



Rule-Utilitarianism and Hume's Theory of Justice

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RULE-UTILITARIANISM AND HUME'S THEORY OF JUSTICE

One of the striking features of Hume's theory of justice is the narrowness of the range of judgments it is designed to illumine. For Hume the paradigms of judgments of justice are judgments about particular actions, not judgments about laws or institutions or states of affairs. Moreover, the characterization of actions as just or unjust is possible according to Hume only in a certain kind of legal context - namely when questions arise about the conformity of conduct to a certain class of legal rules, those which comprise the law of property. In such contexts, actions are said to be just if they are in accordance with property rules and unjust if they are contrary to them.

Of particular interest is the exclusion of judgments about the law - and in particular judgments about property rules - from the class of judgments of justice. Hume recognizes, of course, that we often have occasion to evaluate rules of law, including the rules which make up the law of property. When such judgments have to be made, however, it is never their justice or injustice which is in question for Hume. The fact that he often refers to the rules of property as "rules of justice" may seem to be inconsistent with this view, but it is not. When Hume refers to property rules in this way, it is not because he wishes to signify that the rules themselves satisfy some principle of justice, but rather because he conceives of them as embodying our criteria for the making of judgments about the justice of particular acts. Property rules cannot be viewed as "rules of justice" in this sense without satisfying some supra-legal standard of acceptability. But the standard in question is social utility, not justice. Property rules qualify as "rules of justice", then, not because they are just but rather because they serve the public interest.

Like some contemporary rule-utilitarians, Hume expressly disallows the question whether particular acts of

justice are socially useful. Or rather, to be more accurate, he claims that the disutility of particular acts sanctioned by property law counts neither against their being regarded as "acts of justice" nor against recognition of the obligation to perform them. Neither the characterisation of particular actions as "just" nor the stringency of the obligation to perform them is affected by the discovery that they might have to be said not to be in the public interest if attention were to be concentrated on the special circumstances of their performance. The reason is that it is a mistake, Hume thinks, for such acts to be viewed in isolation from other similar acts. Rather they must be seen as forming part of a scheme or system - a scheme or system which, taken in its entirety, serves the public interest. Hume's theory of justice thus embodies an unusually neat distinction between questions of justice and questions of social utility. When questions of justice are allowed to arise - which is when the justice of particular acts is to be determined - questions of social utility do not arise. And when questions of social utility are allowed to arise - as they do when property rules have to be evaluated - questions of justice do not arise.

Despite the sharp distinction he draws between justice and utility, Hume's theory of justice is clearly a utilitarian one. It is indeed a veritable prototype of the kind of theory now dubbed "rule-utilitarian". As such it has obvious attractions for would-be utilitarians, if it can be made to work. It would enable utilitarians to offer an account of judgments of justice in terms of rules enjoying the status of secondary principles of morality. Justice judgments could be represented as a special sub-class of moral judgments and the principles regulating them as subordinate to, and derivable from, the principle of utility. The vexed question of the relation between justice and utility would thereby be resolved without challenge to the assumption that they are different values and also without

abandonment of the claim that the principle of utility is the only underivative moral principle. By contrast, utilitarians for whom the most basic justice judgments are judgments about institutions seem committed in the end either to simply identifying the principle regulating justice judgments with the principle of utility or to admitting that justice judgments must be accounted for in terms of some principle distinct from, and as basic as, the principle of utility. Neither is a palatable alternative for utilitarians. The first brings them into headlong conflict with an impressive array of ordinary judgments which seem to presuppose that justice and utility are not identical, while the second is tantamount to abandonment of utilitarianism as a single-principle theory.

