

W. Derek Bowman, PhD  
VAP, Philosophy  
Providence College  
wdbowman@gmail.com  
<http://www.derekbowman.com>

## **The Circumstances of Justice**

### **I. The idea of the 'Circumstances of Justice'**

Justice, in its classic formulation, is the virtue of rendering to each her due.<sup>1</sup> David Hume rejects this as a proper definition of justice for the obvious reason that it gets its meaning only by a further specification of what each person is due – a specification which must be settled by appeal to principles of justice.<sup>2</sup> Nonetheless, the phrase is useful in locating the subject matter, if not the substance, of justice. As John Rawls says, the concept of justice is defined “by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages.”<sup>3</sup>

The *circumstances of justice*, then, are the conditions under which such principles apply. Rawls characterizes them as “the normal conditions under which human cooperation is both possible and necessary,”<sup>4</sup> and says that outside these conditions, “there would be no occasion for the virtue of justice.”<sup>5</sup> Without the need for cooperation, there would be no need to assign rights and duties and no social advantages to distribute. These circumstances generate the problem to which principles of

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<sup>1</sup> This formulation traces back at least to Plato’s *Republic*, where Polemarchus attributes it to the poet Simonides. See 331c-332d.

<sup>2</sup> Hume *Treatise*, 3.2.6.2

<sup>3</sup> Rawls 1999, p. 9

<sup>4</sup> Rawls 1999, p. 109

<sup>5</sup> Rawls 1999, p. 110

justice prescribe a solution. What, then, are these circumstances? Rawls credits his account to Hume, claiming to have added “nothing essential” to Hume’s fuller treatment.<sup>6</sup>

As I will argue, however, Rawls’s claim is very much mistaken. Rawls’s Kantian moral psychology and his more capacious concept of ‘justice’ lead him to adopt a list of circumstances that, despite their substantial overlap, cannot be justified, or even explained, in Humean terms. In order to resolve this problem with the Rawlsian-Humean account, I propose a revised account of the circumstances of justice. Thus, resolving this interpretive puzzle points the way to a deeper understanding of the nature of justice and its grounding in the human condition.

## II. The ‘Circumstances of Justice’ in Hume and Rawls

Hume’s account first appears in the *Treatise of Human Nature*, where he identifies justice as an artificial virtue, grounded in social conventions. These conventions arise in response to the natural mismatch between individual human needs and abilities – an inadequacy that can only be alleviated by joining together with others.<sup>7</sup> And yet this need for others only gives rise to considerations of justice when combined with further facts about the qualities of the human mind (“selfishness” and “limited generosity”) and about the situation of the external objects upon which we rely (“easy change” and “scarcity”).<sup>8</sup>

Justice finds its origins in the conventions that arise to address these basic human needs. Where there is no need for such conventions, there will be no justice on this account. But also, as Hume emphasizes when reprising these points in the second *Enquiry*, justice cannot arise where such

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<sup>6</sup> Rawls 1999, p. 110

<sup>7</sup> *Treatise* 3.2.2.2-3

<sup>8</sup> *Treatise* 3.2.2.16

conventions are inadequate for those needs. Extremes of either “abundance” or “necessity” would make justice useless, as would either “perfect moderation and humanity” or “perfect rapaciousness and malice.”<sup>9</sup> Finally, Hume adds a condition of ‘rough equality’ to the list of circumstances necessary for justice to apply, since justice would again prove useless for with respect to those who have no power of resistance or reprisal.<sup>10</sup>

Drawing on Hume’s initial distinction between “the situation of external objects” and “qualities of the human mind,” Rawls divides his own account of the circumstances of justice into “objective” and “subjective” conditions. According to Rawls, the objective circumstances of justice are (numbering mine):

**(1)**[M]any individuals coexist together at the same time on a definite geographic territory. **(2)** These individuals are roughly similar in physical and mental powers; or at any rate, their capacities are comparable in that no one among them can dominate the rest. **(3)** They are vulnerable to attack, **(4)** and all are subject to having their plans blocked by the united force of others. **(5)** Finally, there is the condition of moderate scarcity...<sup>11</sup>

While the subjective circumstances are (numbering mine):

