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# Love and Justice

Consonance or Dissonance?

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edited by  
Ingolf U. Dalferth  
and  
Trevor W. Kimball

Mohr Siebeck

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# Love, Justice, and Divine Simplicity

EVERETT FULMER

I wish to discuss a paradox that arises from predicating fairly ordinary conceptions of love and justice to God. Consider Joseph and Scarlett. When Joseph loves Scarlett, her perspective on reality, her hopes and desires, and so forth are salient to him in some sort of special and unique way. He is partial to her, to say the least. Now, consider Scarlett in her capacity as circuit court judge. If she is a just judge, she will explicitly strive to be blind to, to discount, and ignore the subjective hopes, desires, and perspectives of the individual litigants before her. Thus the demands of love and the demands of justice seem to be opposed to each other. The former demands attachment and partiality. The latter requires detachment and impartiality.

In the case of Joseph and Scarlett, this may pose little practical difficulty. Love can govern the private relationship between the two of them and justice can govern Scarlett's public relationship with litigants. Serious conflict would arise only if Joseph became a litigant in Scarlett's courtroom. This, however, is not likely to occur, since standard legal code requires that judges recuse themselves in such events.<sup>1</sup>

Yet the reason these conceptions of love and justice cause little problem for human actors is not merely due to contingent juridical codes. If some strange state of affairs did force Joseph to be a litigant in Scarlett's court, consider what would occur. By the demands of love, Scarlett should give salience to the subjective viewpoint of Joseph. By the demands of justice, she should not. While Scarlett faces contrary demands, there are (at least) two possible avenues by which she could avoid a genuine paradox. Perhaps the nature of morality is such that in this case love should trump justice, or vice versa. Or perhaps, Scarlett could perform a cost-benefit type tradeoff between the demands of love and those of justice: detaching from some but not all of her lover's subjective viewpoint.<sup>2</sup> In short, as long as morality does not require that Scarlett exhibit the *same degree* of love and justice to Joseph, then there will be, at least, logical space for a solution.

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<sup>1</sup> E. g., *United States Code (USC)*, Title 28, §455.

<sup>2</sup> To be rational, such a tradeoff would require some third moral value on which basis the tradeoff is performed.

The situation seems far worse when one applies these ordinary conceptions of love and justice to God. For starters, since traditional theism holds that God is both *perfectly* loving and *perfectly* just, there can be no tradeoffs between love and justice in God: both attributes must be exhibited fully. Furthermore, divine love and justice cannot be relegated to distinct spheres: there is no distinction between God's public and private life, nor is there among time periods or places. The immutable God relates to all persons, in all times, in all places, with perfect love and justice.<sup>3</sup> Finally, the problem looks even more intractable if one accepts the doctrine of divine simplicity. For if God's one and the same essential nature is identical with both perfect love and perfect justice, then, taking love and justice to require contrary demands entails that the very concept of God is inconsistent.<sup>4</sup> It seems, then, that the traditional theist has a genuine paradox on her hands: two independently plausible yet mutually inconsistent claims.

It is this paradox that I aim to resolve below. My suggestion is to distinguish between two ways that one might attain the relevant sense of impartiality required for justice. The common and even default assumption is that impartiality is attained by detaching from particular persons and viewpoints. But instead, consider the judge who seeks further involvement, attachment, and empathy with *all* parties involved. If no party is left out, then such a judge need not be *inappropriately* partial: she need not have given unequal consideration to one party over another.<sup>5</sup> Hence, as long as it is equality of consideration, and not detachment *per se*, that ultimately matters for justice, the paradox can be resolved. That is to say, since God's love involves compassionately seeing the world from the perspective of each and every created thing, God,

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<sup>3</sup> Some, it should be noted, have rejected that claim that God loves all persons equally (e.g., CALVIN, *Institutes of the Christian Religion*, 3.23.12; and AUGUSTINE, *Enchiridion*, 103). Willingness to limit the scope of God's love, however, does not fully dissolve paradox at hand, for then God still is said to be perfectly loving and just to one and the same subgroup of humans. For a contemporary defense of this limiting of divine love, see: P. HELM, "The Logic of Limited Atonement," *Scottish Bulletin of Evangelical Theology* 3 (1985): 47–54; and J. JORDAN, "The Topography of Divine Love," *Faith and Philosophy* 29 (2012): 53–69. For a response to Jordan, see: T. TALBOTT, "The Topography of Divine Love: A Response to Jeff Jordan," *Faith and Philosophy* 30 (2013): 302–316; and see Jordan's recent rejoinder, "The Topography of Divine Love: A Response to Thomas Talbott," *Faith and Philosophy* 32 (2015): 182–187. C.f., AQUINAS, *Summa Theologica*, 5 Vols., trans. Fathers of the English Dominican Province (Notre Dame: Christian Classics, 1948), Ia q. 20 a. 3, in which God is said to love all with equal intensity, but since God wills greater goods to some persons over others there is still a sense, though not Calvin's sense, in which God does not love all equally.

