

## 2 | Prime Justice

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[I]f he keeps within the limits that separate scientific prevision from fanciful Utopian conjecture, the form of society to which his practical conclusions relate will be one varying but little from the actual, with its actually established code of moral rules and customary judgments concerning virtue and vice.

—Henry Sidgwick<sup>1</sup>

### 1. Introduction

Justice, sometimes, is a way in which things can be right even though things have gone wrong. It is just, and in that way right, for the thief to compensate the victim, or maybe even to be punished. Or, when neighbors selfishly compete to divert scarce stream water for themselves, it would be just for the water to be apportioned impartially in some way. Without erasing the wrongs involved, these solutions are right. This aspect of justice, that it can be a virtue in a context of vice, is sufficiently striking that, at least in the case of social justice, it is sometimes thought to be of its essence. I think this is a mistake, and that recognizing the mistake leads us to the unfamiliar idea of justice for morally flawless people. In turn, we will see that this initially frivolous-sounding topic exposes something important about the structure of moral normativity more generally, namely, the primacy of non-concessive standards—standards of right that are not occasioned by wrong.

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<sup>1</sup> Henry Sidgwick, *The Methods of Ethics*, 7th ed. (Indianapolis, IN: Hackett Publishing, 1981), Book IV, Ch. 4, 473–74.

Social justice may seem to have its occasion only when, and because, individuals are, among other things, morally flawed.<sup>2</sup> The thought is not tempting in the context of criminal justice, since, even when there has been no moral malfeasance, justice patently requires not punishing for theft a person innocent of theft. Justice's standards apply. But in the case of social justice, it is evidently tempting to think that questions of justice would not arise at all if each person were to give morally proper weight to the interests or property (etc.) of others—if, that is, they were free of the vice of selfishness. That tempting thought is difficult to maintain, though, when we notice that one person's interests conflicting with another person's interests does not depend on either, or anyone, being morally deficient in any way. I have an interest in getting most of the stream water, and you have a conflicting interest in your getting it rather than me. So far, no vice has been mentioned or implied in either party. If one of us were to take all the water, that would probably be wrong, but such an action is no part of the very short story I have told, which is only about our conflicting interests. The "circumstances of justice" are sometimes thought to include moral deficiencies, which Rawls mentions in his influential elaboration of Hume's account.<sup>3</sup> But since no such deficiency is really required, Rawls may only be meaning to list the ordinary conditions of human life that do, in fact, occasion questions of social justice. We certainly would be interested in standards that apply in the conditions we face, but I propose to pause on the question whether justice lacks application in the case of fully rightful agents and actions. If the quotation in my inscription is any indication, Sidgwick would not approve, although the conservatism he embraces should give us pause, and we will come back to him.

Let me begin with a rough definition of some terms I will be using. By "prime justice," I will mean a certain part of what I will call the "global prime requirement." This is the requirement according to which all agents (individual or collective) behave as they morally ought to given that all others are also doing so. Presumably, or so I will assume, there will be a component part of this prime requirement that concerns something like the basic social structure, the social justice part of the morally flawless scenario. So, there is evidently this question: what ought the basic social structure to be like given that nothing is going morally wrong? I do not mean what it ought it to be like in descriptive detail, but what standards or principles ought it to meet? Call this *prime*

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<sup>2</sup> Gregory Kavka ("Why Even Morally Perfect People Would Need Government," *Social Philosophy and Policy* 12, no. 1 [1995]: 1–18) reflects on and rejects Madison's claim, "if men were angels, no government would be necessary" *Federalist Papers*, 51 (any edition).

<sup>3</sup> See John Rawls, *A Theory of Justice* (Cambridge: Harvard Belknap Press, 1971); 2nd ed., 1999) sec. 22 (either edition): "Some of these defects spring from moral faults, from selfishness and negligence; but to a large degree, they are simply part of men's natural situation." But then, a few sentences later, he adds, "Thus, one can say, in brief, that the circumstances of justice obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity." I discuss these matters more fully in "What's Circumstantial About Justice?," *Social Philosophy and Policy*, (forthcoming).

*justice*. I will not propose an answer to that question, but I want to reflect on the status of this question in our thinking about social justice. I will ask whether there is any good alternative to this ostensibly utopian standard for the simple title of full social justice. If not, then it may be that justice is utopian. I will try to show, however, that even though the prime requirement is indeed utopian, justice, even if it is prime justice, might not be utopian at all.

There was a debate in the late nineteenth century between Sidgwick and Spencer about the merits of Spencer's approach to moral philosophy, in which individuals (and perhaps also social relations) were assumed to be morally perfect.<sup>4</sup> For the most part, their dispute was about whether such a study would serve the pressing practical aim of determining what ought to be done under actual and decidedly non-ideal conditions. Spencer argued in the affirmative, that the study of the ideal case was an essential step toward eventual understanding of real and more complicated moral conditions. He used analogies from mathematics, mechanics, and astronomy to argue that understanding the real and imperfect cases would be impossible without first understanding idealized and pure cases of circles, straight lines, perfectly rigid levers, and so on. Sidgwick objected that not only is it beyond our grasp to ascertain what the content of moral rules would be in such a fantastical scenario, but even if we could know that much, it is far from clear that such knowledge would be of any practical value with respect to the question of what we ought to do in the very different actual conditions we are bound to find ourselves.