**(6)**[W]hile the parties have roughly similar needs and interests, or needs and interests in various ways complimentary, so that mutually advantageous cooperation among them is possible, **(7)** they nevertheless have their own plans of life. These plans, or conceptions of the good, lead them to have different ends and purposes, and to make conflicting claims on the natural and social resources available. Moreover, although the interests advanced by these plans 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 and that advances claims in its behalf as deserving satisfaction. **(8)** I also suppose that men suffer from various shortcomings of knowledge, thought, and judgment. Their knowledge is necessarily incomplete, their powers of reasoning, memory, and attention are always limited, and their judgment is likely to be distorted by anxiety, bias, and a preoccupation with their own affairs. Some of these defects spring from moral faults, from selfishness and negligence; but to a large degree, they are simply part of men’s natural

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<sup>9</sup> Hume, *Enquiry Concerning the Principles of Morals*, 3.1.12

<sup>10</sup> *Enquiry* 3.1.18

<sup>11</sup> Rawls 1999, p. 110

situation. As a consequence individuals not only have different plans of life but **(9)** there exists a diversity of philosophical and religious belief, and of political and social doctrines.<sup>12</sup>

It is easy enough to see why Rawls credits Hume as his source when we look at the objective conditions. Conditions 2 and 5 appear explicitly in Hume's account. Condition 3 is covered under Hume's condition of 'easy change,' which in its initial elaboration includes a concern with the violent dispossession of the fruits of one's labor and of one's good fortune.<sup>13</sup> However, condition 4's more general concern with one's "plans" already represents a move away from Hume's focus on basic human needs. Finally, on the simplest reading, Condition 1 is simply a precondition for the operation of the other listed conditions, since, e.g. we are only vulnerable to attack when others are physically close enough to execute such an attack.<sup>14</sup>

The implausibility of Rawls's claim to have added "nothing essential" to Hume's list becomes clearer when we examine the subjective conditions. Condition 6 is easy enough to connect to Hume's account, given the role of sympathy in his account of moral motivation, and given his contention that motives of perfect malice would render justice useless. But in specifying Condition 7, Rawls explicitly rejects a tendency toward selfishness as a pre-condition for the circumstances of justice. To be sure, Hume's own account of selfishness is more nuanced than the term might suggest. He recognizes that we don't care *only* about ourselves, but he insists that we care *most* about ourselves, followed by our close friends and relations, with mere acquaintances and strangers coming in last.<sup>15</sup> Nonetheless, the core of Hume's account makes no appeal to different conceptions of the good. The only issue is to

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<sup>12</sup> Rawls 1999, p. 110

<sup>13</sup> *Treatise* 3.2.2.7 It is noteworthy that this concern doesn't reappear in the *Enquiry*. This may be due to the specific scope of the argument there, which only requires an illustration of justice's dependence on circumstance.

<sup>14</sup> But talk of a "definite geographic territory" suggests something a bit more heavy duty, e.g. relating to Rawls's treatment of justice for a closed society. I don't explore that complication here.

<sup>15</sup> *Treatise* 3.2.2.13 and 3.3.3.2

what extent we prefer our own good, and that of our close relations, over the good of others – not what disputes we might have over which things are indeed good.

Conditions 8 and 9 are similarly absent from Hume’s account. He does make allowances for a general tendency to choose our short-term good over our long-term good in explaining the need for government to enforce the rules of justice.<sup>16</sup> But this falls far short of the range of limits canvassed under Condition 7, limits Rawls would later group under the label “the burdens of judgment.”<sup>17</sup> And Hume shows no interest in having the rules of justice accommodate this kind of philosophical disagreement, as we can see from his impatience with moral appeals based on religion.<sup>18</sup>

Rawls’s protestations to the contrary, it shouldn’t be surprising that his account differs dramatically from Hume’s. First, Hume views justice primarily as a system of rules assigning property rights.<sup>19</sup> Second, Hume’s account of the circumstances of justice is, in the first instance, an exercise in speculative anthropology.<sup>20</sup> In the conclusion of Book 3 of the *Treatise*, Hume describes his discussion of justice and the other virtues as analogous to the work of an anatomist.<sup>21</sup> And in both the *Treatise* and the *Enquiry* he is concerned with the “origins” of justice – that is, under what conditions do rules of justice actually arise in human societies.<sup>22</sup> This is not to say that there is no normative element in

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<sup>16</sup> See *Treatise* sections 3.2.6 and 3.2.7

<sup>17</sup> Rawls 1993, p. 54-8 and 2001, p. 35-7

<sup>18</sup> *Enquiry* 9.3

<sup>19</sup> This is evident from the central role possession and property play in Hume’s account. See, e.g. *Enquiry* 3.8 where he counts opening granaries in an emergency as a suspension of justice, rather than an exercise of it.

