766.

⁴² *Ibid.*

dignity has no equivalent (i.e., people can't be treated like means), and regarding other rational agents as ends in themselves implies commitment to furthering their contingent ends, because one cannot ignore the projects and concerns of the agents one respects.⁴³ These aspects, plus the impartiality and the decision procedure based on agents valuing autonomy, as well as the rather modest moral viewpoint this last feature constitutes, makes the kingdom of ends well-suited for deliberation about moral problems. In fact, Hill maintains that the “moral commitments implicit in the Kantian conception lead rather directly to general moral guidelines that may be used in deliberations about more specific policies when historical circumstances are taken into account.”⁴⁴ We might now take up this Kantian moral point of view and ask, what laws would a legislator adopt? It seems that laws that entail strict respect for persons and their dignity will be favored along with those that allow (or even promote) humanity in general—in all generations—to pursue its contingent projects and ends.

Where climate change is concerned there is of course much uncertainty. But it seems evident that if the current generation does not abate emissions now, then the current legislators are not treating future legislators as ends in themselves, and with the dignity that that implies. Furthermore, through their inaction, they will rule out the possibility of future people pursuing their contingent ends. It is not important, for this position, that these future *ends in themselves* do not yet exist because the duty in question is not owed to the individuals but to all of humanity, all generations. Hence, it is possible that the intergenerational duties we have to future people are imperfect moral duties to all of humanity that each of its members (whoever they will be) has the opportunity to live a dignified life, and pursue his or her own ends. We may express this as the Rawlsian natural duty to promote a decent civilization.⁴⁵ Alternatively, we may simply say that these imperfect duties are duties of strict respect, and the furtherance of the dignity and projects of all of humanity in its past,

⁴³ Ibid., p.768.

⁴⁴ Ibid., p.769.

⁴⁵ Earlier in this section I cited Rawls's natural duty to promote the institutions of justice and a decent civilization. I omit the institutions of justice here because I am arguing against climate change as an institution of justice. However, it would be reasonable for legislators in the kingdom of ends to promote such a duty if they were deliberating on problems of justice.

present, and future forms. In light of historical information about climate change, these more abstract duties pragmatically entail curbing emissions, promoting policies of conservation, supporting additional climate change research, etc. The bases of these imperfect duties are the Kantian notions of autonomy and dignity and the respect that these require. The nature of these duties, or at least one way we might understand them, is by thinking about them as though we were legislators in a kingdom of ends. Operating without knowing the specifics about our circumstances, but committed to treating others with respect, we would legislate principles that would promote dignity, and the protection of future generations.

This Kantian constructivist model of how we might derive imperfect duties of conservation from more general moral principles of respect and dignity is only one way that we might circumvent the problem of perfect intergenerational duties. Some different principles, or a different decision procedure, may result in better-fitting principles to inform us of our imperfect duties with regard to future people. However, my purpose here is not to defend an account of our duties, but to show that it is possible to identify imperfect duties regarding climate change that will involve choosing policies of conservation. The ultimate point is that it is possible to avoid the problems of perfect duties toward future people and still acknowledge stringent imperfect duties toward future people regarding climate change.

Addressing the problem of climate change as a duty of imperfect morality dissolves the non-identity problem, as it no longer requires that we look for a justice relationship with future people. It does not matter that our decisions do not harm future people, because our duties have nothing to do with their individual state of living. Dennis (from the discussion of the non-identity problem) cannot claim we harmed him by choosing the destructive environmental policy. This is still true, but now irrelevant with the imperfect duties approach. The imperfect duties we have are duties of strict respect to all humanity and the promotion of the dignity and projects of all members of humanity. This is a duty because we are all autonomous, rational beings, not because Dennis has a claim against us not to be born worse-off than some other environmental policy choice would have entailed. This is a duty because we are morally obliged to promote the ends of humanity and treat individuals as ends.

Further, these duties are justified with no reference to future people's rights or harms against them.

The non-reciprocity problem is similarly avoided on this approach to the intergenerational problem of climate change because it demands no relationship between the living and future generations. It does not require that future people have rights, only that current people have duties. The theories that have attempted to negotiate some way around the non-reciprocity problem, and met with any degree of success, actually seem to rely on either imperfect, unidirectional duties (subject-centered theories) or generalized reciprocity (the stewardship model), both of which are moral duties, not the perfect duties of a reciprocal nature—either direct or indirect—that mark rights and justice.