Neither author made much effort either to ascertain the content of such moral rules, or to actually investigate (rather than declare) whether there would be valuable things to learn from such a project—practical or otherwise. They were mostly focused on the question of the practical usefulness of proceeding in one way or the other. (Only in passing did Spencer bother to mention his belief that the requirements applicable to ideal agents are *true*.)<sup>5</sup> That leaves untouched a question that is of at least philosophical interest, namely, whether the more realistic approach favored by Sidgwick and so many others deserves to be seen as the correct method by which to understand the *truth* about moral standards. Famously, we might object, it would be comical to look for one's dropped car keys far from where they surely lie simply because the light is better there. What we do not clearly see does not thereby disappear. The content of justice may be obscure to us if Spencer is right (or maybe not, more below), but that alone could not warrant the view that he is wrong, that the content of justice can be found in

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<sup>4</sup> See Herbert Spencer, *Social Statics, or, The Conditions Essential to Human Happiness Specified, and the First of Them Developed* (London: John Chapman, 1851), (esp. chap. 1); and *The Data of Ethics with an Appendix, Containing an Additional Chapter, and Replies to Criticisms* (London: Williams and Norgate, 1879), (esp. chap. 15, "Absolute and Relative Ethics"); and in Sidgwick, *The Methods of Ethics* (esp. chap. 2).

<sup>5</sup> Spencer, *Data of Ethics*, sec. 105.

more tractable places. Even if, as many seem to think,<sup>6</sup> we political philosophers should not spend too much time with our eyes raised to the less practical, more idealizing questions, that does not mean they disappear. There are such questions, and maybe even answers, whatever value and importance you might think they have or do not have. As I have said, (unless it just turns out to be incoherent, rather than merely of dubious interest) there *is* this question: what ought the basic social structure to be like given that nothing is going morally wrong?

None of my main points depend on conceiving social justice as a standard for something called the basic social structure (following Rawls), but I frame it that way here just to fix ideas. Even so-framed, there is no need to limit the basic structure to legal or governmental structures, rather than as including a much broader range of structured social norms of certain kinds. But even that more capacious use of basic social structure will not be essential for my purposes here.<sup>7</sup>

## 2. Concession and Primacy

The following are, quite obviously, two different questions:

### 1. *Concessive*:

What principles for the basic structure of society would work out well if there were (contrary to fact) full compliance with those principles—full justice compliance, *but significant non-compliance with many other moral standards*?

### 2. *Non-concessive*:

What principles for the basic structure of society would work out well if there were (contrary to fact) full compliance with them, and *also (contrary to fact) full compliance with all moral standards*—full moral compliance?

These are formulated in a way that will appeal to a certain kind of “constructivist” about the content of social justice. Let a *constructivist theory of justice* be one according to which the principles for the justice of a society are whichever principles would be chosen by suitably situated hypothetical choosers as those that would, in light of the facts, promote the choosers’ (theoretically specified) interests.<sup>8</sup> A little terminology will streamline things. When these are taken to

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<sup>6</sup> For one example, see Colin Farrelly, “Justice in Ideal Theory: A Refutation,” *Political Studies* 55, no. 4 (2007): 844–64.

<sup>7</sup> For an illuminating treatment of basic social structure as broader in that sort of way, see Timothy Syme, “Everyday Life and the Demands of Justice” (PhD diss., Brown University, 2015).

<sup>8</sup> Leading contemporary examples include Rawls (*A Theory of Justice*), whose approach derives especially from that of Immanuel Kant, and David Gauthier (*Morals By Agreement* [Oxford: Oxford University Press, 1986]), who develops an approach deriving from Hobbes and Hume.

generate the content of social justice, then the assumption of full compliance with principles of justice will be called full “justice compliance.” The account assumes compliance with the very principles it is meant to be an account of. The non-concessive version is importantly different, since it assumes broader compliance than that. I will just call that full “moral compliance.”

If the constructivist theory is a theory only of social justice, and not of moral right generally, call it a “partial constructivism,” with a “complete constructivism” being one that offers a single and unitary constructivist account of moral right generally. Constructivism about justice must choose between these two versions, the concessive and the non-concessive, selecting one of them to give the fundamental principles of social justice. On what basis is one or the other to be deemed superior? While I will stay within a constructivist framework to keep things clear, the main points I will be making probably apply more broadly.

It is true that the non-concessive question contemplates principles chosen for the way they would operate in an imaginary utopian environment. (We do not need to precisely define “utopian” here in order to see that.) But this difference in “realism” between that and the concessive version is a matter of degree, with both of them falsely assuming at least full justice compliance. Since neither of them gives the choosers the whole truth and nothing but the truth, that criterion does not decide between them.

The fully idealizing version has a kind of primacy. Consider the case of Professor Procrastinate, who (we stipulate) ought to accept and perform a certain assignment to write a book review, but who will not (even though he surely could) write it even if he accepts. There is a non-concessive question, “What ought he to do?” There is also a concessive question, “What ought he to do given that he will not write in any case?” As Jackson and Pargetter point out, when the non-concessive ought statement (“He ought to [accept and perform]”) is satisfied—that is, when he accepts and performs—any concessive requirement evaporates.<sup>9</sup> There is no longer a question of what he should do about acceptance in light of his non-performance—because he performs. This obliteration is not symmetrical, however. The non-concessive ought stands either way, since even if he will not perform and so, perhaps, ought not to accept, it remains the case that he ought to accept and perform. This is a notable asymmetry, and a way in which the concessive ought is less fundamental: it is contingent in a way that the concessive one is not. We glimpse this primacy when we say, as we might, that he ought to decline, but *only because* he (unjustifiably) will not write even if he accepts. We signal our thought that, were he to write if he accepted, as he ought to, then it would not be the case that he ought not to accept.

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<sup>9</sup> Frank Jackson and Robert Pargetter. “Oughts, Options, and Actualism.” *Philosophical Review* 95, no. 2 (1986): 233–55.