<sup>4</sup> The paradox still looms without the doctrine of divine simplicity; it is only that the paradox looks worse with it.

<sup>5</sup> N.B., 'need not': Justice can be violated while still treating all equally. I address concerns of this sort in the final section.

*ipso facto*, gives each and every created thing equal consideration, just as divine justice demands. Hence far from exacerbating the problem, divine simplicity is manifest in the proposed solution.

In the first two sections, I briefly and separately discuss the concepts of love and justice. In section three, I give the argument for resolving the paradox, and in the final section, I consider some objections.

## I. On Love

The puzzle here trades on the supposition that love requires a sort of partiality to the beloved and the beloved's viewpoint. Yet even if correct, love requires much more than partiality. And since there are various views of what else love involves, what is under discussion here is not a single conception of love but a family of diverse conceptions: all of which affirm some sort of partiality to the beloved. Let us refer to this broad category as 'love as attachment.'

Love as attachment is entrenched in our everyday folk metaphors. "If you really love her," your grandmother might remark, "then you can see the world through her eyes. You feel what she feels: both the ups and the downs. You care about things just because she cares about them" and so forth.

But it is not merely folk metaphors that affirm love as attachment. It is knit through much of the philosophical discourse on love.<sup>6</sup> Take Aquinas, for example, who views love as jointly composed of two inter-dependent desires that the lover has for the beloved:<sup>7</sup>

- (i) The desire for union with the beloved.<sup>8</sup>
- (ii) The desire for the good of the beloved.<sup>9</sup>

As Eleonore Stump has argued, the sort of union at issue in Aquinas' first condition must be understood as a sort of psychological closeness involving shared

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<sup>6</sup> A notable exception would seem to be Harry Frankfurt, whose first of four "marks" of love is a "*disinterested* concern for the existence of what is loved, and for what is good for it." See: *The Reasons of Love* (Princeton: Princeton University Press, 2004), 42. C.f., Frankfurt's third "mark" of love, "the lover is *invested* in his beloved: he profits by its successes, and its failures cause him to suffer" (*Ibid.*, 61). On the opposite end, some contemporary philosophers explicitly endorse love as attachment. See: T. JOLLMORE, *Love's Vision* (Princeton: Princeton University Press, 2011). And, B. HELM, "Love, Identification, and the Emotions," *American Philosophical Quarterly* 46 (2009): 39–59.

<sup>7</sup> AQUINAS, *Summa Theologica*, IIaIIae q. 25 a. 3.

I am here following E. STUMP, "Love, by All Accounts," *Proceedings and Addresses of the American Philosophical Association*, 80, No. 2 (2006): 27.

<sup>8</sup> AQUINAS, *Summa Theologica*, IIaIIae q. 26 a. 2 ad. 2; q. 28 a. 1 s.c.

<sup>9</sup> AQUINAS, *Summa Theologica*, IIaIIae q. 26 a. 4.



mental states, volitional states, and attitudes.<sup>10</sup> This complex cocktail of shared psychological states, in turn, involves cognitively and affectively registering with the subjective viewpoint of the beloved; i. e., one understands and feels what the beloved perceives *as* perceived from the beloved's perspective.<sup>11</sup> In short, the desire for union implies a desire to attach to the beloved's subjective viewpoint.