One might now ask why philosophy has been resistant to this solution before. Why did we not immediately recognize that the intergenerational problem is an ideal instance of an imperfect duty, and not attempt to make it fit into models of justice/perfect duties with which it is incompatible? My suspicion is that the urgency of the issue has turned people against this route. Ernest Partridge, in "On the Rights of Future Generations," rejects the attempt to assign our duties to future people to the category of "unreciprocal, (i.e., imperfect) duties to the future," as a way to get around what he calls the "rights problem."⁴⁶ He argues instead that we do have positive, perfect Kantian duties stemming from future people having rights. Of interest here is Partridge's reason for dismissing imperfect duties.

Partridge argues that choosing perfect duties over imperfect duties may make a significant moral difference because "rights have a stringency and urgency that benefactions do not."⁴⁷ He develops this further by explaining that if future people have rights claims against us, "they will have no cause to be grateful to us for preserving a viable ecosystem, for they will have received their due."⁴⁸ (Partridge barely responds to the non-identity problem.⁴⁹) He maintains that perfect duties have

⁴⁶ Ernest Partridge, "The Rights of Future Generations," in *Upstream/Downstream: Issues in Environmental Ethics*, ed. Donald Scherer (Philadelphia: Temple University Press, 1990), p.40.

⁴⁷ *Ibid.*, p.43.

⁴⁸ *Ibid.*, p.44

⁴⁹ Partridge's response is largely to set aside the non-identity problem by claiming that some collective of future people will exist and we are obligated to improve their

more weight than imperfect duties, thus the interests of future people will be better served if we can show they have rights claims against current generations. Partridge claims to be following the Kantian distinction of perfect/imperfect duties. He gives the same argument for perfect duties that Barry cites as a popular reason for intergenerational justice—urgency. However, this is only a reason to include the intergenerational problem within the ambit of justice if exclusion would deny urgent, immediate, policy-driven outcomes. This is not the case. Partridge wants to argue à la Feinberg that to respect a person is to think of that person as a potential claim maker. He insists that this respect is lacking in imperfect duties as they ignore these rights claims.⁵⁰ This is wrong, especially on the Kantian distinction of the perfect/imperfect divide Partridge has adopted. Kant’s notion of imperfect duties focuses on both the notions of respect for the ends of others, and the aim of promoting their interests. Further, both Mill and Kant, as illustrated above, do not consider imperfect duties to be optional or any less obligatory than perfect duties. It is regrettable that, as Mill notes, some people have understood imperfect duties to mean optional duties. Partridge seems to have made this error.

It may seem that Partridge has some grounds for his criticism of imperfect duties insofar as it is easier to implement a policy of duties at the state level if we can see that there is some person or set of people with claims against us. While Partridge is correct that this would make it easier to implement policy, it is not the only way policy can be implemented. We need not go so far as to invent harms against future people when we are perfectly able to achieve Partridge’s aim of treating future people with standards of respect due to individuals on an imperfect duty account of our dues. Recall that, according to Mill, legal duties are compatible with imperfect duties. That is, though we have some latitude in how and when we fulfill the duties, Mill appears to find it legitimate for a juridical system to impose coercive rules on individuals to compel them to fulfill their imperfect duties.⁵¹ Kant rejects this, explaining that imperfect duties cannot be subject to juridical duties because they pertain to an end, the having of which is a duty. However, “no external lawgiving

life prospects, but this will only be the case if we have perfect duties not to bring future people into a sub-threshold state (which fails for reasons given above).

⁵⁰ Partridge, “The Rights of Future Generations,” p.44.

⁵¹ Mill, *Utilitarianism*, p.93.

can bring about someone's setting an end for himself (because this is an internal act of the mind), although it may prescribe external actions that lead to an end without the subject making it his end."⁵² While Kant is not saying that imperfect duties can be juridical duties, he does imply that it is at least possible for external actions to contribute to an end (in this case the end of humanity). And while such actions, if not from a good will would not be good actions for Kant, there is no reason to think that legal duties require specific motives for compliance. Even if one reduces carbon emissions because of a legal duty to do so, one is still fulfilling the legal and moral duty—for those less demanding than Kant—to conserve.