When the meeting of one requirement renders moot or eradicates another requirement, I will say that it “overrides” it.<sup>10</sup> We can now unfold some implications for morality in the individual context, returning to the question of justice shortly. Any requirement on an agent to do one thing, where that requirement depends on the fact that the agent has wrongly done something else, is overridden by a requirement to <not do the first thing, *and* do certain other things in light of that>. Each agent will, then, be subject to a maximally overriding requirement to do all the right acts (which in many cases are bound to present permissible options, an important point I will return to) that would be available should she never do anything wrong. That point will be important when we return to the context of social justice, and I will call it the *agent’s prime requirement*.

If the agent acts wrongly (or will do so), she is under a concessive requirement to do all the remaining (and maybe different) right acts that would be available should she do nothing else wrong. This is concessive because this latter requirement is owed to non-compliance, but it is still overriding of any requirements she might find herself under given any *further* wrongdoing by her. Add to this that there will be concessive requirements in light of present or future wrongdoing as well as past (as we know from Professor Procrastinate), though of course those are overridden by a requirement that those acts violate.

We can illustrate the point in the case of social justice. First, consider only the issue of compliance specifically with the principles of justice. As I have said, I will come back to a puzzle about how justice might require things of individuals, but I will bracket that issue for now. The nonconcessive question here is, What ought the basic social structure plus individual justice compliance to be like? Where justice compliance is lacking to some degree, there is also the concessive question, What ought the basic social structure to be like given expected levels of justice non-compliance? This question and whatever standard supplies the answer are genuine, but subordinate in the way I have specified. So there would be a subordinate relation even if justice were understood as bracketing other (non-justice) questions of moral compliance by taking actual levels of moral compliance as given. However, a second instance of subsidiarity suggests that that whole issue is itself subordinate to the issue of the prime requirement.

Presumably, just as people ought to build and comply with certain institutions, it is also true that they ought to build and comply with those institutions *and* together behave personally in all sorts of (certain) ways, many of which

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<sup>10</sup> I follow Jackson and Pargetter’s terminology here. Notice that if actualism is true, sometimes two requirements can override each other (call this the “symmetrical” case), so I will say that one has “primacy” over the other when it overrides it but is not overridden by it. To illustrate the symmetrical case, note that actualists hold that Procrastinate is required not to accept given that he will not perform. The requirement to perform given that he accepts would override that, since if it is met, the duty not to accept disappears. Symmetrically, the duty not to accept given that he will not perform overrides the duty not to perform given that he has not accepted.

have nothing to do with justice.<sup>11</sup> The concessive question above, (1), which takes some morally wrongful behavior as given whenever it is not a violation of principles of justice, is overridden by the non-concessive question, (2), in which principles of justice are chosen for their aptness in an environment of full moral compliance. Here is the asymmetry: In a world in which the non-concessive prime requirement is met (full moral compliance), the concessive ought—concessive justice—evaporates, but not vice versa. In that important sense, the concessive standard for the basic social structure is less fundamental than the non-concessive one. The part of the overriding requirement that speaks to the basic social structure has that kind of primacy, but it is not itself subordinate to any further superordinate standard. There is no standard that is less concessive.

This is no challenge to the concessive question's practical interest or urgency, of course, since the real practical environment is bound to be morally flawed. My claim is rather that the moral requirements on building basic social institutions, given certain moral failures and injustices, are concessive, and so, in that sense, morally subordinate principles. There is a broader and morally more fundamental or superordinate requirement that also speaks to the building of social institutions, and its content might well be quite different. It is the requirement on all agents to be morally good in every way including construction and compliance with the institutions that would be apposite in that condition. Call this the *global prime requirement*.

There are two important considerations in favor of positing such a standard (whether or not we know much about its content). First, the *existence* of such an inclusive requirement inherits plausibility from the fact that Professor Procrastinate is not released from his duty to accept and perform merely by the fact that he will not perform. This is an important point, and it recalls my opening remarks about whether things disappear just because we do not see them. Whatever qualms one might have about this prime requirement's interest or practical value, or susceptibility to our full understanding, those are not arguments that it is non-existent. Second, its *primacy* is supported by the asymmetrical way in which it is not overridden by concessive requirements whereas the concessive (non-inclusive) requirements are overridden by the non-concessive one.<sup>12</sup>

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<sup>11</sup> This "ought" that ranges over the combined acts of multiple agents is admittedly problematic in a way that I will sketch below as a "puzzle of plural obligation."

<sup>12</sup> As a familiar instance of this structure, Alan Dershowitz writes, in this spirit, "I am generally against torture as a normative matter. . . . I pose the issue as follows: If torture . . . would in fact be used in an actual ticking bomb mass terrorism case, would it be normatively better or worse to have such torture regulated by some kind of warrant, with accountability, record-keeping, standards, and limitations." Perhaps it ought to be done only with a warrant. As Dershowitz emphasizes, that would not cancel the more comprehensive requirement not to torture with or without a warrant. See Alan Dershowitz, "The Torture Warrant: A Response to Professor Strauss." *New York Law School Law Review* 48 (2003): 277.

There might very well be multiple non-concessive or “prime” equilibria, so to speak, combinations of satisfied moral standards on people and institutions such that each such requirement is itself morally correct given the satisfaction of all the others. For example, it might be that property regime A, along with moral norms B, along with full compliance, is morally flawless, but so would be property regime C along with moral norms D and full compliance. So there is disjunction at that level (in addition to whatever options each of the standards would themselves permit, as in the case of imperfect duties).

It might seem that this gives rise to massive indeterminacy, but that is not clear. There may be enough determinacy about enough of the standards—since so many of them are robust with respect to the normative environment—that the remaining indeterminacy would be relatively modest. For example, moral requirements against cruelty, and institutional requirements against domination or subordination might not depend on facts about other forms of moral compliance. In any case, even if the indeterminacy in the standard’s content were massive, and so hard to know in any detail, there is the more abstract point that this could nevertheless be the true structure of morality even if its content would be hard to understand. In many areas of knowledge, we know of vast areas and categories of truths that we do not know and may never discover. Math and cosmology are like this, and it would hardly be surprising if moral philosophy were too.