If this is the right way to understand Aquinas' account, then it is also the right way to understand the sort of union at issue in any account of love (i. e., any account that includes union). For, the analysis from union to partiality does not rely on any particularly Thomistic claims. For starters, it is well acknowledged that the sort of union relevant to love cannot be understood as mere physical proximity.<sup>12</sup> One can be sitting right next to someone while "being somewhere else," as the expression goes. And, one can be united with a beloved who is miles away. In fact, one can desire that one's beloved be miles away, if that distance is required for the beloved's well-being: e. g., a parent desiring her child to go off to college. Hence while lovers undoubtedly often desire physical proximity, the sort of union that is required by love is not physical.<sup>13</sup>

If not physical, then the union at issue must fall somewhere under the broad umbrella of psychological union: a topic widely researched in recent developmental psychology.<sup>14</sup> The term for such union in the psychology literature is 'joint-attention', and the paradigmatic example of joint-attention is the sort of psychological union exhibited in the interactions between a loving parent and her child.<sup>15</sup>

The seminal figure in this field is Peter Hobson, whose reflections on the decades of research explicitly invoke a kind of partiality to the perspective of

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<sup>10</sup> E. STUMP, *Wandering in the Darkness: Narrative and the Problem of Suffering* (Oxford: Oxford University Press, 2012), 123. The language here should not be read as affirming the implausible claim that one numerically identical mental state is shared by two distinct persons. The union may be as ordinary as two distinct token mental states being tokens of the same type. But, I need not commit to any particular metaphysical view of such union.

<sup>11</sup> STUMP, *Wandering in the Darkness*, 114–123; R. P. HOBSON, "What puts the jointness in joint attention?" in *Joint attention: Communication and other minds*, ed. J. ROESSLER (Oxford: Oxford University Press, 2005), 185.

<sup>12</sup> VELLMAN, "Love as a Moral Emotion," 353; STUMP, "Love, by All Accounts," 27–28; *Wandering in the Darkness*, 91–92.

<sup>13</sup> One might think that at least for romantic love, physical proximity is required. But if so, then it would be impossible for persons to truly fall in love via letter writing (or something more high tech). I take it that both literature and anecdotes give us ample evidence to the contrary. I conjecture that physical proximity is important for its instrumental role in developing love, not because it is essential to love.

<sup>14</sup> By 'psychological union' I merely mean not spatial proximity: mental, volitional, emotional, dispositional, or some such thing – the set of which I take to be the object of study in psychology.

<sup>15</sup> HOBSON, "What puts the jointness in joint attention?," 185–204.

the other: seeing what the other sees and how the other sees it.<sup>16</sup> Less metaphorically, Hobson defines this perspective taking as “a propensity to *identify* with the attitudes of others towards a shared world;”<sup>17</sup> such attitudes, he elsewhere calls the other’s “subjective orientation.”<sup>18</sup> And identifying with another’s subjective orientation, he insists, is not merely to understand how things look to the other, but also to identify affectively with the other:

These are matters not simply of understanding, but of registering and being moved by another person’s perceived orientation, such that one can relate to oneself and the world from a position that encompasses the other’s stance.<sup>19</sup>

To relate to the world “from a position that encompasses the other’s stance” just is to give special salience to the other’s subjective viewpoint. That is to say, independent of any particular philosophical view, Thomistic or other, our best empirically informed account of psychological union suggests that such union involves the ability to identify with the subjective attitudes, cares, and concerns of the other.<sup>20</sup> Hence, if love requires at least the desire for psychological union with the beloved, love requires partiality to the beloved’s subjective stance.

Furthermore, Aquinas is far from unique in proposing that love requires a desire for union. Such a view goes back to Plato, if not before, and has since been affirmed by the likes of Aristotle, Pseudo-Dionysius, Montaigne, Hegel, and more recently Robert Nozick and Bennett Helm, among others.<sup>21</sup> Even

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<sup>16</sup> R. P. HOBSON, “Autism, Literal Language and Concrete Thinking: Some Developmental Considerations” in *Metaphor and Symbol* 27 (2012): 4–21; J. A. MEYER and R. P. HOBSON, “Orientation in Relation to Self and Other: The Case of Autism,” *Interaction Studies* 5 (2004): 221–244. C.f., H. MOLL and A. MELTZOFF, “Perspective-Taking and its Foundation in Joint Attention” in *Perception, Causation, and Objectivity, Issues in Philosophy and Psychology*, ed. N. EILAN, H. LERMAN, and J. ROSSLER (Oxford: Oxford University Press, 2011), 286–304.

<sup>17</sup> HOBSON, “Autism, Literal Language and Concrete Thinking: Some Developmental Considerations,” 10. Emphasis his.

<sup>18</sup> MEYER and HOBSON, “Orientation in Relation to Self and Other: The Case of Autism,” 239; R. M. GARCIA-PEREZ, R. P. HOBSON, and L. ANTHONY, “Narrative Role-Taking in Autism,” *Journal of Autism and Developmental Disorders* 38, No. 1 (2008): 158.

