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Circumstances of Justice and Future Generations

BRIAN BARRY

I

In this paper, I do not intend to raise questions concerning population policy, of the kind that are discussed elsewhere in this volume. Nor do I propose to ask whether we have an obligation to ensure that there will be future generations at all. I have come to believe that the value of continued human existence has to be a premise of other arguments that invoke the interests of actual (present or future) human beings. It cannot be derived from any such argument, and I do not think that anything is gained by invoking the supposed interest of potential persons in becoming actual.¹

The question to be addressed here is as follows: assuming that there will be people in the future, can it be said that we should be behaving unjustly if we neglected their interests in deciding how much to use up finite resources, how far to damage the environment in ways that are irreversible or at any rate extremely expensive to reverse, and how much to invest in capital goods or research and development of new technologies (e.g. into non-exhaustible energy sources)? Naturally, the interests of those currently alive may well set some limits to the amount of resource depletion, environmental damage and lack of investment that can occur without injustice. But suppose (as seems quite likely) that these limits would be more stringent if the interests of future generations were taken into account. Does justice require us to stay within those stricter limits?

It may be asked why we should bother to pose the question in terms of justice, and I have found this question is often raised. For it seems clear that reference to the virtue of humanity would lead to the conclusion that we ought not totally to ignore the interests of future generations. I accept the conclusion but I will go on to observe that the same might equally well be said of relations between contemporaries. Why, then, would people attach importance to attempts to stake out claims based on justice, if there were nothing to be lost by falling back on claims based on humanity?

The answer is, I take it, twofold. First, although it is true that justice and humanity both exclude a total disregard for the interests of others, that does not make them by any means equivalent in general. Humanity requires that we respond to others' needs whereas justice requires that we give them their due. If something is due you, you do not have to show that you need it or that you will make better use of it than other possible claimants. Justice and humanity thus diverge in content.

Second, claims based on justice are commonly regarded as having a higher priority than claims based on considerations of humanity. An extreme but not I think atypical view is the one expressed by John Rawls: that the claims of justice have absolute priority over any others. "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."² The implications of this within Rawls's own theory can be seen by noting that (for reasons I shall discuss later) Rawls says that animals are "outside the scope of the theory of justice." Although "duties of compassion and humanity" apply to animals,³ the overriding priority of justice would presumably entail that we would never be right in moving to protect the interests of animals if this entailed committing an injustice against human beings.

If future generations were held to be likewise "outside the scope of the theory of justice" their claims would be reduced to the same residual status as the claims of animals are granted by Rawls. As I shall argue below, Hume's theory of the circumstances of justice does quite clearly entail that animals and future generations are outside the scope of justice, and for exactly the same reasons.

It is not necessary to go all the way with Rawls in order to regard claims based on justice as more pressing than claims based on humanity. In contemporary political debate, the most striking illustration of the

importance that is attached to making out a case for aid in terms of justice rather than relying on humanity can be found in the sphere of relations between rich and poor countries. With perhaps as many as a billion people suffering more or less severely from malnutrition, and an estimated thirty-five thousand children under the age of five dying each day from a combination of under-nourishment and infectious diseases, the case on humanitarian grounds for the rich countries to provide aid out of their superfluity is clear enough. But advocates of aid do not content themselves with pointing out the case based on considerations of humanity, which is so simple and straightforward, but try to construct arguments to the effect that the present distribution between rich and poor countries is a reflection of injustice. These arguments, which take various forms, have in common that they are complex and difficult if not impossible to verify because they appeal to counterfactuals—what the pattern of distribution would be in the absence of various features of the world as it actually has developed and is now.⁵

The humanitarian case, which depends on no elaborate chain of argument or resort to counterfactuals, and requires no more than the establishment of the facts of preventable suffering, has nevertheless been remarkable for its lack of success in bringing about worldwide redistribution. In the current recession among the industrialized countries, indeed, it has been noteworthy that the already exiguous aid to poor countries has been one of the first victims of government belt-tightening. It is therefore highly understandable that advocates of aid to poor countries should despair of humanitarian appeals and hope that a claim based on justice, if it could be made out, would have more impact.

In the final section of this paper, I shall propose a relatively simple principle of justice which would at once underwrite the claims of poor countries and of future generations to certain kinds of consideration. Before this, however, I shall investigate the notion that the circumstances of justice are absent in relations between one generation and its successors, this having the implication that justice and injustice cannot properly be predicated of those relations.

II

The actual term "circumstances of justice" is drawn from *A Theory of Justice*,⁶ but Rawls there refers us to Hume, remarking that "Hume's

account of them is especially perspicuous" and that his own statement of them "adds nothing essential to [Hume's] much fuller discussion."⁷ In spite of the intense scrutiny to which almost every aspect of Rawls's theory has been subjected, I do not know of any critic who has challenged Rawls's incorporation by reference of Hume's discussion, in the *Treatise* and the *Enquiry*, of the circumstances of justice. Moreover, I get the impression that the Hume/Rawls doctrine of the circumstances of justice may be well on the way to becoming part of the conventional wisdom. Since I, at any rate, have only recently come to realize how insidious is the doctrine, I am prepared to believe that others may also have let it slide by too easily. I shall therefore try to show, by a detailed examination of Hume's account, that the doctrine of the circumstances of justice, in the form in which Hume puts it forward, is false.

The assertion around which Hume's analysis of justice is organized is that justice is an artificial virtue. What does Hume mean by this? One thing he means is that, putting it in modern jargon, the rules of justice define a social practice. In the absence of some assurance that others will play their part there is no reason for anyone to do his. In an attractive metaphor, he likens the product of benevolence to "a wall built by many hands, which still rises by each stone that is heaped upon it, and receives increase proportional to the diligence and care of each workman."⁸ In other words, whether others are benevolent or not benevolent, it will always be an improvement in the state of the world for me to act benevolently. Justice, by contrast, produces its effects in the manner of "a vault, where each individual stone would, of itself, fall to the ground; nor is the whole fabric supported but by the mutual assistance and combination of its corresponding parts."⁹ "Whatever is advantageous to two or more persons if all perform their part, but what loses all advantage if only one perform, can arise from no other principle."¹⁰

This is not, however, the most central or distinctive claim that Hume wants to make in saying that justice is an artificial virtue. What he means is that there is no external standard of justice against which the rules can be assessed. The "vulgar definition of justice" as "a constant and perpetual will of giving every one his due" is mistaken in supposing that it makes sense to think of a "due" that is "independent of justice, and antecedent to it."¹¹ In the same way that Hobbes denied the possibility of laws being unjust, because the laws define what is just and unjust, so Hume claims that the rules of justice cannot be subjected to

criticism on the basis of independent criteria of justice because they define what justice is.

Rules of justice, Hume maintains, arise out of and are sustained by mutual interest that people have in securing stability of possessions. "It is self-love which is their real origin; and as the self-love of one person is naturally contrary to that of another, these several interested passions are obliged to adjust themselves after such a manner as to concur in one system of conduct and behaviour."¹²

Hume's position is substantially the same as that recently and more long-windedly set out by F. A. Hayek in *The Mirage of Social Justice*.¹³ Rules of justice (which for both authors amount to rules of property) are conventional. To criticize such rules on the basis of some abstract standard of justice (what is people's "due" in some sense not defined by the rules themselves) is absurd. But this is not to say that there is no basis on which proposed rules of justice can be criticized. Since the rules exist because it is to everyone's advantage that they should, we can criticize alternatives to the existing rules on the grounds that everyone would lose from a change to such rules. So, in the *Enquiry*, Hume goes out of his way to attack proposals for egalitarian redistribution. The work of modern conservatives like de Jouvenal and Hayek adds little to Hume's arguments: that the lack of incentive would make everyone worse off and that the concentration of political power necessary to carry out the redistribution would be too dangerous to liberty.¹⁴

Hume's discussion of the circumstances of justice can be understood only in the context of his attempt to show that justice is an artificial virtue in the sense that I have just distinguished:

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.

The common situation of society is a medium amidst all these

extremes. We are naturally partial to ourselves and to our friends; but are capable of learning the advantage resulting from a more equitable conduct. Few enjoyments are given us from the open and liberal hand of nature; but by art, labour, and industry, we can extract them in great abundance. Hence the ideas of property become necessary in all civil society; hence justice derives its usefulness to the public; and hence alone arises its merit and moral obligation.¹⁵

Rawls accurately summarizes Hume's "circumstances of justice" as moderate scarcity, moderate selfishness and relative equality.¹⁶ (Only the first two are referred to in the passage quoted.) On the face of it, if these are the circumstances of justice then things look black for future generations. We may be confident that moderate selfishness is here to stay but we cannot be sure of moderate scarcity (maybe at some time in the future the whole human race will be destitute) and the lack of equality between us and our successors is guaranteed by "time's arrow," which enables us to affect our successors while depriving them of the ability to affect us. A lot therefore hangs on the question whether the doctrine of the circumstances of justice is true or not, and it is that question which I now take up, subjecting each of the alleged conditions to scrutiny in turn.

III

The condition described by Rawls as "moderate scarcity" is analysed by Hume in terms of an upper and a lower bound on the generosity of nature in supplying men's wants. The upper bound is that, if everything human beings wanted were as freely available as air normally is (the mythical "golden age" of the classical poets), the "cautious, jealous virtue of justice" would never have become established. "Justice in that case, being totally useless, would be an idle ceremonial, and could never possibly have place in the catalogue of virtues."¹⁷

In accordance with his overall argument, Hume emphasizes that the reason why the virtue of justice would have no place is that it would be "totally useless." He thus takes the fact that justice is inconsistent with unlimited abundance to be a support for the view that justice is founded on utility. But, as David Miller has pointed out, this is not a

valid move. "It proves only that the belief in justice arises from a society of moderate scarcity, not that men have their belief because they see it is in the public interest to have rules of property."¹⁸

More specifically, the fact that there would be no room for justice in a "golden age" is simply the consequence of the fact that the subject-matter of justice is the distribution of things that are in short supply. So if nothing were in short supply (relative to total demand) the concept of distributive justice would have no application. Equally, if there were no scarcity there could be no virtue of generosity (nobody is praised for being open-handed with air) and no virtue of frugality (nobody is praised for its careful husbanding). Yet these virtues are, for Hume, natural virtues. This shows that nothing follows about justice being an artificial virtue from the fact that its application presupposes scarcity.