There are important challenges to this idea that social justice gets its content from a more comprehensive hypothetical scenario of full moral and political moral compliance—the global prime requirement. I will mention two such challenges. I will mainly explore the first, which is that the more comprehensive requirement has what might strike us as radical and surprising implications, both in the limited context of social justice, and also in the context of morality more generally. I will call this

*The utopian implication* of the global prime requirement: In thinking about what kind of institutions are part of the morally fundamental standard of social justice, we are to ask which institutions would operate well under the highly unrealistic assumption that people will comply not only with principles of social justice, but also with all requirements of morality.

It is doubtful, I think, that institutions such as contracts, laws, police, or jails would be obviated by meeting the prime requirement.<sup>13</sup> Still, whatever institutions are included (and again there are bound to be options), they may seem unlikely to resemble the kinds of institutions that are normally contemplated

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<sup>13</sup> For arguments that they would not, see Kavka, “Why Even Morally Perfect People Would Need Government.”



(even including the many differences of opinion about this question) in thinking about a just society.<sup>14</sup> The second challenge is what I call the puzzle of plural obligation, and after introducing it toward the end of this paper, I leave its exploration for another occasion.

It is important to guard against a certain exaggeration of my argument. The prime requirement would require all agents to be, in one way, morally faultless. Nothing in the prescribed set of behaviors would be conditional on, and so concessive to, any shortfall from compliance with the full set by all. This is surely a requirement so high that it is unlikely to be met. However, it is not as stringent as certain other possibilities. As I have said, I assume for the sake of argument that no agent is required to do anything that they are not able to do, and so it is not unrealistic in that particular way. In addition, satisfaction of the prime requirement does not (at least not obviously) require that all agents be morally perfect. The reason is that there may be acts that would be morally good but not required—beyond the call of moral duty. Supererogation, if there is such a thing, is plausibly characteristic of any agent who is morally perfect—one for whom there is no such thing as being morally better yet.<sup>15</sup> The prime requirement, part of which gives the content of prime justice, leaves all supererogation aside. This is warranted by its being a question of requirement. So, prime justice is limited to the case of full moral compliance, and not moral perfection more generally. In that respect it is not a standard for angels.<sup>16</sup> There would be nothing wrong with asking a different question: what would the basic structure be like in a world in which everything was not only right but also morally perfect? But falling short of that standard is not injustice, since there need be no violation anywhere of any requirement.

### 3. Is Prime Justice Simply Justice?

There will be, embedded in the prime requirement, requirement-fragments about the organization of institutions, distributions, and so forth.<sup>17</sup> Any other

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<sup>14</sup> The points in this section and the next raise interesting questions about act-consequentialism and rule-consequentialism, questions I have not yet been able to devote much thought to.

<sup>15</sup> For this point and some good distinctions, see Earl Conee, "The Nature and the Impossibility of Moral Perfection," *Philosophy and Phenomenological Research* 54, no. 4 (1994): 815–25.

<sup>16</sup> Nothing here deviates from Rawls's approach, then, when he writes, "I have assumed all along that the parties know that they are subject to the conditions of human life. Being in the circumstances of justice, they are situated in the world with other men who likewise face limitations of moderate scarcity and competing claims. Human freedom is to be regulated by principles chosen in the light of these natural restrictions. Thus justice as fairness is a theory of human justice and among its premises are the elementary facts about persons and their place in nature. The freedom of pure intelligences not subject to these constraints (God and the angels) are outside the range of the theory" (*A Theory of Justice*, rev. ed., 226).

<sup>17</sup> These are not properly requirements, since, to put it in terms of logical form, the requirement operator does not distribute to the conjuncts, allowing "detachment" as self-standing requirements.

requirements about those matters will be in a concessive, subordinate context. So one point is simply that an important—and in a significant sense the primary—part of the topic of social justice is prime justice, where no moral shortfalls are conceded. I am not suggesting that knowing the concessive requirements depends on, or is even systematically aided by, first knowing the non-concessive ones. Remember, we are bracketing questions about the practical value of understanding the content of prime justice, recognizing that what is true and what is useful are two separate questions.

In the face of prime justice's potentially utopian implications, some will resist shipping the idea of justice off to such remote shores. Justice is “for us,” many will say, so it follows that justice is not utopian. Therefore, they will think, the content of justice must be determined in the light of some certain configuration of concessions to predictable moral violation. The suggestion that the prime requirement does not satisfy the “for us” criterion is confused, or so I have argued elsewhere,<sup>18</sup> but I want to make an additional reply. Suppose that someone says that the *real* question of social justice is not the question of prime justice with its unrealistic supposition of moral flawlessness, but rather that justice takes moral imperfection as given. The problem with that view is that it will be difficult to choose some single scenario of moral shortfall that sets the level at which the “real” question of social justice belongs. In fact, it might well be that apart from prime justice, there are infinitely many concession-relative standards, one for each set of moral shortfalls that are being taken for granted. How is the essentially concessive approach supposed to identify which concessions are the justice-determining ones and why? The non-concessive prime justice approach acknowledges that there are *also* concessive requirements, and they are relative to specified concessions. Many of them concern normative questions of unrivaled importance. For example, how should criminals be punished, and/or protected? How should an economy be structured given predictable levels of selfishness and partiality that exceed what morality permits? And many more. But what level and profile of concession would count as full justice?

It might seem that a salient concessive level would be the one that takes for granted the shortfalls we *know* will happen. The problem with that is that just because we know they will happen there is no guarantee that what we should do in light of those facts is appropriately called justice. For example, we might simply know that justice-tainting or justice-destroying shortfalls such as inordinate levels of selfishness and exploitation will happen, and, granted, we must still do something in light of that fact if it is one. There may be morally right ways to deal with such sad conditions, but even when they are faced rightly, the conditions are unjust if anything is.