<sup>19</sup> HOBSON, “Orientation in Relation to Self and Other: The Case of Autism,” 239.

<sup>20</sup> Unsurprisingly, it is this perspective taking component of joint attention that has led to further research on the link between joint-attention capacities and empathetic abilities. See: K. STUEBER, “Social Cognition and the Allure of the Second-Person Perspective: In Defense of Empathy and Simulation,” in *Joint Attention: New Developments in Psychology, Philosophy of Mind, and Social Neuroscience*, ed. A. SEEMANN, (Cambridge: MIT Press, 2011): 265–292.

<sup>21</sup> Plato’s character Aristophanes describes love as the desire for union with the other half of one’s primordial self (*Symposium*, 190a). After Plato, a very incomplete short list of adherents would include: Aristotle (*EE* I245a30, a35; *NE* II7ob7, *MM* 12I3aI3, a24); and perhaps, Diogenes Laertius, *Lives*, 5.20, Pseudo-Dionysius the Areopagite (*Div. Nom.* iv), Aquinas (see above), Montaigne (“On Some Lines of Virgil” and “Of Friendship,” both in the *Essays*), Hegel’s “A Fragment on Love”, and most recently R. NOZICK, “Love’s Bond,” in *The Examined Life: Philosophical Meditations* (New York: Touchstone Press, 1989), and B. HELM, “Love, Identification, and the Emotions,” *American Philosophical Quarterly* 46 (2009): 39–59.

those who fall outside of the “desire for union” tradition typically accept some sort of union between lover and beloved. On one side, some theorists regard the “desire condition” to be too weak: they hold that love requires not merely a desire for union but an actual union between lover and beloved.<sup>22</sup> On the other side, some give analyses of love without explicit reference to the notion of union, but one very often still finds union lurking in the details of even these accounts. Gabriele Taylor, for example, analyzes love in terms of a valuing of the beloved and a concern for the beloved’s welfare. But when she summarizes her view, the desire for union still shows up in her account:

To summarize: if  $x$  loves  $y$  then  $x$  wants to benefit and *be with*  $y$  etc., and he has these wants (or at least some of them) because he believes  $y$  has some determinate characteristics  $\Psi$  in virtue of which he thinks it worthwhile to benefit and *be with*  $y$ .<sup>23</sup>

Similarly, Annette Baier seems to leave union behind when she analyses love as a composite of emotions that one feels for the beloved. But here too, once the details are fleshed out a kind of union comes to the fore. Baier writes:

Love is not just an emotion people feel toward other people, but also a complex tying together of the emotions that two or a few more people have; it is a special form of emotional interdependence.<sup>24</sup>

Hence even when many other details are contested, there is wide agreement in the philosophical tradition that love requires some sort of union, or at least a desire for union, with the beloved. I take it that this is no contingent happenstance. Without at least a desire for union, it is hard to see how one would distinguish love from mere good will or benevolence. And it is hard to see how one could account for the notorious pain of unrequited love.

In sum then, it is not merely a folk conception of love that attests to the partiality of love. A robust philosophical pedigree supports the claim that love requires at least a desire for union with the beloved. And the best evidence we have to understand the sort of union at issue here implies that the lover is partial to the subjective stance of the beloved.

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<sup>22</sup> Examples here include: R. SCRUTON, *Sexual Desire: A Moral Philosophy of the Erotic* (New York: Free Press, 1986); R. SOLOMON, *About Love: Reinventing Romance for Our Times* (Indianapolis: Hackett, 1988); and M. FISHER, *Personal Love* (London: Duckworth, 1990).

<sup>23</sup> G. TAYLOR, “Love,” *Proceedings of the Aristotelian Society* 76 (1975–1976): 157. Italics mine.

<sup>24</sup> A. BAIER, “Unsafe Loves,” in *The Philosophy of (Erotic) Love*, ed. R. SOLOMON and K. HIGGINS (Lawrence: University Press of Kansas, 1991), 444.