<sup>20</sup> Hubin (1979) interprets Hume as engaged in a descriptive/historical characterization of the circumstances of justice in the *Treatise* but as engaged in a more normative treatment of the subject in the second *Enquiry*. (See his p. 5). I find Hume’s appeal to the ‘utility’ of justice in the *Enquiry* to be ambiguous between these two readings. But either way, as Hubin points out, Rawls also rejects a normative account of justice that grounds it in utility in this way.

<sup>21</sup> *Treatise* 3.3.6.6; however, see Krause 2008, p. 225, note 52 for a reminder not to take this passage to mean Hume had no moral aims in the *Treatise*.

<sup>22</sup> See, e.g. *Treatise* 3.2.2.11 and *Enquiry* 3.12

Hume's treatment of justice – after all, he categorizes justice as an artificial *virtue*.<sup>23</sup> And, given his view of moral psychology, there can be obligations of justice only if there is some deeper human motive served by justice.<sup>24</sup> Thus, for Hume, showing the anthropological origins of justice is a precondition for establishing its normative bona fides.

Rawls, in contrast, is concerned primarily with the normative project of identifying and defending the correct principles of justice. For Rawls, these are not, in the first instance, the circumstances under which we find people appealing to justice. Rather they are the circumstances to which the concept of justice applies. And because Rawls's theory of moral psychology is more Kantian than Humean, he does not assume that normative concepts can apply only where they are useful or where they satisfy other non-moral motives.

Nonetheless, Rawls is able to incorporate much from Hume's account because of his view of society as a cooperative scheme for mutual advantage and of justice as the virtue governing the distribution of those advantages. Justice only applies when there are social advantages to be distributed, and there will typically be such advantages only when society is useful, in Hume's sense. Taken together then, this Rawlsian/Humean view represents the traditional account of the circumstances of justice.

### III. The Significance of What Rawls Added

Summing up the traditional account: The role of principles of justice is to define the appropriate distribution of rights and duties and of the advantages and disadvantages of social cooperation. The

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<sup>23</sup> <Acknowledgement omitted for blind review>

<sup>24</sup> *Treatise* 3.2.1.6 "that no action can be virtuous, or morally good, unless there be in human nature some motive to produce it, distinct from the sense of its morality"

circumstances of justice are the material and psychological preconditions for the applicability of such principles. These circumstances are divided into two groups. The objective circumstances are the material conditions which require and enable cooperation, and the subjective circumstances are “the relevant aspects of the subjects of cooperation.”<sup>25</sup>

Hume treats moderate scarcity as the primary condition on the objective list. It is clear enough why this should be so for Hume, who treats 'justice' primarily as a system of property rights. Without a scarcity of resources, everyone can take as much as they wish without thereby diminishing the prospects of others to do the same. Under these conditions there is no reason to dispute about any particular bundle of resources and so no need to lay claim to exclusive control thereof. Similarly, under conditions of maximal benevolence each member of the community treats the good of each as being of equal weight to the good of herself and her friends and family. But in such conditions there is nothing to give rise to disputes which property rights would be needed to solve. Thus, without scarcity and without limits of benevolence, there is no problem for justice to solve.

But it is important that the scarcity be only moderate. For example, if the scarcity of food is so great that there's no distribution that would allow some to escape starvation except by means that will require others to starve, then no property system could exist, since those consigned to starvation in any arrangement cannot be expected to abide by it. Thus, while there is a practical problem, it is one that must be resolved by force rather than by recourse to justice. We can take the phrase 'limited benevolence' to have the same dual aspect. While excessive benevolence would preempt the problem that justice is brought in to solve, it seems unlikely that a common system of property could be settled upon where there is not some fellow-feeling or partial identity of interests.

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<sup>25</sup> Rawls 1999, p. 110

Rawls's misleading claim to have added nothing substantial to Hume's account leads him to defer to Hume's defense and explanation of these circumstances. Hume's simpler account holds together and is explicable in terms of his overall moral psychology. On his view benevolence is the primary other-regarding motive and, for Hume, there can be no moral requirements without a motive. Where benevolence is unlimited, there is no need for anything more. But where it is limited, the only remaining motive for justice would be its usefulness. Thus requirements of justice can only obtain where benevolence is limited, but where rules of justice would be useful to those who are bound by them. And it is evident enough why the conditions of moderate scarcity, combined with rough equality should be necessary, and perhaps sufficient, for this condition.