The upshot of this discussion is, then, that we can accept Hume's assertion that justice would have no place if nature were sufficiently abundant in providing for men's wants. But we have no reason for accepting Hume's formulation of it, that the question is one of the "usefulness" of justice. It is perfectly open to us to say that there are non-conventional criteria of justice but that they have no application in the absence of scarcity.

IV

Hume's assertion of a lower bound to the generosity of nature as a circumstance of justice, which Rawls also accepts, seems to me to be without foundation:

Suppose a society to fall into such a want of all common necessities that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery; it will readily, I believe, be admitted that the strict laws of justice are suspended in such a pressing emergency, and give place to the stronger motives of necessity and self-preservation. . . . The public, even in less urgent necessities, opens granaries without the consent of proprietors, as justly supposing that the authority of magistracy may, consistent with equity, extend so far; but were any number of men to assemble, without the tie of laws or civil jurisdiction, would

an equal partition of bread in a famine, though effected by power and even violence, be regarded as criminal or injurious?¹⁹

Let us concede Hume's statement of the case: that the normal rules governing distribution would be properly suspended in situations like those depicted above. Does this support the implication that Hume wishes to draw, that justice is an artificial virtue? I think not. One line of argument is as follows: "If justice and the public interest are actually independent values, there may be circumstances in which the public interest is allowed to override justice." Thus, in the granary case, people "do not wholly cease to respect the claims of ownership, but rather allow these claims to be overridden by considerations of humanity and the public interest."²⁰

Consider the case of a country threatened by an invasion in which there is reason to fear that some section of the population (identified by ethnic background, membership of a political movement, etc.) contains potential fifth columnists. Suppose that all the members of this group are interned for the duration of the war. This would clearly be unjust in that it imposes a serious penalty on some people not for anything they have done but for what they might do, and, over and above that, does not consider individual cases but makes membership of a certain class the basis of internment. Yet such a policy might be, in sufficiently extreme circumstances, defensible in terms of the overriding value of national survival.

Hume's granary case might be like this: the taking of the grain from its owners is unjust but nevertheless morally acceptable because of the overriding importance of preventing starvation. Certainly, nothing Hume says goes to show that that is not a correct analysis of the situation. It may perhaps seem rather trivial to ask whether the laws of justice are "suspended," as Hume says, or "overridden," as David Miller suggests, since in either case the rules of justice are conceded not to apply in a situation of extreme scarcity. But, unless we give Hume the answer he wants, he cannot use the case to support his claim that the rules of justice are a conventional device for securing the public interest by indirect means.

However, I am not prepared to concede that the case is as Hume states it. I see no reason why it should be accepted that criteria of justice are out of place in conditions of extreme scarcity. Hume himself,

be it noted, speaks of "an *equal* partition of bread in a famine."²¹ Might not an unequal partition (or, more precisely, an unequal partition in which the departures from equality were not based on conditions such as pregnancy, sickness, heavy manual labor etc.) be criticized as unjust?

It seems to me that the justice (or, perhaps more naturally, fairness) of a rationing scheme is something that can always be intelligibly queried. Perhaps even more plainly, the application of the scheme can be brought before the bar of fairness: is it being administered impartially, or are some people getting specially favourable treatment?

Experience suggests, indeed, that any system of rationing automatically produces public controversy about its fairness. The wartime food rationing scheme in England is a case in point, and in the postwar period the allocation of council housing to applicants (which is usually done by a system of "points") has similarly attracted much controversy conducted largely in terms of fairness.

Even in a wealthy country like the USA, there are limits to the amount of expensive medical treatment (chronic hemodialysis, coronary bypass surgery) that can be carried out, and the supply of donors for transplants limits the number (of, for example, kidney transplants) to well below the number of people that might benefit. The existence of a *de facto* rationing system has led inevitably to questions about the fair way to select people for treatment.²²

Thus, to illustrate the kinds of problem that immediately present themselves, consider the criteria used by the selection committee in the early days of the Seattle Artificial Kidney Center: "A person 'worthy' of having his life preserved by a scarce, expensive treatment like chronic dialysis was one judged to have qualities such as decency and responsibility. Any history of social deviance, such as a prison record, any suggestion that a person's married life was not intact and scandal-free, were strong contraindications to selection. The preferred candidate was a person who had demonstrated achievement through hard work and success at his job, who went to church, joined groups, and was actively involved in community affairs."²³ This state of affairs induced the caustic remark that "the Pacific Northwest is no place for a Henry David Thoreau with bad kidneys." The authors of this comment, a psychiatrist and a lawyer, went on to say, in terms highly relevant to the present discussion, that "*justice requires that selection be made by*

a fairer method than the unbridled consciences, the built-in biases, and the fantasies of omnipotence of a secret committee."²⁴

This discussion also shows that the application of criteria of justice extends beyond the relatively benign case of the famine envisaged by Hume to the more extreme case in which "the utmost frugality and industry cannot prevent the greater number from perishing."²⁵ For, as the pioneer of chronic hemodialysis has said, scarcity and the selection it makes necessary entail "the decision by somebody on some grounds that somebody will not be permitted dialysis or transplant, which says, in effect, he must now die."²⁶ The question "Who is to be saved?" is one within the scope of justice.

It might be said that none of this shows justice to be a virtue independent of humanity, because the only basis on which one could call one basis for distribution more just than another is that is more humane. When we criticize a rationing scheme as unfair, on this view, we are simply saying that it does not distribute the food (or whatever) in the way that will do the most good. But this seems not to be correct. For there might be a number of ways in which the scarce good might be distributed that would equally well satisfy the demands of humanity and yet we could still say that one was fairer than another. In situations where all can be saved, equal sacrifice is fairer than unequal, whatever a utilitarian calculus might determine.²⁷ And in a situation where an equal division means that all perish (or far more than would have to if an unequal distribution were introduced) we can still talk about the fairness of the selection process that condemns some to certain death so that the others may survive.²⁸

What I am saying can be put another way: if we allow Hume to appropriate the term "justice" for property rules and nothing else, then he is right in claiming that justice may properly be waived in situations of extreme scarcity. For it is unacceptable for some to be permitted excess if others are destitute. But the reason is not only one of humanity, and if Hume insists on equating "rules of justice" with "property rules" we must simply import another word—"fairness" is the obvious candidate—to enable us to say that there are criteria for evaluating a distribution even in conditions of extreme scarcity.

The issue raised here has direct implications for the applicability of the concept of justice to intergenerational relations. For a critic of Rawls has pointed out that, by postulating that the people in the origi-

nal position know that the circumstances of justice obtain, Rawls is committing himself to the proposition that the circumstances of justice hold in all generations (past, present and future) since the people in the original position do not know what generation they belong to:

In order to show that the circumstances of justice will obtain for all future generations, we must postulate either that there will be ever-expanding sources of raw materials and energy for us to exploit or that, through population control and technological advances, mankind will achieve homeostasis in this environment. Otherwise the resources will be exhausted no matter how provident we are. And so, barring these optimistic assumptions, justice among all generations is not possible because the circumstances of justice will not obtain. Since there is no good evidence that either of these assumptions will be proven correct, we do not seem justified in supposing that the circumstances of justice among all generations of mankind exist.²⁹

But if I am right, there are no grounds for accepting this part of the doctrine of the circumstances of justice. So although the argument is an effective *ad hominem* one against Rawls, it does not tell against the claim that the concept of justice is applicable in all times and places, whatever their circumstances.

V

The third circumstance of justice is moderate selfishness. Again, Hume suggests that the virtue of justice can arise only if the extremes are absent: "if men pursued the public interest naturally, and with a hearty affection, they would have never dreamed of restraining each other by these rules [of justice]; and if they pursued their own interest, without any precaution, they would run headlong into every kind of injustice and violence."³⁰

It should be noticed at once that, although Hume wishes, for his own polemical purposes, to extend the "not too much, not too little" formula from scarcity to selfishness, the two extremes that he presents are not really two extremes of selfishness. Hume does, indeed, deny that, as a matter of fact, people are totally selfish. He suggests that, "though it be rare to meet with anyone who loves any single person

better than himself, yet it is as rare to meet with one in whom all the kind affections, taken together, do not overbalance all the selfish."³¹ But this does not help much in securing social union because "in the original frame of our mind our strongest attention is confined to ourselves; our next is extended to our relations and acquaintance; and it is only the weakest which reaches to strangers and indifferent persons."³² "Benevolence to strangers" is therefore "too weak" to "render men fit members of society by making them abstain from the possessions of others."³³

The point is not therefore that justice is inconsistent with total selfishness, for the benevolent sentiments people have are confined to too narrow a circle to make any difference. Justice is, Hume says, founded on mutual self-interest: "itself alone restrains it." The question, is not one of the "wickedness or goodness of human nature" but "the degrees of men's sagacity or folly."³⁴ The rhetorical "not too much, not too little" device is thus misleading here. The opposite extreme to total benevolence, that makes the virtue of justice inapplicable, is not total self-interest but *unintelligent* self-interest.³⁵ It is not therefore correct to say that the circumstances of justice, on Hume's account, include some intermediate degree of selfishness. They only exclude total benevolence.