## II. On Justice

Justice does not seem to be able to tolerate this sort of special salience given to the beloved's subjective orientation and viewpoint. At its most indeterminate, justice is traditionally regarded as a matter of giving each her due. And what one is due is determined by the universally describable features of what one has done or what social role one occupies *vis-à-vis* others. Particular features of who one is – hair color, music preferences, hopes, and dreams – are irrelevant. And the just judge, to use the paradigmatic case, is blind to the particularities of persons involved in the case she considers. It does not matter, for example, how the case looks from the subjective perspective of the defendant. The just judge only considers the case as a series of universals: e. g., laws, state descriptions and kinds of actions – and the defendant himself is regarded as no more than an instance of such universals.

This conception of justice, which for short I will refer to as “justice as detachment,” is embedded in our juridical practices. It is the reason why a judge must recuse herself if she is personally involved with any of the parties to the case.<sup>25</sup> And it is the reason why *Iustitia* (Lady Justice) is typically depicted blindfolded, and has been since 1573 when Hans Gieng's famous statue *The Fountain of Justice* (*Gerechtigkeitsbrunnen*) was erected in Bern.

But justice as detachment also enjoys philosophical pedigree. For example, Rawls builds this detachment from particular persons into his argument for the two principles of justice. As Samuel Freeman nicely summarizes,

Rawls basically argues that the principles of justice would be chosen by rational representatives of free and equal persons in an *impartial* initial situation; there the parties know the general facts about human nature and social institutions *but have no knowledge of particular facts about themselves*.<sup>26</sup>

While Rawls explicitly invokes detachment only in describing the rational choice problem he uses to argue for his conception of justice, by so doing he implies that justice itself requires such detachment. Behind Rawls' “veil of ignorance,” the representatives are faced with a choice between competing conceptions of justice. Two principles of justice are claimed to be the unique solution to this rational choice problem.<sup>27</sup> That is to say, given the constraints on the choice problem, Rawls argues that his two principles of justice deductively follow.<sup>28</sup> But if deductive validity is the bar of success, then for the argument to be valid, it also must be the case that the constraints on the choice

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<sup>25</sup> *United States Code*, Title 28 §455.

<sup>26</sup> S. FREEMAN, *Rawls* (New York: Routledge, 2007), 141. Emphasis mine.

<sup>27</sup> J. RAWLS, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 119.

<sup>28</sup> *Ibid.*

problem themselves are just.<sup>29</sup> Plausibly, Rawls himself can be read as realizing as much. He claims, more or less explicitly, that the constraints on the choice problem, including detachment from all subjective facts, are requirements of justice:

Of course, the fact that a situation is one of equilibrium [one feature of the original position], even a stable one, does not entail that it is right or just ... The moral assessment of equilibrium situations depends upon the background circumstances which determine them. It is at this point that the conception of the original position embodies features peculiar to moral theory ... The original position is defined in such a way that it is a status quo in which any agreements reached are fair ... Thus justice as fairness is able to use the idea of pure procedural justice from the beginning.<sup>30</sup>

Thus Rawls seems to hold the view that the procedural constraints on the original position are themselves dictates of justice, in which case he implies that procedural justice requires that the subjective orientations of the persons involved are excluded from consideration.<sup>31</sup>

### III. The Paradox

Thinking of justice and love along these terms generates the paradox, for the former requires identifying with the subjective orientation of a particular person, whereas the latter requires abstraction away from all such subjective facts. Plausibly, the tension that exists here poses no substantive problem for us finite beings who can divide our relations with others into different spheres: public and private, at different times, and with different persons. That is to say, if the demands of justice are opposed to those of love, we humans can relegate the two sets of demands to distinct spheres. But for a divine, impassible, simple being who occupies the eternal present, these divisions are unavailable. Traditional theism is committed to the claim that God relates to the same persons (all), in the same time (eternally), in the same way (with both perfect love and perfect justice). Thus, the contrary demands of love and justice pose a genuine paradox for the theist. To put the problem more formally, where any created person may be substituted in for Scarlett:

1. God loves Scarlett only if God identifies with Scarlett's subjective orientation.
2. God makes a just decision with respect to Scarlett only if God neither considers nor identifies with Scarlett's subjective orientation while judging.

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<sup>29</sup> Otherwise Rawls would be in violation of the fundamental K-axiom of modal logic (letting "just" function as a kind of  $\Box$  operator); the K-Rule reads:  $\Box(A \supset B) \vdash \Box A \supset \Box B$ .

<sup>30</sup> RAWLS, *A Theory of Justice*, 120.

<sup>31</sup> N.B. This is the point on which Michael Sandel has famously criticized Rawls. See, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 93–95.