In chapter 4, I offered examples of legitimate duties of a state that have the unidirectional nature of a duty of beneficence (i.e., imperfect duty, duty of humanity, or duty of virtue). One of these duties is a duty of foreign aid. These are extremely common in times of disease and natural disasters. Previously, I gave the example of nations offering relief to Haiti after an earthquake, other disaster relief examples include: tsunami relief in different parts of Asia in the last decade; emergency shelter and supplies provided after hurricanes, earthquakes, droughts, and floods around the world; and current aid efforts in Syria. Non-disaster relief examples also abound, including Western nations helping fight AIDS in Africa; family planning projects in underdeveloped nations; clean water projects throughout Asia and Africa; developmental projects and agencies such as the US Peace Corps (which is funded by governmental taxes and promotes health, education, nutrition, agricultural, and other projects throughout the underdeveloped world). These are all non-correlative, imperfect duties that governments fulfill largely with the endorsement of their constituents, and usually with funds raised via taxes or donations from said constituents. While these comments may not be sufficient to establish that taxing citizens to fulfill imperfect duties is legitimate (that would be out of the scope of this project), they suffice to establish that such actions are popularly supported and accepted as legitimate. Specifically, legal rules (e.g., taxes) are utilized by the state to enforce the fulfillment of imperfect duties toward distant others. I have argued—in my prior assertion that the international problem is inclusive of justice—that the destitute in these examples may have standing to make claims against us. However,

⁵² Kant, *The Metaphysics of Morals*, p.64.

in the cases listed here that is not why aid is given. Aid is given to promote a certain state of well-being for people who may not otherwise have access to that standard. These are exactly the kind of reasons that we might have for imposing legitimate juridical rules regarding the well-being of future sets of people. Further, there is no reason to think the intergenerational case has any morally relevant differences from the international case of providing benefits to the worse-off people of the earth.

We have extremely good reason to suspect that, without change in our current policies and practices regarding the earth's resources, future generations will exist in conditions that parallel the conditions of the current generation's worst-off people. Because we have imperfect duties to promote all people's dignity and ability to pursue their contingent ends (or on the Rawlsian formula, to promote the circumstances that allow for a particular state of well-being), our current governments can legitimately legislate such measures. The caveat, of course, is that they cannot legislate such extreme measures that they significantly lower the life prospects of current people. This corresponds precisely with Kant's reasoning that imperfect duties cannot "be raised to the universality of a law of nature, because such a will would contradict itself."⁵³ That is, to have duties so stringent that the current generation's perfect happiness is blighted would contradict the aim which guides imperfect duties—the promotion of humanity's perfect happiness. On my kingdom of ends model, this would mean that if duties toward future generations were perfect duties, we would sacrifice the current generation's dignity and ability to pursue contingent projects. Such a risk would defeat the purpose of the duties we have toward future people. Up until the point where humanity's end is threatened, however, it seems that governments could be authorized to impose legislation.⁵⁴ It is difficult to understand how the breadth and extent of possible legal rules made legitimate in this framework could be interpreted as not efficacious enough for those who insist, for reasons of urgency, that the intergenerational problem must involve perfect duties or justice. Imperfect duties do involve some leniency in fulfillment

⁵³ Kant, *Grounding for the Metaphysics of Morals*, p. 424.

⁵⁴ While this is not explicitly endorsed in either Kant or Mill, it is mentioned by both that descriptively this is sometimes the case and (possibly) it also ought to sometimes be the case. As above in Mill, *Utilitarianism*, p.93.; Kant, *The Metaphysics of Morals*, p.64.

(hence we need not eliminate *all* emissions at present), but they do require fulfillment, so possible policies might include carbon taxes, incentives to lower emissions, etc. I have attempted to show only that imperfect duties stand against the critique that they do not warrant enough action to solve the intergenerational problem. This discussion has shown that that critique is misguided.

At this point, one might still reject my solution to the intergenerational problem by asking what is left for justice. If imperfect rights are sufficient for a problem like climate change, have I not narrowed justice too far? My response is twofold. First, it is precisely because of the nature of the problem of climate change—the time lag in the dispersion of harms, the lack of clear culprits, and the lack of clarity regarding what reparations entail—that it is impossible to fit it into a model of direct or indirect reciprocity. Further, the problem involves such urgency that only limited leniency is acceptable in fulfilling this imperfect moral duty. Hence, it is uniquely situated to generate legitimate juridical duties to avoid over-leniency in its fulfillment. It also escapes the problem that Consequentialists have faced of requiring that we do more than is possible right now. If climate change were a duty of justice, the extent to which the current generation would need to sacrifice now to avoid significant impact on future individuals would be astronomical. But juridical duties can stop the current trend of doing little to nothing in the face of such extreme sacrifice, by allowing a bit of leniency in how much we have to do to fulfill this imperfect duty (e.g., a sliding scale, dependent on amount of emissions, for paying carbon taxes), and at the same time ensure that the duty is fulfilled as fully as possible. Hence, it is unique to the climate problem that it would be more successfully dealt with as a moral duty than as a justice duty. My second response is that in other areas where genuine coordination is possible, a justice relationship is still best able to deal with and adjudicate problems. Accepting that one particularly urgent problem is not a justice problem does not threaten the entire system of justice, nor does it imply that the scope of justice is overly narrow.