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<sup>18</sup> “Human Nature and the Limits (If Any) of Political Philosophy,” *Philosophy & Public Affairs* 39, no. 3 (2011): 207–37.

Of course, when a community faces an actual decision of that concessive kind, the facts that set the inquiry are, simply, the facts that obtain (so far as they can be ascertained). There is no plurality of fact-sets to contend with, no need to specify which fact set is the relevant one. On the concessive approach to justice, however, there is a vast array of fact sets to contend with. This is because the question now is not what to do given the facts, but which of the infinitely many configurations of moral deficiency is the one to postulate for the purposes of deriving the content of justice. Should we suppose that justice is relative to moderate selfishness or rather to extreme selfishness, and, in either case, to what degree? Should justice be relative to moderate or high levels of illegality, and to what degree? Should justice take, as given, highly likely levels of bigotry, or should it only accommodate low levels, even if this is unrealistic? And what low level? And why that level rather than the countless others? And why theoretically accommodate any bigotry at all, if the question is full justice? A theory of how the content of justice is determined needs to accommodate the obvious fact that the constraints faced by actual institutional design might restrict the feasible set to options that are all more or less unjust. Justice cannot be defined as whatever we ought to do given however people are likely to respond, since people are not guaranteed to respond in a way that is compatible with full justice. Letting justice itself be at all concessive puts one on a slippery slope, for lack of any salient stopping point, to the absurd conclusion (apologies to Sidgwick) that justice itself takes predictable attitudes and behavior as given, and has no resources from which to count them as constituents of social injustice.

To anticipate an objection: there is no basis for including any level of moral deficiency into the so-called circumstances of justice, the conditions necessary for questions of justice to arise. On the traditional Humean view, followed by Rawls, that would only require multiple agents with aims of their own that conflict in the sense that they cannot all be jointly and fully satisfied. Even morally flawless agents could, and normally would, be in such circumstances—circumstances of justice.

To summarize this point: on the view that justice is essentially concessive and always relative to some specified concession, there is no single salient standard of social justice at all, but rather just a field of concessive requirements. This is unmotivated, however, given the salience of one requirement, the prime requirement. In any case, if the concessive approach to justice were to reject the “grand partition” between just and unjust, preferring only to speak of some kind of justice relative to certain concessions, I have no particular objection for present purposes.<sup>19</sup> That is entirely compatible with the primacy

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<sup>19</sup> “Grand partition” is Sen’s term in Amartya Sen. “What Do We Want from a Theory of Justice?” *Journal of Philosophy* 103, no. 5 (2006): 215–38. I criticize arguments against positing such a partition in “Just and Juster,” in *Oxford Studies in Political Philosophy, Volume 2* (Oxford: Oxford University Press, 2016).

of non-concessive scenarios over concessive ones, and so leaves my central points intact. If one insisted that what I call prime justice, in which the last drop of moral failing is missing, is somehow beyond justice, I disagree for the reasons just given, but for present purposes I see nothing to quarrel about. Its reality would not thereby be disputed, and it would be just like justice, only more so.

#### 4. Is Prime Justice beyond Politics?

Turning to a different objection, some will worry that prime justice is premised on so much morally ideal behavior that the very topic of politics has been left behind. It might be complained that prime justice would obviate any need for punishment or other state coercion, and that these are the very stuff of political life. If one wishes to define the political as essentially involving a prevailing need for state coercion, then this only shows that if I am right, then justice is not, technically, a political condition, but one that transcends or stands above politics. That is no defect in the position. Still, it strikes me as odd to say the justice condition would not be a political condition at all, since there might yet be obligations to obey the law, moral requirements of distributive justice, and much else that seems naturally to fall under the concerns of political thought. But nothing substantial seems to hang on the arbitrary linguistic decision. Sidgwick, whose sympathy for the concessive approach we saw at the beginning, criticizes Spencer's non-concessive conception of ethics on just this point, arguing, "Politics, in the ordinary sense, vanishes altogether" (18). But the point is shown to be a verbal one when he immediately concedes that, "[s]ometimes . . . Politics appears to be used in a wider sense, to denote the theory of ideal social relations, whether conceived to be established through governmental coercion or otherwise."<sup>20</sup>

More importantly than the nomenclature, it is implausible in any case for this objector to suggest that there would be no need for state coercion simply because no one is behaving wrongly. As we have seen, the concept of social justice need not go on holiday in this case, and for similar reasons it seems entirely possible for parties to find themselves vigorously at odds, even to the point of disorder or violence, even without any of them doing anything wrong. For example, maybe in the absence of a fair solution, two families could permissibly be at loggerheads over a scarce source of medicine upon which a family member's life depends. There might need to be commands backed by coercion in order to control cases like these and others, even though there may be no moral violation in the picture. Finally, it might be said that prime justice

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<sup>20</sup> Sidgwick, *The Methods of Ethics*, chap. 2, sec. 2, para. 1.

removes the topic of justice from the question of what ought to be done in conditions of a reasonable plurality of deep moral, religious, and philosophical views, since that must itself depend on one or another party's being morally deficient. But I see no reason to accept that it must so depend. There could be reasonable disagreements, even on moral matters, among people who were not in any way morally deficient by the true moral standards whatever they are. In sum, I see no reason to think that prime justice is too idealized to count either as justice or as political, or even as governmental (whether or not that would have been a defect in any case).