3. God eternally relates to all creatures with both perfect love and perfect justice.
4. Thus, God both identifies with and does not identify with the subjective orientations of Scarlett.

The premise that is mistaken in my view is P2; its consequent, namely, God neither considers nor identifies with Scarlett's subjective orientation while judging, does not state a necessary condition on justice as such, but only one standard conception of justice. Consider that insofar as justice is a virtue that concerns relations between persons, it concerns *particular* embodied beings with their own subjective orientations. Thus, given justice's own subject matter, it would be rather odd if abstraction away from subjective orientations were essential to justice itself.

Furthermore, note that the theories and institutions that hold up justice as detachment developed in response to the historical fact that persons have been treated differently under the law merely because of their subjective facts: their skin color, their surname, their gender, their social position, and so forth.<sup>32</sup> And this, the distinct treatment of like cases, is what justice surely cannot tolerate. That is to say, justice requires that the same case be treated equally regardless of the defendant's family ties or skin color. Ignoring the subjective facts of all litigants is one way to achieve like treatment of like cases. For if litigants are regarded as no more than instances of universals (e. g., kinds of actions and state descriptions), then there can be no basis on which like cases could be treated differently. Hence detached impartiality, I wager, is merely a means for the achievement of equal consideration before the law, and it is only this equality of consideration that is essential to justice.<sup>33</sup>

If justice as detachment is merely a means to equality, then the logical space for a solution is open. For equality itself does not determine how much consideration subjective facts should get; it only determines that all persons should get the same amount. And while this can be achieved if the subjective orientations of all litigants are given no consideration, it can also be achieved if all are given full consideration, or any determinate amount.

Hence, as long as God perfectly loves all creatures, the paradox is resolvable. For, if God loves all creatures perfectly, then God perfectly identifies with the subjective orientations of each and every creature. That is to say, God both understands and feels what the world looks like from the subjective stance of each created being (which is *not* to say that God endorses the subjective stance of all creatures). Insofar as he does, God gives each and every creature equal

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<sup>32</sup> This is evident in the initial statue of "blind justice," Hans Gieng's 1573 *Gerechtigkeitsbrunnen*, in which *Iustitia* is standing on the heads of a king and a pope.

<sup>33</sup> N.B. I am in agreement with Aristotle here who explicitly defines the core concern of justice as equality between persons and things. See: ARISTOTLE, *Nicomachean Ethics*, Bk V Ch. 3.

consideration, as justice demands. In short, then, divine love and divine justice are not inconsistent because divine love guarantees that each creature is given equal consideration. And while this is not sufficient to address all the ways that love and justice might seem to conflict, the particular conflict posed by the partiality of love is thus resolvable.

#### IV. Objections and Replies

The lynchpin of the proposed solution is the claim that detachment from subjectivity is merely a means to achieve equality of consideration before the law, and it is this equality, not detachment *per se*, that is essential to justice. An objector might deny this (i. e., that detachment is merely a means) by pressing on the fact that equality of consideration is not sufficient for justice. Take, for example, the judge who holds a personal grudge against shoplifters, and thus sentences all persons convicted of shoplifting with the harshest possible punishment. Such a judge gives equal consideration to all shoplifting convicts – she detests them all equally – yet her sentencing hearings are clearly unjust. And they are so, because they are arbitrary: her sentencing verdicts do not track the morally significant facts of the case but her personal vendetta.

Justice cannot stand such an arbitrary verdict. Justice, one might argue, requires rule of law. Law is nothing but a series of universals. Thus, rule of law itself requires that litigants be treated as nothing other than instantiations of universals. And therefore, detachment from subjective orientations is not merely a means but is an essential part of justice since it is an essential part of rule of law, or so the objection might go.

In response, I grant that pure rule of law, instead of rule by persons, requires detachment from subjective orientations: only persons can identify with the subjective orientation of another. But I deny that rule of law is essential to justice as such. That is to say, granting that non-arbitrariness is a requirement of justice, I deny that rule by law is the only means by which to secure non-arbitrariness in a juridical regime.<sup>34</sup>

Arbitrariness can be broadly understood as the treatment of a case based on something other than the relevant facts of a case. Although, relevancy may be defined in terms of all and only those things that are subject to laws and statues, it need not be, and it should not be in the divine juridical regime. On a prominent view in the tradition, divine justice is not retributive but restorative justice: God seeks to restore the right relationship between creator and

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<sup>34</sup> Plato too argues that the best sort of justice is not rule of law but rule by the expert. PLATO, *The Statesman* (Cambridge: Cambridge University Press, 1995), 294b–297b.

creation.<sup>35</sup> And the right relationship, in turn, requires that creatures have the right heart: the right passions and the right affect.<sup>36</sup> That is to say, subjective orientations are inescapably relevant for divine justice.