There are, however, at least three objections to the Humean strategy for accommodating judgments of justice within the confines of a utilitarian system. (1) First, judgments about the justice or injustice of the rules which make up the law of property are among the most fundamental of the judgments we have occasion to make and any adequate theory must say something about them. It is implausible to have to deny that the evaluation of such rules ever takes the form of an appeal to principles of justice and to have to insist consequently that it is always really their utility in some sense which is at issue in such contexts. Laws may be socially useful - that is, of benefit in some important respect to the public, or to society as a whole - without being on that account just or fair. This is because judgments about the justice of laws have a special point in that they have to do not with their over-all advantageousness but with the distribution of the costs and benefits of compliance among those subject to the law. (2) Even if social utility rather than justice could be taken to be the standard which laws must satisfy to be acceptable, it is disconcerting to find Hume taking for granted that existing property law passes muster on this basis no matter what its

content. A second objection to Hume's theory consequently takes the form of a challenge to the assumption that the property rules in force at any given time can reasonably be regarded as satisfying his own public interest criterion, thereby qualifying as "rules of justice". (3) Finally, to suppose that particular acts can be said to be just on the basis simply of their conformity to the rules which constitute the law of property is to overlook, among other things, the dependence of judgments about the justice of particular acts on judgments about the justice of the rules under which the acts are subsumable. Care must be taken in presenting this objection not to be unfair to Hume's position. Hume's view that the rules of justice are identical (in content) with the rules which constitute the law of property may give the impression that he simply confounds the moral question whether an action is just with the merely legal question whether it is in conformity with the law of property. This seems not to have been a mistake made by Hume. It is an important part of his view that property rules qualify as "rules of justice" only because there is a moral obligation to act in accordance with them. And it is because the law of property serves the public interest that the rules which constitute it impose a moral, and not a merely legal, obligation. It is because property rules are socially useful that they qualify as rules of justice and thereby furnish criteria for the making of judgments about the justice of particular actions. But although Hume can be defended against the charge that he simply obliterates the distinction between moral and legal questions in his discussion of justice (and the related charge that he supposes justice to be a merely legal notion), his position is still open to serious objection if judgments about the justice of particular actions presuppose judgments about the justice, and not simply the utility, of the rules under which they are subsumable. To be just, as distinct from merely useful (or in the public interest), particular actions must satisfy just

property rules. The narrow scope of Hume's theory of justice thus exposes it not only to the charge that it is seriously incomplete since it has nothing to say about the justice of rules and institutions but also to the charge that even the judgments about particular acts which it is designed to cover cannot be adequately accounted for without reference to the judgments about rules and institutions which it neglects.

Although the last of these objections, if valid, is fatal to the kind of rule-utilitarian strategy which represents judgments of justice as a special sub-class of moral judgments derivable from (higher-level) judgments of utility, I shall say nothing further about it in this paper. As for the first objection, I shall try to blunt its force by drawing attention to a special feature of Hume's conception of the public interest, but I shall argue that it takes no more than a blunt instrument to do fatal damage to his theory. In discussing the second objection also I shall try to identify a feature of Hume's argument which makes his sponsorship of an untenable position at least intelligible.

I

Implicit in Hume's claim that the rules of justice are in the public interest is the assumption that they are in everyone's interest, and not simply that they are rules which serve to maximize social utility.¹ On Hume's conception of the public interest it follows from the fact that something is in the public interest that it is in the interest of every individual member of the public. No doubt rather meagre judgments of private interest are all that can be involved here, for it is not Hume's view that individuals could be single-minded in the pursuit of their own interests without doing any damage to the public interest. All that seems to be intended - and certainly the most that could be true - is that measures which promote the public interest

also serve to benefit all the members of the public without exception, even if some benefit more than others and even if some benefit only slightly. Although on this interpretation Hume's claim that the rules which make up property law are in the public interest is no doubt comparatively unambitious, it is significant in what it excludes. Excluded is the possibility of rules being judged to be in the public interest even when there are members of the public who, as individuals, do not stand to benefit from them at all.

Now the special point of judgments about the justice of laws is to draw attention to the way in which the benefits and burdens of obedience are distributed among those subject to the law. Since it is implicit in Hume's view that property rules serve the public interest that they are in every-one's interest, part of the force of what could, more explicitly, be conveyed by means of a judgment of justice is embedded in the (Humean) judgment that these rules are in the public interest. Hume's public interest criterion thus does part of the job of a principle of justice. This makes it more understandable that he should neglect the question whether property rules are just as distinct from socially advantageous ones, and it is perhaps a less serious fault in his theory consequently that it has nothing to say about the justice of such rules.