It is often suggested that the idea of justice ought to be molded so as not to demand more than we will ever see in human life. Certainly, we do want a concept that applies in real-life conditions, at least sometimes. We have certain questions about real conditions, and we need conceptual resources if we are to work toward answers. The idea of "circumstances of justice" is, as I have said, best understood as conditions for the applicability of standards of social or distributive justice. The demand that justice must also be a standard that is not only applicable but also actually, or not improbably, satisfied has no similar warrant. I know of no plausible rationale for that demand.<sup>21</sup> Prime requirement and prime justice are applicable to our world whether or not there is much likelihood of their being satisfied.

## 5. Is Prime Justice Utopian?

There are big parts of interpersonal morality as we know it that are concessive to moral deficiency. It is wrong to leave a borrowed bike unlocked; there are thieves. It is wrong to vote for a candidate simply because of the value of what she promises; there are liars. It is wrong to pass along a secret received in confidence even to just one person; there are gossips. Each of these suggests large veins of concessive moral rules, and there are many more. None of them would be included in a prime requirement. So, just as a prime ethics (as we might call it) would be inappropriate in real concessive conditions, it might be that prime justice would be similarly like a duck out of water. Indeed, I have framed the discussion so far around the idea that prime justice might be utopian, in the sense that the standards are so high that there is strong reason to believe they will never be met. Since prime justice is meant to be the standard of justice appropriate to such morally pristine individuals (and vice versa), it might seem that it, too, is somehow either highly unlikely in its own right, or profoundly inappropriate as a standard for morally more concessive conditions of individual morality. But this, as it turns out, is far from obvious. Consider the two questions in turn.

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<sup>21</sup> I defend this position more fully in "Utopophobia," *Philosophy & Public Affairs* 42, no. 2 (Spring 2014): 113–34.

First, is it guaranteed that the standard of prime justice—the right standards for basic social institutions in a world of morally flawless agents—is far beyond what we might ever hope to achieve (partly, perhaps, because we will not do all that we could)? Granting that there is no reasonable hope of achieving the environment of morally flawless agents, this says nothing directly about the hope of achieving a basic social structure that meets the principles that would be appropriate in those unrealistic conditions. In general, many standards that would be appropriate there are not, on that basis, somehow made hopeless (whether or not they would be appropriate) in more realistic conditions. That is an entirely separate question. For now, the point is a formal one: posit some standard for social justice that you think is not hopeless to achieve in realistic conditions. It could, in principle, turn out that this standard is also appropriate under the assumption of morally flawless agents. This shows that the utopianism of the prime requirement does not establish that prime justice is, itself, utopian.

Of course, simply because a certain standard appropriate for highly ideal conditions is within our reach in non-ideal conditions does not show that it is an appropriate standard for these less ideal conditions, and that is the second question. As we have seen, the right thing for the basic social structure might be a concessive requirement, one dictated by the presence of other moral shortcomings. It would therefore differ from the standard of prime justice, and would be only<sup>22</sup> a concessive brand of justice. Prime justice might not be utopian, but it might be right only in remote utopian conditions.

That might be so, but it might not. It is also possible, for all we know at this abstract level of inquiry, that prime justice is *not* hopeless in concessive conditions, and also is precisely what is required in those conditions. While this does not follow from its being right in the ideal conditions, it is also not ruled out. And if it were right even in realistic conditions, prime justice would be neither utopian nor inappropriate for us, nor would it, itself, be in any way only concessively justified. To put it another way, it is not guaranteed that morally defective conditions always thereby call for substantively different standards. The non-concessive standards might still apply there.

To explore this, we might consider some putative standard of justice that we (or just you) find plausible—both appropriate and not hopeless—either for people as they are, or at least for people as they realistically might be. Next, we should ask whether its grounding or justification is contingent on concessions to moral imperfection. If so, then it is not a candidate for prime justice, and is *essentially concessive*. But if not—if it is not contingent on any concessions to moral imperfection—then it is a candidate for prime justice even as it is the right standard in flawed realistic conditions as well. If there is such a standard, let us call it *robust prime justice*.

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<sup>22</sup> More on what “only” ought to mean here below.

Rawlsian justice, to take a familiar case, is famously tailored to the idealizing assumption of full justice compliance. Justice compliance is not full moral compliance, but is it tailored to moral *non*-compliance in any way? I do not see any respect in which it is. It might, instead, be robust, tailored neither to moral perfection nor to imperfection, but applicable to either. The method of the “original position” does apparently expose the derivation of the principles of justice to information about how and to what extent people are likely to behave immorally,<sup>23</sup> but the question here is different: do the facts about likely immoral behavior actually drive any of the reasoning in favor of Rawls’s proposed principles of justice as against the alternatives he considers? Although I will not fully investigate the question, it is not obvious to me that they do. That alone is enough to illustrate the larger point, which is that principles of justice (perhaps Rawls’s principles) might be non-utopian even if they are also principles suitable for the prime requirement in which there are no moral violations.

So, prime justice might be characterized as utopian on the ground that it is hopeless, but that is far from guaranteed, and something like Rawlsian justice throws this into doubt. Prime justice might, finally, be dismissed as a standard (however high, however hopeful, and however just) that is not appropriate in realistic conditions of moral deficiency. And, again, we have seen that there is no general reason to believe that this is so. What is justice for the flawless might be justice for the flawed.

Does this possibility make any difference to what we should think is the appropriate moral standard for a basic social structure in realistic conditions of morally flawed agents—the content of such a standard? Suppose it does not. We arrive at this concessive standard under the supposition of moral deficiency, and we just happen to arrive at the same standard that would be right for the ideal case. And yet, there would be this significance, for what it is worth: When justification is offered for a basic structure that, in realistic flawed conditions, meets that prime standard, the justification is not diminished in the manner of concessive justification. This is not the way the basic structure ought to be *only* because we are morally flawed. The basic structure meets the same standards that would apply even if we were not morally flawed.