Divine justice is still non-arbitrary, but it is so for a distinct reason. God's justice is doled out to each particular individual according to one and the same principle: namely, God does whatever is most conducive to restoring, as much as possible, right relationship with himself. Thus, non-arbitrariness can be achieved without subjective detachment, and in the case of divine justice it must be.

One might worry that this restorative conception of divine justice cannot account for the purported justice of hell, insofar as persons and demons in hell will never be restored to right relationship with God. Hence, if hell is just, then it cannot be restorative justice that underwrites hell's justice, or so the objection might go.

The literature on hell is vast, and I cannot hope to adequately address it here. In brief, what is wrong about this objection is that it assumes that if restoration is never achieved by means of a just act, then restorative justice cannot be the kind of justice guiding the act. But such an assumption is as false for human justice as it is for divine. A judge may sentence a juvenile offender to hours of community service in an effort to restore the youth's relationship with her community. But if the juvenile becomes a repeat offender, it does not follow that the judge's sentence was not an act of restorative justice.

In the case of hell, the claim is that there are successful eternal rebels: persons who forever reject God. Since God cannot force relationship to be restored, it has to be (at least) possible for free persons to eternally refuse relationship. And if so, then no act of God's (just or otherwise), could unilaterally force persons out of hell. Furthermore, on the broadly Thomistic view that I accept, being and goodness are identical in referent, though different in sense. Hence, to reject God is to diminish one's degree of ontological reality. Such self-destruction has an in principle limit: total annihilation. And since one exists in hell, hell prevents one from achieving this limit. Furthermore, since non-existence is the extreme negation of relationship, hell positively contributes to the restoration between God and creature. In short, to use the extreme case, God is just to Satan because Hell is the closest Satan can get to right relationship with God. Hell is the backstop to prevent Satan from sliding into total annihilation.<sup>37</sup>

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<sup>35</sup> Pace, Calvin. See: M. HALBERTAL, *On Sacrifice* (Princeton: Princeton University Press, 2012); J. BERMAN, *The Temple* (Northvale: Jason Aronson, 1995).

<sup>36</sup> See: E. STUMP, "The Non-Aristotelian Character of Aquinas's Ethics: Aquinas on the Passions," *Faith and Philosophy* 28, No. 1 (2011), 29–43.

<sup>37</sup> The view of hell sketched here is roughly that of Eleonore Stump. See her, "Dante's Hell, Aquinas's Moral Theory, and the Love of God," *Canadian Journal of Philosophy* 16, No. 2



As a final objection, one may worry that even if the proposal above solves the paradox of God's love and justice, it implies an unpalatable cost for the theist's world view. While God can secure equality of consideration by loving all persons equally, finite human judges both cannot do so and should not even try. Given the constraints imposed by our finitude, asking judges to attempt to identify with the subjective orientations of all litigants is likely to produce a courtroom in which the judge identifies with some more than others. Far from improving justice, the likely result would be increased inequality before the law. Hence, rule of law and detachment from subjectivity may be the only realistic means that we finite creatures have for advancing justice. And if so, then reforming our judicial system to make it more closely resemble the divine would almost certainly make human courtrooms less just. This, I take it, is an odd result. While the theist will want to insist that God's ways are not our ways,<sup>38</sup> she will also want to maintain a degree of semblance between divine and human justice. Whereas it seems that I have opened too large of a gulf between human and divine justice.

One might think that embracing this gulf between human and divine justice is of little cost. Such a view would admit that while both human and divine justice essentially require equality before the law, humans must strive to achieve that equality in a uniquely human way – via detachment. I, however, find this view unattractive. It parallels the view of Amartya Sen, who argues that the projects of ideal and non-ideal justice should be fully disjoined from each other.<sup>39</sup>

Ideal justice is standardly conceived of as a pure theoretical construct that includes empirically false idealizations, such as universal adherence to the law. The aim of ideal theory is conceptual clarity: to describe and investigate how the perfectly just society would operate. Non-ideal justice, in contrast, starts from the *a posteriori* facts of the world we live in. It aims at concrete, real world reductions of injustice by means of intuitional or public policy proposals.