But the expanded Rawlsian list is more heterogeneous and is not tied to Hume's moral psychology. Rawls's reliance on Hume's analysis thus leaves this larger list largely unargued and unexplained. At the very least we need an account of the relationship among the various items. Are they meant to be individually necessary and jointly sufficient? Disjunctively necessary? Merely illustrative? By deferring to Hume, Rawls leaves us without any guidance on how to answer these questions.

#### **IV. A Revised Account**

In order to resolve these difficulties, we must first reject Rawls's distinction between "objective" and "subjective" circumstances. As Rawls himself acknowledges in other contexts, what counts as a resource (and thus what counts as "scarcity") is in part a product of the psychological and motivational features of the subjects of cooperation. For example, Rawls explicitly includes "the social



bases of self-respect” among the “primary goods” which a society must justly distribute.<sup>26</sup> And these same social goods will figure into the ways in which our plans – particularly those dependent upon these goods – are subject to being blocked by others.

While Rawls is wrong to think that the two lists of circumstances are divided along an objective/subjective line, however, he is right to group them together in the way he does. Both Hume and Rawls use moderate scarcity as the paradigm circumstance on the ‘objective’ list. But once we emphasize the aim-dependence of both what counts as a resource and what counts as scarcity, it becomes clear that it is the mutual vulnerability of our plans that explains what holds the other members of the ‘objective’ list together. Rough equality, when combined with geographical proximity, make cooperation necessary by making us mutually vulnerable to attack. Scarcity makes us vulnerable to one another because my appropriation of some resource can thereby thwart any of your plans that depend on that resource. Moreover, the need for cooperation is heightened when these two forms of vulnerability are combined. In such cases one's vulnerability to assault may incentivize resource hoarding, while insecurity in access to resources can serve as an incentive for exploiting others' vulnerability to assault.

But we can also see that mutual vulnerability alone is not sufficient to require appeals to justice. If all of us were always motivated to achieve precisely the same states of affairs in precisely the same ways, there would be no conflicting claims for justice to resolve. With all wanting the same outcome in every situation, we would have no occasion to exploit (or to fear the exploitation of) our mutual vulnerability. To be clear, this is not the condition in which we want ‘the same thing’ in the way that all participants in a race want the same thing – namely, to win. This is rather it is the condition of

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<sup>26</sup> Rawls 1999, p. 386

wanting 'the same thing' in the way that a particular racer's parents want the same thing – namely, for that child to win.

This further condition is what unifies the 'subjective' list. The diversity of life plans, diversity of philosophical/religious views, and further disagreements resulting from the burdens of judgment all serve to preclude such a unity of aims. But we must be clear that under the term 'aims' we include both final ends *and* proximate goals that may be pursued only as instruments for some further aim. Thus, even where a parent and child share the same final end (e.g. the child's well-being), their differing judgments about how to pursue that end (e.g. eating candy or eating a healthy snack) may lead them to adopt divergent patterns of aims. And we must also add the condition of divergence in interests, in order to acknowledge the injustice of successful oppressive regimes.

Of course the circumstances of justice are supposed to make cooperation both necessary *and* possible, so we need to add the flip side of mutual vulnerability – our ability to act in concert with one another on shared terms. And, in the case of aims and interests, there must be some degree of partial congruence, or else we would be unable to find the common ground upon which to rest our appeals to justice. So the resulting proposal is:

Circumstances of Justice: The *circumstances of justice* are those circumstances characterized by (1) the mutual vulnerability of (2) a plurality of potentially interacting agents with (3) partially divergent aims and interests.

This account is able to explain what holds Rawls's original list of circumstances together while avoiding the confusion caused by his failure to adequately distinguish his account from Hume's. More importantly, I think it provides an illuminating picture of the basic subject matter of justice. Justice, on this account is fundamentally about finding mutually acceptable terms of cooperation that can allow us

to live together in ways that tame our mutual vulnerability, even in the faces of divergent aims and interests that might otherwise tempt us to neglect or exploit the vulnerability of others.

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