It seems to me that Hume is quite correct in denying that benevolence is a necessary motive for the observance of justice. People who genuinely care a lot about the welfare of (some) others (e.g. those they know) are not always very scrupulous in weighing the claims of those they care about against the claims of others. And conversely people who are punctilious in carrying out the requirements of justice may not be particularly benevolent, as John Aubrey's story about Mathew Hale illustrates: some dining companions in the Middle Temple,

Having made an end of their Commons, fell unto various Discourse, and what was the meaning of the Text (Rom. v. 7) "For a just man one would dare to die; but for a good man one would willingly die." They askt Mr. Maynard what was the difference between a just man and a good man. He was beginning to eate, and cryed:—Hoh! you have eaten your dinners, and now have leasure to discourse; I have not. He had eate but a Bitt or two when he reply'd:—I'll tell you the difference presently: serjeant Rolle is a just man, and Mathew

Hale is a good man; and so fell to make an end of his dinner. And there could not be a better interpretation of this Text. For serjeant Rolle was just, but by nature penurious; and his wife made him worse: Mathew Hale was not only just, but wonderfully Charitable and open handed, and did not sound a trumpet neither, as the Hypocrites doe.³⁶

What is more questionable, of course, is whether self-interest is an adequate motive for behaving justly, as Hume's theory requires him to maintain. In the closing four paragraphs of the *Enquiry*, Hume allows himself to entertain doubts on that score, considering the possibility that "according to the imperfect way in which human affairs are conducted, a sensible knave, in particular incidents, may think that an act of iniquity or infidelity will make a considerable addition to his fortune, without causing any considerable breach in the social union and confederacy."³⁷

Hume's attempt to convert this "sensible knave" to the path of justice is remarkably feeble. One argument is that the best things in life are free: the "natural pleasures" are incomparably preferable to the "feverish, empty amusements of luxury and expense."³⁸ But while it is true that health is more important than money, most people may still believe that health plus money is better than health without money. In any case, Hume has built his whole theory on the proposition that the desire for more material possessions is an almost universal feature of human nature, and it is a bit late in the day to go back on that. Another argument is that there is always the risk of overreaching oneself and being found out, but this amounts to a recommendation of cautious knavery rather than a reason for not being a knave.

Hume's only serious argument is that "in all ingenuous natures the antipathy to treachery and roguery is too strong to be counterbalanced by any views of profit or pecuniary advantage. Inward peace of mind, consciousness of integrity, a satisfactory review of our own conduct—these are circumstances very requisite to happiness, and will be cherished and cultivated by every honest man who feels the importance of them."³⁹ The trouble with this is that it is transparently circular: it says in effect that an honest man is an honest man. If a man is not a knave, he will feel uncomfortable if he behaves in a knavish fashion. But what reason has he for not being a knave, or (if it is too late now to

change his character) for not wishing he had been brought up as a knave?

No wonder Hume concedes, in introducing this argument, that "if a man think this reasoning [that honesty is not invariably the best policy] much requires an answer, it would be a little difficult to find any which will to him appear satisfactory and convincing."⁴⁰ The only form of argument, I conceive, that could be relevant here would be one to the effect that justice is a good thing quite apart from its general long-run tendency to be in everyone's interest. But that form of argument Hume has denied himself by insisting that there are no external and independent criteria of justice. The good of justice, for Hume, simply *is* its long-run tendency to conduce to everyone's interest, so if, in a given case, it does not conduce to someone's interest, there is nothing more to be said to him.

It may be worth noting, incidentally, that the difficulty Hume runs into here is not intrinsically related to the assumption that the person to be convinced is motivated by self-interest. Suppose someone were motivated by the public interest. Hume constantly draws our attention to the fact that "a single act of justice is frequently contrary to *public interest*; and were it to stand alone, without being followed by other acts, may in itself be very prejudicial to society."⁴¹ A truly benevolent person who had the opportunity to behave unjustly on such an occasion with good reason to expect that the usual indirect ill-effects would not supervene could not be argued with.

I do not want to say that in cases of such a kind (the desert island deathbed wish, etc.) it would always be wrong to act contrary to the requirements of justice. But the point is that Hume cannot advance any reason why there should even be a moral problem here. Justice has no value in itself so there is nothing to put in the scales against benevolence. All Hume can say is that if you have been brought up a certain way you will feel bad about it, but presumably a truly benevolent person should seek to overcome such a superstitious feeling or, if he cannot do that, set it against the net benefit to others in deciding what will maximize overall utility.

None of this shows that Hume is incorrect in denying that there are any non-conventional criteria of justice. But it does suggest that the implications were such as even Hume himself ultimately found unpalatable.

VI

The validity of Hume's argument that "limited generosity" is a circumstance of justice depends directly on the truth of his central proposition that justice is an artificial virtue. Suppose that each person "feels no more concern for his own interest than for that of his fellows."⁴² Everybody would be a Benthamite utilitarian, counting each individual for one and nobody for more than one. Thus, somebody would always perform a service for me "except the hurt he thereby receives be greater than the benefit accruing to me."⁴³ If we assume (as Hume appears to) that a utility-maximizing calculus of this kind can yield determinate conclusions, we must expect that there will be universal agreement about what each person ought to do. (The "ought" here is a hypothetical imperative: it prescribes the means for each person of carrying out the purpose that he naturally has of maximizing total utility.) Clearly, if justice is a convention designed to settle disputes by providing a fixed set of rules, the scenario described would leave no room for the application of justice. But if it makes sense to say that such a society would be unjust, it follows that justice cannot be purely conventional.

It seems to me that we could quite intelligibly say that this society's peaceful equilibrium was founded on injustice, and advance is support of that claim the usual arguments against the equation of justice and utility. Utility is maximized when the marginal utility of each good is maximized, and that entails giving more to efficient "pleasure machines."⁴⁴ But there is no reason based on justice why those who are naturally fortunate in being able to obtain a lot of pleasure from a given quantity of goods should have that advantage compounded. There is no need to continue. The list of anti-utilitarian arguments is familiar enough.

It might be said that I am overlooking the point that in the society of perfect utilitarians we are imagining, everyone—including those who make the sacrifices to increase net total utility—would be consenting to the arrangements. No doubt consent is relevant to justice: it may be just for me to give you something when it would not be just for you to take it without my permission. But is consent decisive? I think not.

It seems to me to make perfectly good sense to say that someone

freely consents to an unjust arrangement, for example because he incorrectly believes that it is required by justice. Suppose in some society it were universally accepted that some people were by birth entitled to economic and social privilege. There would be no conflict over distribution yet we could surely say that this social system was unjust.

When confronted, for example, with the facts of untouchability in India we do not, I believe, have to know whether or not the untouchables themselves accept the legitimating world-view of the *varna* system before reaching the verdict that the operation of the caste system constitutes a paradigm of injustice. I should be inclined, indeed, to go further, and say that, if we found that untouchables did accept their treatment as just, that would be the basis for an even stronger indictment, since it would show that untouchables were suffering not only economic and social deprivation but also from the lack of an inner sense of worth as human beings.

A society of utilitarians would not, of course, be anywhere near as unjust as a caste society. But, if the caste example succeeds in showing that consent is not inconsistent with injustice, the possibility is surely opened up that the sacrifices some people would be called on to make in the cause of maximizing total utility would be unjust even though, in a society of utilitarians, they would be voluntarily accepted.

Suppose, however, that my contention is not granted and it is held that, in the absence of conflicting claims, justice has no application. What then follows? Not that justice is founded on utility, as Hume wishes to maintain. All we have to do is extend the conclusion we reached earlier for the case of unlimited abundance.

We said there that one could quite consistently accept that justice has no application where everybody's wants can be satisfied without effort and without any limit to the extent to which others could satisfy theirs and yet at the same time say that in the absence of these conditions non-conventional criteria of justice come into play. We should now have to add that justice has no application where everybody's *claims* can be simultaneously satisfied. But again we can go on to say that this is quite consistent with affirming that, when the sum total of claims adds up to more than the amount available for distribution, the criteria of justice than become relevant are non-conventional.

VII

The core of Hume's argument is that rules of justice arise and are maintained only when and so long as they are mutually advantageous to the parties. The third circumstance of justice—equality—in effect identifies the parties. Only those who are in a position to cause trouble unless they are cut in on the deal qualify for a seat at the bargaining table.

Thus, animals are excluded from the scope of justice not because (as has been held before Hume and after him) they lack the power of reasoning but because they cannot cause us trouble if we maltreat them. Of course, an individual animal may in certain special circumstances be able to injure or even kill an individual human being who is maltreating it⁴⁵; but collectively human beings are clearly on top.

Hume's unflinching recognition of the implications of the doctrine of the circumstances of justice poses the issues with admirable clarity:

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment, the necessary consequence, I think, is that we should be bound by the laws of humanity to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property, exclusive of such arbitrary lords. 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. Whatever we covet, they must instantly resign. Our permission is the only tenure by which they hold their possessions; our compassion and kindness the only check by which they curb our lawless will; and as no inconvenience ever results from the exercise of a power so firmly established in nature, the restraints of justice and property, being totally *useless*, would never have place in so unequal a confederacy.⁴⁶

It is an immediate consequence of Hume's position that, if beings from another world were to arrive on earth, with some combination of

personal characteristics and technology that made them collectively as superior to us as we are to animals, we could appeal to them to give us "gentle usage" but could make no complaint of injustice, *even among ourselves*, if they declared the whole of the earth their property and proceeded to exploit it (and us) for their own purposes.

But there is no need to resort to science fiction. Hume, himself, in the paragraph following the one quoted above, observes that "the great superiority of civilized Europeans above barbarious Indians tempted us to imagine ourselves on the same footing with regard to them [as men are in regard to animals], and made us throw off all restraints of justice and even of humanity, in our treatment of them."⁴⁷

Here, I think, Hume must be accused of drawing back from the full implications of his doctrine. Why does he say that the European settlers were only "tempted to imagine" themselves above justice? Surely, on his theory, they *were* above justice in relation to the Indians. Right from the start, the European settlers were able to impose their "lawless will" on the Indians; and, although the Indians were not, of course, as helpless as Hume's hypothetical "species of creatures" to cause trouble, they could not (as events proved) long resist any course of action that the Europeans were determined on.⁴⁸ Red Cloud, the Sioux Chief, said in a speech in New York in 1870: "All I want is right and just."⁴⁹ A follower of Hume would have to say that he was mistaken in thinking that right and just had any place in relations between Indians and whites, given the superiority of the rifle to the bow and arrow.