If one fully disjoins the projects of ideal and non-ideal justice, then non-ideal theory can only make synchronic comparative judgments between, for

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(1986): 181–198. As one may no doubt surmise, such a view of Hell is controversial. On the one side, Augustine understands Hell in terms of retributive justice (see: AUGUSTINE, *City of God*, XXI.9). On the other side, Clark Pinnock argues that hell just is the annihilation of souls. C. PINNOCK, “Annihilationism,” in *The Oxford Handbook of Eschatology*, ed. J. WALLS (New York: Oxford University Press, 2007), 462–75. And Thomas Tallbot argues that no free rational agent could reject God for all eternity, see: T. TALLBOT, “Universalism,” in *The Oxford Handbook of Eschatology*; and his “Misery and Freedom: Reply to Walls,” *Religious Studies* 40 (2004): 217–224.

<sup>38</sup> Isaiah 55:8–9.

<sup>39</sup> A. SEN, “What Do We Want from a Theory of Justice?,” *Journal of Philosophy* 103, No. 5 (2006); *The Idea of Justice* (Cambridge: Harvard University Press, 2009).

example, possible social arrangements or policy proposals. But as several commentators have pointed out, this has counter-intuitive implications.<sup>40</sup> Given that the aim of non-ideal theory is the reduction of injustice, we should reject any policy that would thwart future reductions in injustice, *even if* such a policy would reduce some injustice today. That is to say, non-ideal justice should be conceived diachronically. But such a longer term view requires thinking of various improvements as aiming to reform society in a determinate direction – i. e., towards perfect justice, even if the telos itself is never achieved. Hence conceiving of non-ideal justice diachronically, as we should, entails that ideal and non-ideal justice cannot be wholly distinct. The ideally just society provides the telos towards which non-ideal improvements aim.

Thus, assuming that divine justice functions as ideal justice in the theistic worldview, the theist should want human and divine justice to be on a single scale of moral improvement, even if humans can never fully achieve divine justice. I hope, therefore, that the seeming gulf between divine and human justice can be bridged, at least partially. And if so, then human society can and should develop legal institutions that include and even identify with the subjective orientations of persons, at least to some degree. While the constraints of space and time prevent me from developing this proposal, I end with some empirical reasons to think that hope of success here is reasonable.

Consider the frequent claims of minorities that their voices and viewpoints are excluded from the mainstream structures of power and influence in our society. What these groups are asking for is not more detachment and impartiality from society but the inclusion of their particular viewpoints. And that some injustices are better addressed in this way is increasingly becoming a point of agreement. Take for example “colorblindness,” which is the anti-racism strategy whereby one attempts to ignore persons’ racial identities. There is currently a near consensus among sociologists that “colorblindness” has been a failure in the fight against racism.<sup>41</sup> It now seems clear that improving racial justice is far better served by building a society that both recognizes racial distinctions and provides a platform for distinct racial perspectives to be included in considerations of justice.

How we build institutions that identify with the subjective orientations of various demographics is a difficult question, and so is the question of how we do so while maintaining enough rule of law to protect against partiality and arbitrariness. Without space for such investigations, these remarks stand

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<sup>40</sup> See: I. ROBEYNS, “Are Transcendental Theories of Justice Redundant?” *Journal of Economic Methodology*; P. GILBERT, “Comparative Assessments of Justice, Political Feasibility, and Ideal Theory,” in *Ethical Theory and Moral Practice: An International Forum* 15, No.1 (2012); J. SIMMONS, “Ideal and Nonideal Theory,” *Philosophy and Public Affairs* 38, No.1 (2010).

<sup>41</sup> See, e. g., E. BONILLA-SILVA, *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, 4<sup>th</sup> ed. (New York: Rowman & Littlefield, 2014).

as notes for a theistic theory of justice. That is to say, while divine justice and love can be squared by seeing that divine love secures equality of consideration without blind detachment, a fully worked out theistic worldview must also give a unifying account of human and divine justice. Yet I take it that the recent trends in minority and racial justice give reason to think that there is some way forward here. And if so, then the theist can coherently endorse a worldview in which both (i) God's justice is consistent with God's love and (ii) divine justice is the telos towards which human justice strives.<sup>42</sup>

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