While this is suggestive, it does not obviously mark any respect in which the basic structure is *better* simply because it meets the standard of prime justice. Concessive justice is not a lower grade of justice in the sense of being less right—meeting it is fully right. Concessive rightness, more generally, is not somehow less than full rightness. Professor Procrastinate will wrongfully not write the review even if he accepts, and for that reason, suppose, he rightly

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<sup>23</sup> For more on this suggestion see my “Human Nature,” and “Bad Facts,” in *The Original Position*, ed. Timothy Hinton (Cambridge: Cambridge University Press, 2016).

declines the assignment. It is not as if there is something more fully right that he should have done given that he will not write the review. Similarly, it is right to build and maintain the basic social structure that is called for given that we will tend to misbehave in various ways, and there is not some structure that would be more right under those conditions. In what sense, then, would it be fortunate or desirable if prime justice were robust—if meeting it was not only right in concessive conditions but would also be right in non-concessive conditions?

The following analogy, while only rough, may be suggestive. The mathematical problems used to test proficiency will be different for college students than for elementary school students. In that respect, different standards apply. Suppose a grade-schooler were to ask in what sense the college standard is a better or higher standard. After all, a correct answer in grade school is no less correct than the correct answers in college. All are fully correct. Still, we might answer by pointing out to the grade schooler that the standard appropriate for her is the appropriate standard only because she lacks certain knowledge and skills that the college students have. While it is the proper standard, and if she meets it she performs flawlessly by the appropriate standard, nevertheless, it is a lower standard. Something similar would hold for a concessive standard of justice if it is different from prime justice. It is right only because something is wrong. That is only to say that if it is *not* different, if prime justice is robust, then meeting the appropriate standard in concessive conditions is not only fully correct, it is also not in any way the meeting of a lower or reduced standard. There is, then, also this kind of distinction enjoyed by robust prime justice, if there is such a thing: it is right not only for flawed people like us (though it is fully right in that way given how we are). It is also not altered or bent to fit our crooked shape, since it has the same shape it would have even if we were morally straight.

## 6. What Can We Know about the Content of Prime Justice?

It is important to notice that the reality of the prime requirement does not depend on whether we would be able to know much about its content. Sidgwick seems to me to be too impressed with the epistemic difficulties. It is a bit like, upon realizing that we can never know all the digits in the decimal value of  $\pi$ , we stipulate that it is a rational number after all, since that would be more tractable. Or we search for our keys far from where we dropped them because the light is better.

In any case, there may be much we cannot know, but there is also much that we can know, or at least very confidently conjecture. Think first about the aspects of the prime requirement that are not about social justice, but about



what we might call interpersonal morality. We know a lot of moral requirements that do not seem in any way to be premised on anyone's wrongdoing. Gratuitous or entirely selfish harm to others covers a lot of moral ground, for example. Without some reason to think that such moral proscriptions are plausible only because some agents violate some moral requirements, we can conjecture that these will be part of a prime requirement. The same goes for a great deal of interpersonal morality as we understand it in realistic, non-ideal conditions: they would not lose their basis in any way in a scenario of moral flawlessness.

## 7. Plural Obligation, Deferred

I want to acknowledge a further challenge to the primacy of full-compliance in the context of justice, one to which I will not here offer an answer. I mention it here because, while I believe it to be serious, it is not special to the idea of prime justice but a wide-ranging lacuna in our understanding of moral normativity. As it arises in our context, it is a problem about what agent is subject to this requirement. One common response to highly idealistic practical standards is to say that while they might signify something that would be good or nice, they are not moral because they are not action guiding in the right way. I will refer to this objection as alleging a "*normativity gap*." Whereas "*normative*" is sometimes used interchangeably with "*evaluative*," I will use it here to mean being so as to provide practical reasons to some agent or agents. I will also use the common term "*action guiding*" to mean the same thing. I want, first, to explain a way in which this objection, that the prime requirement is not reason giving or action guiding, might easily be misused.

I have argued that an alleged requirement on a society to [build and comply] is silent about whether to build, since it says nothing about what to do when there will not be compliance. Does this show that it is inert from a practical point of view, not action guiding, and so not normative in that sense? It does not, as we can see by comparing the case, again, to that of Professor Procrastinate.<sup>24</sup> Notice that the alleged requirement on Procrastinate to [accept and perform] gives no guidance about whether to accept in the case where he will not perform. It is silent, not action guiding in that way. However, the requirement to accept and perform is a perfectly ordinary, normative action guiding requirement. He can do it and he ought to. If he does not, he thereby acts wrongly. There are some practical questions this requirement does not address, such as what to do if he will not perform, but that is beside the point. This requirement itself is normative in a garden-variety way. It is a

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<sup>24</sup> I make these points in "Human Nature."

moral requirement, and it gives Procrastinate a moral reason to accept and perform. So, at least if we simplify and suppose that a society is an agent in the relevant way (a question I turn to next), the fact that “build and comply” does not tell the society whether or not to build given that there will not be compliance, shows only that it is not action guiding about *everything*. But it is just as action guiding as Professor Procrastinate’s pedestrian duty to accept and perform. There is not yet any normativity gap.