H. L. A. Hart, having set out (following Hobbes and Hume) "approximate equality" as a feature of the human condition,⁵⁰ goes on to note that "neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope." So that, "though a society to be viable must offer *some* of its members a system of mutual forbearances, it need not, unfortunately, offer them to all." Slave societies, Nazi Germany and contemporary South Africa are offered as illustrations.⁵¹ But Hart also says that "injustice" is the term properly used whenever benefits and burdens are distributed on grounds that are irrelevant, "so 'unjust' would be appropriate for the expression of disapproval of a law which forbade coloured people the public means of transport or the parks" because, "at least in the distribution of such amenities, differences of colour are irrelevant."⁵²

This seems to me a correct statement of the case. If I have to say why Hume's theory should be rejected, I "must confess that, if a man think that this reasoning much requires an answer, it would be a little difficult to find any which will to him appear satisfactory and convincing."⁵³ But I think my problem is less severe than was Hume's in finding an answer to the "sensible knave." Hume's problem was that he really could not, consistently with his own theory, develop an adequate argument against the "sensible knave." Mine is simply that, if someone can read a history of European settlement in Australia and the Americas, or a history of Negro slavery, without admitting that he is reading about a history of monstrous injustice, I doubt if anything I say is likely to convince him. I would have a similar doubt about someone who, asked whether or not South African racial policies are unjust, replied that the answer would depend on an estimate of the whites' ability to hold down the rest of the population indefinitely. I am inclined to think that nobody would give such an answer unless he had already been exposed to the theory of the circumstances of justice, so all I can do is point out that Hume offers no independent grounds for accepting the theory.

This point is worth emphasizing. If we agree with Hume that justice would have no application where any of the circumstances of justice failed to hold, that strengthens his claim that the rules of justice are conventional. But the assumption that the rules of justice are conventional cannot then be used as a premise in the argument that the circumstances of justice are necessary for the rules of justice to apply. We must make up our own minds about that.

The only independent argument that Hume offers is patently unsatisfactory. In the *Treatise* he argues that "all virtuous actions derive their merit only from virtuous motives, and are considered merely as signs of those motives." And he concludes from this that "the virtuous motive must be different from the regard to the virtue of the action."⁵⁴ But suppose we agree that a well-intentioned action that, for reasons beyond the control of the actor, fails to have the intended consequences still shows evidence of a virtuous motive; and that an action that accidentally fulfills a duty without that being intended by the actor does not exhibit a virtuous motive. It does not follow, as Hume seems to think here, that there is any incoherence in saying that a type

of action is virtuous if a desire to do an action of that type constitutes a virtuous motive. Hume would have been correct if he had said that an action confers merit on the actor only on the basis of the motive it exhibits. But that formulation would make it clear that the desire to do an action of a certain kind (e.g. pay a debt) can be, quite consistently, held to be a virtuous motive.

It seems plausible that Hume himself came to recognize the weakness of the argument from alleged circularity. For he makes no use of it in the *Enquiry* and relies exclusively on the argument from the circumstances of justice. If we reject Hume's claim that justice has no application in the conditions stated, we are bound to reject the doctrine of the circumstances of justice.

I would suggest that the requirement of equality is a dramatic illustration of what is wrong with the theory, and provides sufficient grounds for rejecting the theory from which it is deduced. This is not to say that it is without explanatory power. It may well be that the idea of justice could arise only among approximate equals, and it is still true that justice is more likely to be realized among approximate equals than when injustice can be perpetrated with impunity. But that does not mean that the concept of justice is limited to such contexts.⁵⁵

VIII

If the doctrine of the circumstances of justice is true, it must follow that there can be no place for justice between the generation of those alive at any given time and their successors. For it is clear that, even if we waive the problem about moderate scarcity that has already been mentioned, there can be no getting round the total absence of equality.

In a recent article, the author, D. Clayton Hubin, postulates the correctness of the doctrine and draws that conclusion from it: "Hume, and those following him, require as a condition of justice that members of the society be roughly equal in those abilities which allow one person to dominate another. Rawls, in particular, requires that 'the 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' (*A Theory of Justice*, p. 127). The idea is that even the strongest must be vulnerable to the weakest. But this assumption

does not hold between members of various generations. Members of earlier generations are invulnerable with respect to members of later generations."⁵⁶

However, he maintains that he can "account for much of our duty to provide for future generations in terms of a duty of justice *with regard to future generations* (but not owed to them)."⁵⁷ Hubin employs for this purpose a construction modelled on the Rawlsian original position, in which the people know what generation they belong to (information that would be withheld by Rawls) but do not know about their personal characteristics. They are mutually disinterested, but they "know that it is a general psychological fact about people in our society that they care about their offspring to such a degree that they to some extent identify their offsprings' [*sic*] interests with their own."⁵⁸

I do not want at this stage to get mixed up in the question how Rawls's original position relates to the doctrine of the circumstances of justice. I shall address that question in the next section of this paper. (Hubin himself, it should be said, offers no explanation of the move from the circumstances of justice to the original position, apparently not seeing that there is a problem of compatibility.) Fortunately, however, I do not think that anything crucial in his arguments depends upon the construction involving the original position.

Let us formulate the case by saying that we are dealing with a society in which the circumstances of justice hold: there is moderate scarcity; the strength of benevolence, or other "natural" claim-limiting mechanisms, is insufficient to avert conflicting claims; and the society is not divided into powerful and powerless groups, that is to say it is not a colonial society, a slave society or a society of institutionalized group repression like contemporary South Africa. Such a society will, if Hume is right, have a common standard of justice that applies to all its members.

The arguments presented in this paper up to now are not designed to show that Hume is wrong about this. What I have called the doctrine of the circumstances of justice and attacked is the doctrine put forward by Hume that in the absence of the circumstances of justice the concept of justice can have no applicability. We could concede that the presence of the circumstances of justice constitutes a *sufficient* condition for a society to have uniform rules of justice without allowing that the cir-

cumstances of justice are *necessary* conditions for the application of the concept of justice.

It should be noticed that, if the circumstances of justice are not necessary conditions for the application of the concept of justice, Hume's arguments in favor of the absence of external and independent criteria of justice collapse. For they depended on the notion that justice is a device for reaching agreement among approximate equals and that justice has no place where agreement does not have to be reached. But, at the same time, the view that the circumstances of justice are sufficient conditions for the application of the concept of justice is quite consistent with the truth of the view that there are no independent and external criteria of justice.

Of course, when we take standards of justice that would be agreed on by equals and apply them to condemn a society pervaded by systematic group discrimination we are in a sense making use of independent and external criteria. But they need not be independent and external in the sense in which Hume denied such criteria of justice exist. They need not invoke abstract relations of fitness and right, which is what Hume was attacking. All we need be doing is taking principles whose claim to count as principles of justice is no more than that they would be agreed upon in a society of a certain kind (one in which the circumstances of justice obtain) and applying these principles in another kind of society (one in which the circumstances of justice do not obtain).

We have so far postulated that we are dealing with a society in which the circumstances of justice hold. Although I am inclined to think that it is empirically questionable, I shall accept the Humean view that the members of a society will exhibit a common sense of justice, in other words that they will apply common standards in judging justice or injustice. We can now add the psychological datum that Hubin introduces: people care about their offspring, to the extent of identifying with their interests. According to Hubin, the principle that would be agreed upon "would require that we treat the interests of those in the next generation (at least) as if they were interests of persons in this generation—for in a real sense they are—except where doing so will cause severe hardship for this generation."⁵⁹ The proviso about hardship reflects the idea that one of the circumstances of justice is moderate scarcity. If things are so bad that it's us or them, the circumstances of justice do not apply.

The only part played in the argument by the original position is that it conceals from the parties whether or not they themselves are among those with an attachment to the interests of at least one person in the next generation. But we can get to much the same place by observing that very few people can be sure that they will not at some time get into a position in which they form such an attachment, even if they cannot or intend not to have children themselves. The argument then is simply that it is just to make savings for the benefit of the next generation because of the psychic benefit that those in the present generation gain from better prospects for those in the next.⁶⁰

As it stands, this is clearly no argument at all. Unless we fill it out in certain ways it says that it is just to impose a collective decision to save on everybody because most people have psychic investment in the wellbeing of certain members of the next generation. (It must be borne in mind that we are supposing the motivation to arise from the fact that each person is likely to care about some member of the next generation, not that most people care about the collective welfare of the next generation.)

From the brute fact that most people care for certain members of the next generation, all we seem to be able to get out is that most people should (in order to get what they want to happen) be prepared to save for those they care about. In exactly the same way, anyone with a psychic investment in the wellbeing of a pet should (and it is exactly the same kind of "should") be prepared to spend time and money on looking after it. The notion is, in both cases, that a rational person's budget should reflect the concern he has for the interests of others (friends, children, pets).

To get beyond this and show why it is a matter of justice among the members of the current generation to provide for the next generation we have to add something. The most important thing we can add is that the welfare of individual members of the next generation is interdependent. Even if I do the best I can for those members of the next generation in whose welfare I have some psychic investment, the main determinant of their future prospects is the kind of world that they will live in, and that depends overwhelmingly on the decisions of *others*.

The welfare of the next generation is thus a public good. If I want my children to have a better public park, I have to be prepared to pay my share; and the same goes if I want them to have a better world. The anti-free-rider principle that Rawls places at the heart of the notion of

justice as fairness, a principle that in my view derives from the more general principle of justice that one should make a fair return for services rendered, can be invoked now to underwrite a general duty of justice to contribute towards collective savings for the benefit of the next generation.

It should be clear, however, that this way of generating a relationship of justice is completely general and applies to any altruistic public good. Thus, it would underwrite a duty of justice among the members of a society if they wanted to prevent the extinction of the whale or if, out of sentiments of beneficence, they wanted to make another country more prosperous by transferring resources to it. Even dog allowances could be required by justice as requital for the provision of a public good if there is a general concern for the welfare of dogs.

The point here is that the prosperity of the other country, if it is a generally held objective, becomes a public good, so the "anti-free-rider" principle makes it legitimate to use taxation to raise the money. The argument often made (e.g. by Nozick) that individuals should be content to give charitably themselves and not to seek to coerce everyone into doing so overlooks the public good aspect. If someone's good is a litter-free environment (rather than a tiny bit less litter) it makes sense for him to support coercion to stop everyone littering, but not to pick up his own litter unless others do. Similarly, if someone's good is a certain kind of world it is not irrational to contribute to the cost of attaining it only if others do.