A final objection Constructivists could raise to my project may be that I have closed the door too soon on constructivist theories of justice. If I am willing to let indirect reciprocity be sufficient for the scarcity of resources condition, why not try to find a way to motivate a system of coordination such as the one suggested by Heath?

My initial response is that as long as such coordination lacks the fact of solidarity between distant generations, it will not be possible. This response may just look like a reason to reject my account of the circumstances of justice. However, there is an option left open to the Constructivists. It is possible that if the current generation's duties toward future people become juridical duties and future people benefit from the fulfillment of these duties, starting a system of coordination between generations such as the one Heath describes could become just. This is because the duties of future generations would be less extreme once emissions have begun to be curbed. Furthermore, being within a shared, functioning legal system would ensure that individuals fulfill these duties, and that the punishment for defection involves legal retribution in proportion to the wrong in a way that seems more appropriate to the crime (e.g., paying fines for emitting instead of losing pension or currency benefits already paid for). This system will be fair only if the disadvantages are appropriate such that cooperation is mutually beneficial.

It is in much the same way, I imagine, that systems of health care and education come into existence. Initially, meeting needs for health care and education are moral duties, not justice duties. Such moral duties only become duties of justice when they exist in a system regulated to ensure indirect reciprocity—usually a state system. The initial impetus to include such duties in a system of justice develops from the moral duties to promote others' well-being and health, not because some individuals are owed these considerations in exchange for other, unrelated benefits. Applying this reasoning to the controversy surrounding the Affordable Care Act in the United States, we could explain the resistance to public health care not as a denial of a moral duty to promote the health and well-being of others. Rather, the resistance is to including the promotion of other's health and well-being in a system that would, by means of indirect reciprocity, render moral duties into duties of justice. In sum, justice toward future people could be possible if we can create institutions which translate imperfect moral duties into indirect reciprocal duties. However, lacking the relevant institutions to do so, our duties to future people remain imperfect moral duties.

Could this kind of coordination open the door for some form of attenuated solidarity between generations through the overlapping way that generations actually

interact with one another? I am not certain, but allow for the possibility since more expressional solidarity is certainly likely. Another option for Constructivists is to simply point out that in restricting their scope to justice, they in no way rule out the possibility of imperfect moral duties. Hence, it could be consistent with their larger system of moral duties that the intergenerational climate change problem be treated as an imperfect moral duty. According at least to Rawls's constructivist approach to justice, it is a moral duty that one promote justice. Thus, the imperfect duties approach to the intergenerational problem is not tantamount to dismissing the issue: only dismissing it from the scope of constructivism about justice.

Conclusion

In this chapter I first argued that intergenerational coordination problems do not fit into my own or the standard account of the circumstances of justice. The rest of the chapter may be seen as an attempt to show that this is not a problem for my view of the circumstances of justice, as all of the best attempts to incorporate the intergenerational problem into the scope of justice have failed. I introduced two reasons that theorists have been inclined to account for intergenerational problems within the scope of justice, both of which are person-affecting reasons. In one case, that of harms we inflict on future people, we saw that there is no good way around the non-identity problem. In the second case, the claim was that future people have a right to our protecting the environment because of the urgency of the matter. This case also has no solid theoretical foundation as it raises the non-reciprocity problem. I then proposed that the unidirectional duties we find in some attempts to circumvent the non-reciprocity problem are actually imperfect moral duties. These duties not only fit the structure of the intergenerational problem, but also avoid the non-reciprocity and non-identity problems. Furthermore, this model is able to capture the issue of urgency by warranting legal sanctions in the same way a perfect duty might. Hence, imperfect moral duties might result in the same kinds of policy change that would result from considering the intergenerational problem a problem of justice.

This chapter has offered a new analysis of some old ways of characterizing duties in an attempt to respond to the intergenerational coordination problem. My conclusion is that because there is a sense of urgency, and a sense that we are harming future people, the intuition that we have duties of justice toward future

people seems plausible, but actually is wrong. We have only imperfect moral duties toward future people. The reason we have rejected the idea of having imperfect duties toward future people is that modern treatment of imperfect duties suggests that imperfect duties are not as demanding as perfect duties, and so would be less effective in dealing with the problems of climate change. The idea that only perfect duties can deal with the harms and urgency of climate change is misguided. Imperfect duties can also deal with urgent, harmful situations—as they do in disaster relief and development projects daily—because they are as demanding as perfect duties.