Of course, it is not clear whether a society is ever properly conceived of as an agent in the relevant way, and this gives rise to a separate challenge. It would be natural to think that something is not an agent unless it could have the mental states that are part of what it is to produce intentional action, including at least some of the following: beliefs, desires, deliberation, and intentions. Some authors believe that some groups and some societies can count as group agents by criteria such as these.<sup>25</sup> In that case, there would be no normativity gap in the requirement on the society to build and comply with certain institutions. If, instead, it is not a group agent, and the only agents are the individual members of the society, there will indeed be a troubling normativity gap in the supposed obligation to build and comply with certain institutions. No individual can build the institutions. So, supposing there are no requirements to do things that are impossible, there is no normative requirement to do so. Or, even if it is allowed that a society can sometimes be an agent and could build the institutions, compliance with individual moral requirements is an individual matter. Using “O” to represent a modal operator meaning “It is obligatory that . . .” we might try putting the global prime requirement this way:

O (*Society* build and comply with justice institutions, AND each *individual i-n* behave in certain ways respectively)

The worry is that it is not clear upon whom the obligation falls. We have seen reasons to reject the idea that this can be factored into multiple obligations some on society and some on individuals. As in the case of Professor Procrastinate, whether any of those is actually obligatory is thrown into question when not all of the actions are performed. So, there is reason to doubt that there is any single agent subject to the conjunctive requirement to build *and* comply, because the conjuncts can only have separate agents. If there is no single agent that is subject to this kind of conjunctive requirement, then there is a normativity gap that may preclude our regarding this as a moral requirement at all: there is no agent for whom it would be action guiding or reason providing. The requirement would, in a way that is suspect, purport to apply to a collection of agents, but not to anything amounting to an agent, not even a group agent. Call this the *puzzle of plural obligation*. I will not try to resolve the problem here. I wish

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<sup>25</sup> Notably Christian List and Philip Pettit. *Group Agency* (Oxford: Oxford University Press, 2011).

only to argue that although it has arisen in a certain way out of exploration of the idea of prime requirement, the puzzle is not distinctive of that approach but represents a much more general philosophical problem.

To see this, consider it in a simple two-agent example with no particular connection to questions of social justice or to my ideas of prime requirement or prime justice. What a person ought morally to do on a given occasion often depends on what others will do. It may be that, under the circumstances, Dr. Slice, a surgeon, ought to make an incision and remove a tumor if and only if Dr. Patch (or someone) will be there to stitch up the wound. If Patch will not be stitching, then (since neither will anyone else), it is not the case that Slice is required to cut (and she is probably required not to cut, which is a separate point). What Slice is required to do depends on what Patch will do. In its structure (if not in the stakes), this is familiar in daily life.

But the story might be a little different, and more puzzling.

### *Slice and Patch go golfing*

Suppose that unless the patient is cut and stitched he will worsen and die (though not painfully). Surgery and stitching would save his life. If there is surgery without stitching, the death will be agonizing. Ought Slice to do the surgery? This depends, of course, on whether Patch (or someone) will be stitching up the wound. Slice and Patch are each going golfing whether the other attends to the patient or not. Does anyone act wrongly?

Patch ought to stitch the patient if and only if Slice will be doing the surgery (stitching is possible, but pointless and harmful if there is no wound that needs stitching). But suppose that Slice will not be doing the surgery. Patch might as well go golfing. Ought Slice to cut? Well, no, because Patch will not be there to stitch, and so the surgery will only make the patient's death more painful. Slice might as well go golfing. Neither has acted (or omitted) wrongly, despite the fact that the patient will needlessly die.

Many of us respond to this case with the intuition that there is some moral violation here, but the puzzle is to find an agent who has committed it. The intuition that something goes morally wrong here cannot be handled by saying it is a matter of conditional obligations: each should act so long as the other does. The antecedent is not met, so no such conditional obligation has been violated either. Here is an inconsistent triad. Which proposition ought to be discarded?

#### *a. Moral failure:*

It is morally wrong if the patient is left to die.

#### *b. No wrong without obligation:*

If something is morally wrong, then there was an obligation on some agent to act or omit other than as they did.

c. *No violating agent:*

There is no agent in this case who is morally required to act (or omit) otherwise.

If we hold on to “moral failure,” then we must believe either that moral obligations are not always normative for any agent, or that there is, in fact, an agent under an obligation. I will use the name “normativity gap” for the puzzle of how it could be true both that something is morally wrong, and also that there is no agent for whom there is any relevant obligation. I will grant that where the group is not itself an agent, there is nothing wrong unless some members act wrongly. The puzzle is to give, if we can, an account that would vindicate the common response of moral offense or outrage when the patient is left to die, and in similar cases. There are various ways one might try to identify some individual wrongdoing in such cases. If these do not work, it is also possible to give up or lose the intuitive sense that something goes morally wrong in such a case. I will not tackle these questions, since my point is only that the idea of prime justice should not be thought to be disadvantaged by the fact that a version of this puzzle arises. The puzzle arises in some of our common moral thought in ways that have nothing to do with prime justice, which is just one instance of it.

## 8. The Question of Reconciliation

It cannot be taken for granted that our condition, even considered over time, is hospitable to social justice. If it is, presumably, it would be momentous to discover this good news, but it would be equally momentous to discover that—contrary to our hopes perhaps—the news is bad. An inquiry can be an important one, then, in that sense: the question is momentous because we very much hope the answer is one thing and not another. But the inquiry remains important whatever the answer might be, good or bad. If justice is prime justice, then unless prime justice is robust, I think it is fair to say that the human condition is fundamentally inhospitable to true justice—not because it is beyond our abilities, but because it is beyond our proclivities. For those who deeply hoped things were otherwise, that would be bad news, in which case the inquiry is of some moment. Perhaps the news will be good and justice is robust. However, even if it is not—if the requirements in realistic conditions are essentially concessive—this does not mean that people or societies cannot respond to injustice, even their own, in ways that are fully right and proper, even against their interests and with the utmost of moral worth. If, in practice, the human condition sadly presents us with nothing but essentially concessive questions about social justice, and even

if this is our own doing, we might yet respond flawlessly to that challenge and do fully and exactly what we ought to do. We might find some, even if not whole-hearted, reconciliation in this: whether or not prime justice is robust, humanity's moral failures do not preclude successes that are complete and flawless, possibly even awesome, under the morally unfortunate circumstances we find, and perhaps place ourselves, in.