Of course, it is perfectly possible that someone may be so upset by litter that he picks up his own (or even other people's) in the absence of any similar action by others. Such a person is, in analytic terms, one who gets so much benefit from a public good that it pays him to provide some of it on his own. The same may be true of someone who wants to live in a world free of poverty: he may be willing to contribute if others do but not otherwise.

If this whole discussion seems peculiar and slightly repulsive, I agree but suggest that this is an inevitable result of assuming that the only reason for relieving poverty (or taking care of the interests of unborn children) is that it brings about a state of affairs that makes those who do it feel better. Justice is on this account parasitic upon the sentiments that people actually have. If people care for their children's welfare, and if the welfare of the next generation is a public good, it is unfair not to contribute to it. But it would not be unjust for peo-

ple not to care about the interests of their children. The limits of caring are the limits of justice.

I conclude that some sort of a case can be made out for the proposition that members of the current generation have a duty of justice to contribute to the public good constituted by the welfare of the next generation—to the extent that the sentiments of the existing generation make the welfare of the next generation a public good. But the doctrine of the circumstances of justice, understood as the doctrine that justice applies only where these conditions obtain, still rules out any claims on behalf of the interests of future generations. If therefore we do not care about any generation after the next (or the one after that, say) we do not behave unjustly in totally neglecting their interests, as Hubin concedes.⁶¹

I hope that the importance of determining whether or not the doctrine of the circumstances of justice is true will now be apparent. If I am correct in arguing that the doctrine is false, the way is open to maintaining that there are criteria of justice relevant to the relations between different generations. The question is what they are.

IX

I introduced the discussion of the circumstances of justice by citing Rawls, and it is worth asking how Rawls's own theory of justice is related to his endorsement of the doctrine of the circumstances of justice. Can Rawls somehow escape the limitations on the scope of the concept of justice that the doctrine of the circumstances of justice appears to pose? If so, can Rawls's theory be employed to suggest criteria for justice between generations?

One way of accounting for the complexity and difficulty of Rawls's theory of justice is to recognize that it is an attempt to incorporate both Hume and Kant in a single theoretical structure. Since Hume and Kant are commonly, and reasonably, regarded as occupying polar positions in moral philosophy it is hardly surprising if the result of Rawls's endeavors suffers from a certain lack of unity.

There are two tempting short-cuts open to us if we are looking for a way to characterize the relation between the Humean and Kantian elements in Rawls. Each has a grain of truth but is on balance more misleading than useful. One is to say that the premises are Hume and the conclusions are Kant. This suggestion fits in with the fact that the

circumstances of justice, which are distinctively Humean, turn up in the premises, while the distinctively Kantian notion that justice has nothing to do with happiness turns up in the conclusions. But it falls on the fact that Rawls offers a "Kantian interpretation of the original position" and on the close relationship between the way in which Rawls derives the difference principle and the way in which Hume argues that everyone gains from the rules of justice.

The other short-cut is to posit a temporal sequence in Rawls's own thought: he started out with Hume and finished up with Kant. The difficulties in interpreting *A Theory of Justice* would then arise, on this view, from the fact that the process of transition was still incomplete at the time the book went to press. In support, it can be argued that articles written by Rawls subsequently to the publication of *A Theory of Justice* exhibit a greater stress on the Kantian elements and a further attenuation of the Humean ones.⁶²

I do not see how anyone can doubt that Rawls's thought shows a process of development along these lines. But it is easy to overdo the contrasts between "Justice as Fairness" and *A Theory of Justice*. A lot of the apparent developments in a Kantian direction are better seen as moves to make explicit Kantian elements that were implicit in the early article than as fundamental reversals of perspective.⁶³

The most illuminating way in which to think of Rawls's theory, I am inclined to believe, is to conceive of it as two parallel structures, one Humean and one Kantian, which overlap in their implications for a certain favored case—that of contemporaries in a modern Western society—and diverge elsewhere. The Humean structure is more apparent in the earlier work and the Kantian structure is emphasized more in the later, but they coexist throughout. Peter Danielson, who put forward this idea of a dual structure in a review article on Rawls, called the two theories "justice as rational co-operation" and "justice as universal hypothetical assent."⁶⁴ These are good names and I shall use them.

X

The theory of justice as rational co-operation is, of course, the Humean one. Justice is, as Rawls says at the start of *A Theory of Justice*, to be defined for "the basic structure of society conceived of for the time being as a closed system isolated from other societies."⁶⁵ And

"a society is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them."⁶⁶

As we have seen, Rawls endorses Hume's characterization of the circumstances of justice, and says that the people in the original position know that the circumstances of justice exist in their society. How can he say this? The other things that the people in the original position are said to know—various generalizations about psychology, sociology, and economics, for example—are claimed by Rawls to be genuinely true. But it is notorious that Hume's third circumstance of justice—approximate equality—does not hold universally. Hobbes thought that approximate equality of bodily strength and powers of mind were enough to guarantee that the "articles of peace" would have to recognize the fundamentally equal claims of all human beings. But Hume, as I observed above, admitted that gross inequalities of organized coercive power between different groups invalidated the third circumstance of justice. If, therefore, the people in the original position believe that the circumstances of justice obtain in their own society they are believing something that may not be the case.

I have a suggestion that I believe conforms with Rawls's intentions. Hume's doctrine of the circumstances of justice took the form, as we saw, of a theory to the effect that the three circumstances of justice constitute necessary conditions for the adoption and maintenance of rules of justice: if any of these conditions fails to hold, rules of justice are "perfectly useless" and therefore fail to come into being or (if they exist already) fall into disuse. But there is a weaker version of the doctrine, to which I alluded earlier, namely that the circumstances of justice are sufficient conditions for rules of justice to be created and sustained. It seems to me that Rawls's operations make sense if we interpret him as wishing to endorse this view of the role of the circumstances of justice.

What Rawls is then saying (in his Humean persona) is that we can find out what the principles of justice are by seeing what regulatory principles would be agreed on where the circumstances of justice obtain. That is why the people in the original position are to believe that the circumstances of justice obtain in their society: unless they believe that, their evidence is no help. The theory is after all one of "justice as fairness," and an elementary condition of fairness is that the parties should be equally matched.

But because the circumstances of justice are, on this view, a sufficient condition but not a necessary one, we do not now have to follow Hume in saying that the concept of justice has no application where the circumstances of justice fail to hold. For we can now say that a society of structured group oppression like contemporary South Africa is unjust because it embodies relationships that the disadvantaged members of the society would not have agreed upon if they were in a position of approximately equal power.

From here on, we can construct out of Rawls a coherent theory of justice as rational co-operation that adheres closely to its Humean antecedents. The vital common element is that Rawls accepts Hume's central claim that there are no independent or external criteria of justice. The principles of justice simply *are* the principles for regulating distribution that will be chosen by people in a society where the circumstances of justice hold. In other words, justice is, for Rawls as it was for Hume, a convention. Its basis is, for both men, an agreement founded in the mutual advantage of the parties.

This explains a feature of Rawls's theory that has led some to deny that he has put forward a theory of justice at all, namely the fact that his principle for the distribution of material benefits, the difference principle, is forward-looking rather than backward-looking. Thus, David Miller says that the two parts of Rawls's second principle of justice "are not distributive principles in the same strong sense as the ordinary principles of justice. They do not specify some property of the individual which will determine what his share of society's goods shall be. . . . [I]n this respect the contractual theory of justice resembles utilitarianism."⁶⁷ Rawls's theory is forward-looking, like utilitarianism, in that "the size of incomes and other rewards is not to be fixed in such a way that they fit the past, but in such a way that the greatest benefit is produced in the future for the least advantaged members of society. And although Rawls's theory is not strictly aggregative, because it does not allow the few to be deprived to obtain a greater balance of happiness for the many, it is not distributive either since it contains no principles directly prescribing an allocation of benefits and burdens to persons."⁶⁸

I believe therefore that Hayek is right in recognizing a kindred spirit in Rawls—at any rate in the Rawls of justice as rational co-operation. Hayek writes that he has "no basic quarrel with an author who. . . acknowledges that the task of selecting specific systems or distributions

of desired things as just must be 'abandoned as mistaken in principle'" He claims as "what I have been trying to argue" Rawls's statement that "the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least not unjust)."⁶⁹

The reason why Hayek embraces Rawls is precisely their common endorsement of Hume's rejection of independent and external criteria of justice. Where they differ is that Rawls sets tougher "constraints" than does Hayek. But the difference parallels a change in Hume's own thinking. Hayek is close to the Hume of the *Treatise*, arguing in effect that the important thing is that the rules should be fixed. In the *Enquiry*, Hume is prepared to argue for some rules against others in terms of their generally beneficial tendency, and his discussion of the reasons for not imposing equality, with their emphasis on the advantage to all of providing incentives, strongly foreshadows Rawls's own work.⁷⁰

In order to make the parallel between Hume and Rawls quite clear, we need to take account of the fact that Hume talks about rules of justice and Rawls of principles of justice. We can restate their theories so that each has a view of the principles of justice and the rules of justice. The principles of justice are the criteria on the basis of which institutions are to be judged. Thus, for Rawls, one of the principles of justice is that economic institutions should be arranged so that the position of the worst-off representative man will be as good as possible. For Hume, the principle of justice is that the outcome of whatever institutions exist is to be mutually advantageous to the parties. (Obviously, this is fairly vague and is not inconsistent with Rawls's formulation). The rules of justice are, for Hume, the rules a society has for the acquisition, inheritance and transfer of property. The details may differ because at the margins different rules may equally satisfy the requirement of the principle of justice that the working out of the rules should be mutually advantageous.

Rawls speaks of institutions that are designed to satisfy the principles of justice. These play an equivalent role to the rules of justice in Hume. Rawls says that "to apply the notion of pure procedural justice to distributive shares it is necessary to set up and administer impartially a just system of institutions. . . . Suppose that law and government act

effectively to keep markets competitive, resources fully employed, property and wealth (especially if private ownership of the means of production is allowed) widely distributed by the appropriate forms of taxation, or whatever, and to guarantee a reasonable social minimum. Assume also that there is fair equality of opportunity underwritten by education for all; and that the other equal liberties are secured. Then it would appear that the resulting distribution of income and pattern of expectations will tend to satisfy the difference principle."⁷¹ Needless to say, this calls for a more active interventionist state than Hume (or Hayek) envisages. But the underlying idea is the same: once institutions satisfying the principle of justice have been set up nobody can properly use the concept of justice to criticize the particular pattern of distribution that arises.