Conclusion

This thesis is a defense of a new formulation of the circumstances of justice. It proposes a new scope of justice and, in doing so, offers new insight into the nature of justice from a constructivist perspective. In particular, it advocates a particular relationship between solidarity and justice, one in which the capability of participating in a particular kind of mutual trust generated by solidarity, is a necessary condition for justice to have application. The project is comprised of four broad tasks.

The first was to explain the importance of the circumstances of justice for all political Constructivists and to evaluate the standard accounts of the circumstances of justice. This task was the focus of the first two chapters. In the first chapter I showed that constructivism is an appealing method of political philosophy and that it is characterized, among other things, by principles derived from certain relevant facts about the world and human nature. This means that a theory of justice is constrained by the facts that make its principles appropriate. These facts—whatever precisely they may be—are the *circumstances of justice*. In the second chapter, I argued that the circumstances of justice should be interpreted normatively as the facts that must be true for human cooperation and hence, justice to be needed and possible. In addition, I argued for the importance of mutual trust in the circumstances of justice.

The second task was to explain what solidarity is, and offer a description of its normative aspects. To this end, in chapter 3, I offered a reconciliatory account of solidarity. In my view, solidarity is constituted by four jointly necessary conditions: a shared joint interest, identification with the group, a disposition to empathy, and mutual trust. The bidirectional or unidirectional structure of these conditions determines whether the solidarity in question generates obligations or motivations.

The third task was to develop and defend my own account of the circumstances of justice. This task was the subject of chapters 4 and 5. In chapter 4, I proposed an alternative formulation of the circumstances of justice. I argued that the circumstances of justice are: the fact of solidarity, moderate scarcity of resources, and limited human understanding. While there can be no test as to whether my account of the circumstances is the definitive account of the circumstances of justice, I

contend that my account is more plausible than the standard accounts. Chapter 5 aimed to provide a bulwark against anticipated criticisms of my new account of the circumstances of justice. I did this largely by addressing the tension between inclusion and exclusion in the circumstances of justice.

The final aim of this project was to apply my analysis of the circumstances of justice—and justice itself—to the intergenerational coordination problem of climate change, and ask whether this problem falls within the scope of justice. This was the goal of chapter 6. There I argued that intergenerational coordination problems do not fit into either my own or the standard account of the circumstances of justice. The rest of the chapter may be seen as an attempt to demonstrate that Constructivists do have a response left open to them regarding the problem of climate change. Constructivists could take the position that we have weighty duties toward future people; however, they simply do not understand these duties to be duties of justice. In chapter 6, I have shown why this constructivist understanding of these duties is not a problem.

While I believe my endeavor to formulate a new account of the circumstances of justice is complete, I recognize that the project itself has raised a number of related issues that may merit exploration in the future. The chapter on solidarity posited a somewhat contentious position: that even involuntary solidary groups generate obligations. The consequence of this view is that individuals may have somewhat less volition in choosing values and obligations than the liberal tradition commonly insists.

Chapter 6 raises a number of issues for any Constructivist who may wish to take the imperfect duty explanation of what we owe to future people. The first is the challenge of specifying the content of the imperfect duties we have toward future people. Another is to work out what happens when perfect and imperfect duties conflict? Does one kind of duty trump another? Does perceived conflict only reveal that one of the duties in question isn't really a duty—or does it reveal perhaps some altogether different answer? I think answers to these questions will be necessary, particularly to convince those resistant to calling our duties to future people imperfect duties that we are right to do so.

Another issue which this project raises is the structural relationship between principles of justice and moral principles. I have outlined the rudiments of my view in chapters 4 and 6, but said very little to defend my position on the unidirectional vs. reciprocal structure of the kinds of duties. This project reveals the importance of understanding the relationship between justice and morality before we can get clear on what justice is, and what it aims to do.

Perhaps the most important implications of the project, however, are what it reveals about the ways that we think about justice. If my analysis is plausible and my examples from chapter 5 correct, then mutual trust, solidarity, and perhaps other social groups play a much more significant role in questions and theories of justice than we have been giving them credit for. That is not to say that liberalism ought to be abandoned for communitarianism. Rather liberal political theory may do well to reevaluate its near-exclusive emphasis on individual agency over social agency. After all, we only become agents capable of justice—capable of claim-making and rights-bearing—by being social agents first.

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