Hume and Rawls both maintain that their theories can explain actual beliefs about justice. But they differ in precisely what they offer to explain. Hume claims that he can explain the rules (if not in detail then in broad outline) that determine property rights in societies where the circumstances of justice obtain. His view about the principles of justice is, I think, that most people would acknowledge them if pressed (that is, they would say that the rules must conduce to mutual advantage) but do not normally reflect on them. Rawls, however, does not maintain that existing institutions are just. Following the passage quoted above, he says: "As these institutions presently exist they are riddled with grave injustices."⁷² What he does maintain is that the principles of justice coincide, at the most salient points anyway, with "our" considered judgements. Who are "we"? Rawls does not say, but, if there is anything in the analysis presented here, Rawls ought to claim, in his Humean persona, that the principles of justice (or something like them) will be found in societies where the circumstances of justice obtain but not in others. Thus, we have no reason to expect settlers who are in the process of killing the native population, slave owning families or whites in South Africa to acknowledge the principles of justice, except among themselves.

XI

In laying out the Humean structure within Rawls's theory of justice I deliberately played down the original position and the constraints on knowledge that are built into it. I hope to have suggested that there is

a self-contained conception of justice without it. The significance of the veil of ignorance is not so much to ensure agreement as to rule out bases of agreement that would take account of particular advantages that people bring to the bargain. It therefore forms part of the theory of justice as universal hypothetical assent.

There is no need to say as much about this construction since it is discussed explicitly by Rawls himself. Moreover, the great bulk of the critical literature on Rawls analyses this aspect of the theory in a more or less pure form. However, it is worth comparing the two theories.

The essence of the Humean theory is that the principles of justice are constituted by agreement among approximately equal parties: the principles of justice are the terms on which rational people would consent to engage in co-operative activities. The essence of the Kantian theory is that the principles of justice are constituted by a hypothetical choice made by an individual under conditions that ensure that his choice has universal validity: the principles of justice and the choices made by a noumenal self, that is to say an individual stripped of all particular attributes. "My suggestion is that we think of the original position as the point of view from which noumenal selves see the world. . . . Thus men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the original position."⁷³

This dichotomy—agreement versus hypothetical choice—explains what has puzzled many of Rawls's readers. Why does Rawls insist that the principles of justice must be agreed on by all the members of a society when the presentation of the choice problem in the original position makes it plain that only one agent is required, since all the people are interchangeable? The answer becomes apparent when we see that Rawls is running two distinct theories.

The circumstances of justice play a crucial role, as we have seen, in the theory of justice as rational co-operation, since they provide for agreement to be reached under conditions that do not permit some to impose their "lawless will" (in Hume's words) on the others and get away with it. But the circumstances of justice seem to be irrelevant to the theory of justice as universal hypothetical assent. If I am to choose principles that I wish to see adopted generally, and do not know what my own actual circumstances are, surely I do not need to know whether the circumstances of justice obtain or not in my society, since

I will in any case want to protect myself against potential oppression by choosing appropriate principles. It is of course true that, if I knew the world was a place where scarcity was unknown, I would not bother to choose principles of justice since there would be no room for raising distributive questions. But this is, as I pointed out above, an implication of justice as a distributive concept, and has no special connection with the doctrine of the circumstances of justice in its Humean (necessary condition) or Rawlsian (sufficient condition) form.

I may, of course, be less sanguine about the chances for the implementation of the principles of justice that I choose in a society where the third of the circumstances of justice is violated. For in such a society one motive for respecting the principles of justice—their function as "articles of peace" offering a promise of stability to all—is no longer operative. The question then becomes: to what extent are the appeals of a universalistic morality capable of motivating people to act in ways that are strongly contrary to their interests?

It cannot be said that Rawls found the question in very prosperous shape when he came to it. Kant said that the possibility of acting on universal maxims that run contrary to our natural sentiments is a metaphysical necessity but an empirical mystery. Bentham made it even more mysterious by simply asserting simultaneously universalistic utilitarianism and the doctrine that every man pursues his own happiness. The foremost contemporary exponent of universalistic morality, R. M. Hare, seems to take the view that we can act on universalistic premises if we decide to, which encapsulates the mystery in a tautology.

Against this unpromising background, Rawls's efforts command respect. The key section is the penultimate one in the book (86) and to some extent the preceding one (85). It is, incidentally, an indication of the difficulty of coming to terms with *A Theory of Justice* that such a crucial part of the argument should come almost at the end of the book when the reader is already exhausted. On the whole Rawls's premonitions, expressed in the Preface, of "a danger" that "without consideration of the argument of the last part, the theory of justice will be misunderstood"—and he here cites seven sections, including 85 and 86, of special significance—have been borne out by the book's reception.⁷⁴

I cannot hope here to take up Rawls's subtle and ramified discussion in any detail. The crucial point is that "we should not rely on the doc-

trine of the pure conscientious act," nor should we assume that the desire to act justly is "a final desire like that to avoid pain, misery, or apathy, or the desire to fulfill the inclusive interest."⁷⁵ Given these constraints, it is hardly surprising that Rawls's answer is highly reminiscent (except for its higher moral tone) of Hume's reply to the "sensible knave." Admittedly, Rawls invokes one motive that would have been unintelligible to Hume, namely that "acting justly is something we want to do as free and equal rational beings."⁷⁶ The other three are, however, quite Humean. First, there is the "psychological cost" of practicing systematic deception, professing principles to which one does not adhere. Second, there is the fact that over a wide range the requirements of justice overlap with what our natural sentiments would call for. "But in a well-ordered society these bonds extend rather widely, and include ties to institutional forms. . . ."⁷⁷ And thirdly, "participating in the life of a well-ordered society is a great good. . . yet to share fully in this life we must acknowledge the principles of its regulative conception, and this means that we must affirm our sentiment of justice."⁷⁸

The trouble is that each of these three seems to work only in relation to justice as rational co-operation. Professing one thing and doing another is uncomfortable if it has to be carried out among acquaintances, but is much easier when it is a matter of the people in one country admitting that they really ought to do something about world poverty but not doing anything. The confluence of justice and natural sentiments works only when we restrict the scope of justice to a society, and merely points up the strains imposed on the sense of justice by universalistic requirements. The third point quite explicitly confines itself to the level of a society.

Moreover, Rawls is agnostic about the strength of all these motives even in the favorable setting of a society. "Whether or not it is for a person's good that he have a regulative sense of justice depends upon what justice requires of him."⁷⁹ Utilitarianism is too demanding: "a rational person, in framing his plan, would hesitate to give precedence to so stringent a principle."⁸⁰ But surely the theory of justice as universal hypothetical assent could quite plausibly give rise to demands that would be as severe as those of the rival universalistic theory of utilitarianism. The demands might well indeed be more in conflict with self-interest. For example, worldwide redistribution to satisfy

the difference principle would seem to leave less room for maneuver to the rich countries than would redistribution to satisfy the utilitarian criterion.

XII

Justice as rational co-operation and justice as hypothetical universal assent diverge as we leave the self-contained society of contemporaries to which Rawls confines the application of his theory of justice. The strains become manifest when we look at the problem of justice between contemporaries in different societies, justice between different generations of members of the same society, and (compounding the two) justice between different generations on a worldwide basis.

Rawls's commitment to the theory of rational co-operation conditions the way in which he tackles the first and second (he does not consider the third) and explains an aspect of *A Theory of Justice* that those who approach it as if it were a pure theory of universal hypothetical assent are bound to find puzzling.

Rawls's discussion of international relations is perfunctory and occurs only as a by-product of his discussion of civil disobedience and conscientious refusal, in other words in the context of a domestic issue. Rawls suggests that we should ask what representatives of different states would agree on behind a veil of ignorance and endorses, on their behalf, the standard principles of traditional international law.⁸¹

From the standpoint of justice as rational co-operation this is not unreasonable. The circumstances of justice do not hold between states, which are much too unequal in organized power to be covered by the condition of approximate equality, as H. L. A. Hart emphasizes in his analysis of the circumstances of justice in *The Concept of Law*. Justice between unequals, from the standpoint of rational co-operation, amounts only to those rules that are of mutual advantage to states, and the standard usages of traditional international law (e.g. the rules about treatment of foreign ambassadors) are precisely of this form. Some redistribution can arise from the mutual advantage of the parties: an example would be one country helping an ally because it wants to keep it strong or wants to ensure that it does not fall under the influence of some other country. But redistribution not motivated in this way falls outside justice as rational co-operation.

From the standpoint of justice as universal hypothetical assent, however, it would seem bizarre to set such limits to international redistribution. The natural way to develop the theory is to ask what principles for worldwide distribution someone would choose who did not know what country he belonged to. And whatever in detail we may suppose somebody would choose in such a situation, it seems vastly implausible that any rational person would fail to call for very much more redistribution from rich countries to poor ones than would be in accordance with the mutual advantage of all states involved.⁸²

As far as relations between members of the same society at different times are concerned, Rawls adopts the line that the people in the original position are, and know that they are, contemporaries. This can again be understood once we allow for Rawls's commitment to the theory of justice as rational co-operation, since there obviously cannot be relations of mutual benefit between people who are not alive at the same time. Those alive at a given time can benefit or harm their successors but the relation is not mutual.

The problem then, of course, arises for Rawls how there can be any relations of justice between generations. And the answer that he comes up with is in essentials very similar to that of Hubin, even though (as we saw above) Hubin sets himself up as being in opposition to Rawls. Both of them introduce the notion that we have sentiments of attachment to the interests of our immediate successors (perhaps to the extent of the third generation) and claim to derive relations of justice from that. Hubin, as we saw, claims (or should claim if his argument is to make any sense) that the welfare of our descendants is a public good and we should therefore be unjust in refusing to contribute our fair share to it. Rawls's argument is simpler. He says that, since the people in the original position know that they care for their immediate successors' interests, they will choose to have them respected, and what they choose in the original position constitutes justice. I have criticized this part of Rawls's theory elsewhere,⁸³ and I shall not repeat myself here. But it is, I hope, fairly clear that laundering a sentiment through the original position does not make it into a basis for asserting a relation of justice. The larger point, however, is that for both Rawls and Hubin the limits of caring are the limits of justice, so there is no injustice where there are no sentiments; and it is presumably not unjust to lack sentiments of concern for future generations.

The approach from the direction of justice as universal hypothetical assent is, as might be expected, entirely different. We would have the person who is to choose the principles not know what generation he belongs to. He will then have to try to do the best for himself, allowing for the fact that if he comes early in history he will regret having chosen principles that demand too much saving; but if he comes late in history he will regret not having been rougher on resource depletion and damage to the environment. And so on.

XIII

The preceding four sections of this paper have been devoted to the question whether Rawls has somehow succeeded in incorporating the doctrine of the circumstances of justice into a universalistic theory of justice, as one might gather from the form of *A Theory of Justice*. The answer is a negative one. The appearance is misleading, I have argued; what Rawls really offers in *A Theory of Justice* is two incompatible theories of justice. The incompatibility is muted in the book by Rawls's concentration on the case of justice between contemporaries in a single society. It becomes clear when we move outside those constraints.

Where does this leave justice between generations? The major effort of this paper has been to refute Hume's theory of the circumstances of justice. If I am correct, there is no reason to accept that the circumstances of justice set out by Hume are a necessary condition for the application of the concepts of justice or injustice to social arrangements. I regard the Humean doctrine as worthy of careful refutation because it seems well on the way to becoming an unquestioned axiom. Assuming that it has been cleared out of the way successfully, we can allow that the circumstances of justice do not obtain between members of different generations at the same time we deny that that eliminates intergenerational justice or requires it to be dragged in through the back door in the way that Hubin and Rawls attempt to do it.

Although the vogue for Hume's doctrine of the circumstances of justice stems from Rawls's endorsement of it, I argued that Rawls cannot in fact, consistently with the integrity of his theory, accept that the Humean circumstances of justice are necessary conditions for justice. First, that would commit him to saying that a society of "natu-

ral" utilitarians would not be unjust. Although one of his objections to utilitarianism—that it is too difficult to gain compliance with its requirements—would not have any weight in such a society, he also wants to say that it is *unjust* for some people to make sacrifices purely on the basis of a net overall gain, and that objection would presumably still stand. Secondly, he would have to say that a society in which the condition of approximate equality of power did not hold could not be described as unjust, whatever its arrangements were. I take it that he would not wish to accept that conclusion.

I therefore suggested that we should understand Rawls's endorsement of the doctrine of the circumstances of justice in a different way: as the idea that the circumstances of justice are a sufficient condition for the application of rules of justice. We could then take the rules of justice that would be agreed upon where the circumstances of justice do hold and apply them to societies where the circumstances of justice do not hold, such as the society of "natural" utilitarians or organized unequals.

It might be asked whether we could not extend this line of analysis to relations between countries or relations between generations. Might we not ask what principles would be agreed on if countries were approximately equal in power or if later generations had the same ability to help or harm later ones? The idea is not wholly crazy and perhaps even merits the description "suggestive." But I am bound to say it seems to me a very cumbersome way of getting at the basic moral notion of "How would you like it if others behaved the way you're proposing to behave?" Surely if that is what we are after we can get there more directly by moving to the universal hypothetical assent theory of justice and avoid having to imagine what might be agreed on in a wildly counterfactual world.

There is, I have argued, a self-contained theory of justice as universal hypothetical assent in *A Theory of Justice*, and, if we dump Hume's theory that the circumstances of justice are necessary conditions for the application of justice, we are free to use it as a guide to justice between generations. But at this point we have to ask: why should we equate the product of universal hypothetical assent with *justice*?

We can, of course, also ask why we should equate with justice the terms on which co-operation would be agreed to. That is a good question, too. But I think the lines of an answer are tolerably clear. Rawls

would say, as I understand him, that what is agreed to under fair conditions is just. That is by no means a self-evident proposition, but it is not beside the point. It should be noticed here that, although Hume and Rawls would both agree that "what is agreed on in the circumstances of justice constitutes justice" they would diverge on the interpretation of that slogan. Hume would take it to mean that outside the circumstances of justice there is no *need* for justice, whereas Rawls (on my understanding of his theory) would say that outside the circumstances of justice you don't *get* justice. Ultimately, Hume founds justice on mutual advantage while Rawls founds it on fairness.

The trouble is that this rationale for the derivation of principles of justice from the original position applies only when the theory is construed on the rational co-operation model. In the theory of justice as universal hypothetical assent, the argument for the results of such assent constituting justice has to come from the Kantian line of development. The argument must be to the effect that there are "constraints of right" that specify the range of the morally arbitrary contingent facts about people's attitudes, preferences, social positions, etc., that have to be excluded from any judgement of justice.

Having devoted the bulk of this long paper to the relatively neglected Humean theory I can hardly at this stage launch into a full-scale discussion of the Kantian one. I shall therefore simply say that it seems, to me anyway, that the realm of the "morally arbitrary" that is needed to make the Kantian argument go through is too wide. The point is made succinctly in this criticism: "The prerequisites of justice are that in an established society, men press and acknowledge claims, evaluate and compare one another, feel resentment for injury, gratitude for benefit, and compassion for the suffering of others. These activities and emotions are the necessary underpinning for principles of justice such as desert and need. Rawls's isolated men, concerned only with advancing their own interests, have no possible reason to estimate one another's deserts, and so no reason to adopt a desert-based conception of justice; the same is true of the criterion of need. This explains why Rawls's principles necessarily diverge from ordinary ideas of justice and why he is drawn inexorably toward utilitarianism. For utilitarianism, which has no direct concern with the relative levels of well-being enjoyed by different individuals, is par excellence the moral theory of an impartial spectator placed *outside* society (having no claims or

emotional responses of his own) and Rawls, by the use of the veil of ignorance and his other assumptions, effectively puts his hypothetical choosers into the position of impartial spectators."⁸⁴

XIV

There is a form of paper in which, after everybody else's theories have been knocked down, the author's own theory comes in at the end on a white charger and saves the day. The present paper is not constructed on that plan. The difficulties in both of Rawls's theories seem to me to be real, but I do not have any fully worked out alternative to offer.

However, to avoid ending on an entirely negative note, let me say two things. First, it seems to me undeniable that a lot of what is counted as justice (everywhere that we have records of) fits somehow into the general framework of justice as rational co-operation. Any theory that tries to deny that is, in my opinion, doomed from the start.

Second, justice as rational co-operation cannot be the whole of justice for the simple reason that it cannot itself define a just starting point from which rational co-operation takes place. If Crusoe owns (controls access to) the banana trees and Friday owns (controls access to) the coconut trees, justice as rational co-operation can talk about fair exchange between Crusoe's bananas and Friday's coconuts. Or if Crusoe owns (controls access to) all the trees and Friday climbs them to get the fruit, justice as rational co-operation can talk about a fair return for Friday's labor. But justice as rational co-operation is silent when we ask whether it is just that the initial possessions should be what they are.

We could, of course, say that the only form of justice is indeed justice as rational co-operation and that justice therefore comes into operation only when initial holdings (e.g. control over natural resources) are defined. But this would be strange, to say the least. The question how the initial holdings should be allocated is a central distributive question. The way it is settled (e.g. which country gains control of a massive oil-field by annexing the territory of the weak state under whose land the oil field lies) may be far more significant than the way in which gains from co-operation are divided. Surely the key words for assessing distributions—just and fair—must have a role to play here.

I believe that the positions from which people enter into co-operative arrangements can be subjected to appraisal in terms of justice, and I want to suggest that the relevant concept of justice is justice as equal opportunity. It seems to me that the concept of equality of opportunity is one that is clearly not derivable from that of justice as rational co-operation, since it comes in prior to the stage at which co-operation takes place. Yet its appeal as an independent criterion of justice seems undeniable.

Evidence for the power of its appeal is provided by Rawls's acknowledging it in a way that does not fit in with the rest of his theory. Rawls, as is well known, divides the second principle of justice into two parts and gives the first part, which specifies equal opportunity, lexical priority over the second part, which is the difference principle. Yet in terms of Rawls's own theory, equal opportunity should be a rule of justice, along with income tax and other palliative arrangements, forming part of the complex of institutions that together produce results in accordance with the difference principle. That he pulls it out and gives it a special place is, I think, most reasonably explained as an illustration of the way in which Rawls's instincts are at times better than his theory.

I want to be the first to admit that the concept of equal opportunity is replete with difficulties. Equality of opportunity at one point in time is equal opportunity to become unequal at a later point, but that inequality may itself constitute an unequal opportunity. And so on. Nevertheless, it seems to me that, like all other concepts of political morality, it has clear cases (especially negatively—we can easily enough identify some cases in which it is violated) as well as ones that cause trouble.

In the case of justice between generations, equality of opportunity has to be taken in sufficiently broad terms. What justice requires, I suggest, is that the overall range of opportunities open to successor generations should not be narrowed. If some openings are closed off by depletion or other irreversible damage to the environment, others should be created (if necessary at the cost of some sacrifice) to make up.

This conception of intergeneration justice has several attractive features. First, it is a global extension of a principle that families with possessions to pass on have traditionally espoused: "Keep the capital

intact!" Second, it underwrites the asymmetry that many people (including myself) feel between making successors better off, which is a nice thing to do but not required by justice, and not making them worse off, which is required by justice. And third, it does not make the demands of justice to our successors depend on our knowing their tastes—still less on our approving of them.⁸⁵

Notes

1. For an elaboration of these rather cryptic remarks, see my "Rawls on Average and Total Utility: A Comment," *Philosophical Studies* 31 (1977) 317-325.

2. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) p. 3.

3. Rawls, *A Theory of Justice*, p. 512.

4. Erik P. Eckholm, *The Picture of Health: Environmental Sources of Disease* (sponsored by the UN Environment Program and the World-watch Institute, New York: Norton, 1977), report in *Chicago Sun-Times*, Nov. 20, 1977, p. 24.

5. For a review of these theories and comments on their resistance to verification, see the papers by Karl Deutsch, Andrew Mack and James Caporaso, in Steven J. Rosen and James R. Kurth (eds.), *Testing Theories of Economic Imperialism* (Lexington, Mass.: D. C. Heath and Co., 1974).

6. Section 22 of *A Theory of Justice* is entitled "The Circumstances of Justice."

7. Rawls, *A Theory of Justice*, pp. 127-128.

8. *An Enquiry Concerning the Principles of Morals*, Appendix III. H. D. Aiken (ed.), *Hume's Moral and Political Philosophy* (New York: Hafner, 1949), p. 277. I shall give page numbers to the *Enquiry* and to the *Treatise of Human Nature* to this edition.

9. *Enquiry*, p. 277.

10. *Enquiry*, pp. 278-279.

11. *Treatise*, p. 91.

12. *Treatise*, p. 93.

13. F. A. Hayek, *Law, Legislation and Liberty*, Vol. 2: *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976).

14. *Enquiry*, pp. 193-194.

15. *Enquiry*, pp. 188-189.

16. *A Theory of Justice*, pp. 126-127.

17. *Enquiry*, p. 185. The South Sea Islands before the contact with whites probably came nearest to the Humean "golden age" conditions with their combination of limited wants and relatively easy means of satisfying them: "Traditionally, when a Micronesian was hungry he caught a fish in the reef or picked some fruit." Associated with this was the idea that "It's Micronesian to share, not sell." (Fox Butterfield, "The Improbable Welfare State," *New York Times Magazine*, Nov. 27, 1977, 55-74, p. 64.) Even if there is an element of mythology here, it is surely significant that sharing and ease of acquisition are thought of as going together.

18. David Miller, *Social Justice* (Oxford: Clarendon Press, 1976), p. 164.

19. *Enquiry*, pp. 187-188.

20. Miller, *Social Justice*, pp. 163-164.

21. *Enquiry*, p. 188, my italics.

22. See Jay Katz and Alexander Morgan Kapron, *Catastrophic Diseases: Who Decides What? A Psychosocial and Legal Analysis of the Problems Posed by Hemodialysis and Organ Transplantation* (New York: Russell Sage Foundation, 1975) for a general discussion.

23. Renée C. Fox and Judith P. Swazey, *The Courage to Fail: A Social View of Organ Transplants and Dialysis* (Chicago: University of Chicago Press, 1974), p. 246.

24. Fox and Swazey, *The Courage to Fail*, p. 247, quoting D. Sanders and J. Dukeminier "Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation," *UCLA Law Review* 15 (1968) 357-413, pp. 377-378, my italics.

25. *Enquiry*, p. 187.

26. Interview with Belding Scribner, in Fox and Swazey, *The Courage to Fail*, p. 328.

27. Cf. Miller, *Social Justice*, p. 124.

28. Cf. Onora Nell, "Lifeboat Earth," *Philosophy and Public Affairs* 4 (1975) 271-292, p. 278.

29. D. Clayton Hubin, "Justice and Future Generations," *Philosophy and Public Affairs* 6 (1976) 70-83, p. 73.

30. *Treatise*, p. 65.

31. *Treatise*, p. 57.

32. *Treatise*, p. 58.

33. *Treatise*, p. 61.

34. *Treatise*, p. 62.

35. In the formulation (which pays acknowledgement to Hobbes and Hume) of H. L. A. Hart, in Chapter 9 of *The Concept of Law*

(Oxford: Clarendon Press, 1961), the intermediate position of human nature is expressed by saying that men are neither angels nor devils. "With angels, never tempted to harm others, rules requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible" (p. 192). But that men are not "devils," in this sense, does not entail, as Hart implies, that "human altruism is limited in range and intermittent" (p. 192). All it entails is that, in their conception of self-interest, human beings place personal security at the cost of constraints on the ability to attack others above the possibility of attacking others at the cost of a constant danger of being attacked by them. For a sophisticated game-theoretical analysis of the theories of Hobbes and Hume, see Chapter 6 of Michael Taylor, *Anarchy and Co-operation* (London: Wiley, 1976).

36. *Aubrey's Brief Lives*, ed. Oliver Lawson Dick (Ann Arbor: The University of Michigan Press, 1962), pp. ciii-civ.

37. *Enquiry*, p. 260.

38. *Enquiry*, p. 261.

39. *Enquiry*, p. 261.

40. *Enquiry*, p. 261.

41. *Treatise*, p. 65, italics in original.

42. *Enquiry*, p. 186.

43. *Enquiry*, p. 186. There is a slight complication here. When Hume says, just below this passage, that "my heart" "Shares all [my neighbour's] joys and sorrows with the same force and vivacity as if originally my own," this might make it appear that Hume is positing some kind of psychological mechanism ("sympathy") which literally makes my happiness a function of the sum total of the happiness of the human race. But I take it Hume does not really intend to mean that each person's happiness moves up and down to an equal extent with every change in the happiness of every human being (including himself). In Appendix II of the *Enquiry* he decries attempts to reduce all wants to the more or less subtle pursuit of personal gratification and says that "the hypothesis of disinterested benevolence"—that "from the original frame of our temper, we may feel a desire of another's happiness or good" (*Enquiry*, pp. 274-275) has the merit of simplicity and intrinsic plausibility. I shall therefore take it that in the world imagined by Hume, everybody *desires* and *pursues* the general interest, without necessarily deriving personal psychic benefit from anything except what he himself experiences.

44. See Amartya Sen, *On Economic Inequality* (Oxford: Clarendon Press, 1973), pp. 16-18 for an elegant diagrammatic exposition.

45. "Saki" (H. H. Munro) and Patricia Highsmith have both fictitiously depicted such retribution with relish.

46. *Enquiry*, pp. 190-191.

47. *Enquiry*, p. 191.

48. See Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (London: Barrie and Jenkins, 1971), *passim*.

49. Brown, *Bury My Heart at Wounded Knee*, p. 187.

50. Hart, *The Concept of Law*, pp. 190-191.

51. Hart, *The Concept of Law*, p. 196.

52. Hart, *The Concept of Law*, pp. 154-157.

53. *Enquiry*, p. 261.

54. *Treatise*, pp. 49-50.

55. See Morris Ginsberg, *On the Diversity of Morals* (London: Mercury Books, 1962), pp. 112-115 for a discussion of the development of ideas of justice that stresses the increasing tendency towards universality.

56. Hubin, "Justice and Future Generations," pp. 79-80.

57. Hubin, "Justice and Future Generations," p. 71, italics in original.

58. Hubin, "Justice and Future Generations," p. 81.

59. Hubin, "Justice and Future Generations," p. 82.

60. Hubin, "Justice and Future Generations," pp. 81-82.

61. Hubin, "Justice and Future Generations," p. 83.

62. Thus, the paper "Some Reasons for the Maximin Criterion," *American Economic Review* 64 (1974), pp. 141-161, plays down the derivation of the difference principle from the constrained pursuit of self-interest and asks us to look at the principle as a reasonable one that accords with our ethical intuitions; and the article "A Kantian Conception of Equality," *Cambridge Review* (February 1975), pp. 94-99, scarcely mentions the derivation of the principles of justice from the original position at all but emphasizes their consistency with fundamental requirements of right.

63. This argument is elaborated in opposition to Robert Paul Wolff's *Understanding Rawls* (Princeton: Princeton University Press, 1977) in a Critical Notice forthcoming in the *Canadian Journal of Philosophy*.

64. Peter Danielson, "Theories, Intuitions and the Problem of World-Wide Distributive Justice," in "Review Symposium on Rawls," *Philosophy of the Social Sciences* 3 (1973), pp. 331-340, p. 336.

65. Rawls, *A Theory of Justice*, p. 8.

66. Rawls, *A Theory of Justice*, p. 4.
67. Miller, *Social Justice*, pp. 42-43.
68. Miller, *Social Justice*, p. 50.
69. Hayek, *Law, Legislation and Liberty*, Vol. 2, p. 100; quotation from John Rawls, "Constitutional Liberty and the Concept of Justice," in J. W. Chapman and J. Roland Pennock (eds.), *Nomos IV: Justice* (New York: Atherton, 1963), p. 102. Hayek says (note 44, p. 183) that he is "not aware" of a similar statement in *A Theory of Justice*; in fact the relevant passage is on pp. 86-88—the discussion of "pure procedural justice" to which I shall refer below in the text.
70. The link can be seen especially closely in Rawls's paper, "Distributive Justice," in P. Laslett and W. G. Runciman (eds.), *Philosophy, Politics and Society*, 3rd Series (Oxford: Basil Blackwell, 1967), pp. 58-82.
71. Rawls, *A Theory of Justice*, pp. 86-87.
72. Rawls, *A Theory of Justice*, p. 87.
73. Rawls, *A Theory of Justice*, pp. 255-256. For a defence of the coherence of Rawls's "Kantian interpretation" against Robert Paul Wolff's attack in *Understanding Rawls*, see my "Critical Notice."
74. Rawls, *A Theory of Justice*, p. ix.
75. Rawls, *A Theory of Justice*, p. 569.
76. Rawls, *A Theory of Justice*, p. 572.
77. Rawls, *A Theory of Justice*, pp. 570-571.
78. Rawls, *A Theory of Justice*, p. 571.
79. Rawls, *A Theory of Justice*, p. 572.
80. Rawls, *A Theory of Justice*, p. 573.
81. Rawls, *A Theory of Justice*, pp. 377-379.
82. See my *The Liberal Theory of Justice* (Oxford: Clarendon Press, 1973), pp. 128-133.
83. "Justice between Generations," in P. M. S. Hacker and J. Raz (eds.), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (Oxford: Clarendon Press, 1977), pp. 268-284.
84. Russell Keat and David Miller, "Understanding Justice," *Political Theory* 2 (1974), pp. 3-31, p. 28.
85. Compare M. P. Golding in "Obligations to Future Generations," *Monist* 56 (1972), pp. 85-99.