This defence of Hume, however, is a very partial defence and it is important to notice just why it is a mistake to expect questions about the justice of laws to be taken care of by asking, even in the special way Hume favours, about their social utility. The reason is that Hume's public interest criterion is insensitive to variations in the extent to which the members of the public stand to benefit. Thus it is irrelevant to the truth of Hume's claim that existing property rules are in the public interest just how much or how little given members of the public stand to benefit, provided all without exception benefit to at least some extent. Property rules may pass Hume's (rather modest)

public interest test, inasmuch as they serve to benefit, at least to some (possibly small) extent, all the members of the public, without on that account satisfying the more demanding requirement that the benefits of obedience be justly distributed among those subject to them. Since it is clearly not irrelevant to the proper assessment of property law whether or not there are unevennesses in the distribution of the advantages and disadvantages of compliance, Hume's failure to take cognizance of judgments about the justice of the law of property can be seen to be a crippling deficiency in his theory.

II

Comparatively modest though Hume's public interest criterion seems to be, it is still difficult to see how he can be so confident that existing property rules satisfy it and thus qualify as rules of justice. Surely, it will be said, there are at least some individuals in most jurisdictions who do not stand to benefit at all from the property rules in force; in which case it would follow that they are not in the public interest even in Hume's sense.

Hume's confidence that everyone benefits from existing property rules reflects, to some extent, the assumption that the only alternative to maintenance of these rules is the disappearance of stable property arrangements. It seems to be because he thinks no one would have reason to prefer a state of society in which property rules have broken down entirely to life under even the most oppressive property laws that he supposes existing property rules to be advantageous to everyone and thus, in his sense, in the public interest.

It would be unfair to object to Hume's view here on the ground that judgments of public interest are non-comparative and that consequently it ought to be possible to determine whether existing property arrangements are in

the public interest without first ascertaining whether arrangements of other sorts would be more or less advantageous. Despite their non-comparative form, judgments of interest (including judgments of public interest) are typically comparative in force. When we judge that some action or policy is in the public interest, a comparison with at least certain alternative courses of action is generally presupposed: to hold that X is in the public interest is tantamount to holding that X is more advantageous to the public than, say, Y. This feature of judgments of interest has an important consequence. It means that courses of action which have every appearance of being disadvantageous to individuals or groups who are adversely affected by them may nevertheless turn out to be in their interest after all if the only available alternatives to them would have even worse consequences. The truth of a judgment of interest depends on the appropriateness, and the correctness, of the comparative judgments it presupposes. What is crucial, consequently, to the truth of Hume's claim that obedience to existing property rules is in the public interest (and thus advantageous to everyone) is whether he is justified in supposing that the only alternative to obedience is the total collapse of stable property arrangements and whether, in any case, if this were the only alternative, all the members of a society, especially those who benefit least from existing property laws, would find it advantageous on balance to sustain the existing economic order rather than risk the disintegration of stable property arrangements. On neither score is it plausible to take Hume's part. Even substantial changes in the content of property law can often be sought realistically by legal reformers without serious risk of society's reverting to something like a Hobbesian state of nature; and where reformist strategies are likely, or certain, to be ineffective, destruction of the economic system even at the risk of a temporary breakdown in stable

property arrangements may on balance be more advantageous to at least some members of the public than continued acceptance of oppressive property laws.

It is an intriguing question why Hume should have made it easy for himself to suppose that existing property rules are in the public interest by representing the total collapse of property arrangements as the only alternative to maintenance of the status quo. Part of the answer seems to be that he is sceptical about the prospect of securing agreement about changes in the content of property law on the basis of wide-ranging discussion of the question how *particular goods are to be assign'd to each particular person*. (T502) Although he recognizes that it would be better if *every one were possess'd of what is most suitable to him, and proper for his use*, he goes on immediately to say of this relation of fitness that *'tis liable to so many controversies, and men are so partial and passionate in judging of these controversies, that such a loose and uncertain rule wou'd be absolutely incompatible with the peace of human society*. (T502) The only safe course, he thinks, is to take existing property rules as providing the criteria for determining how control over the use and enjoyment of possessions is to be regulated. He is not unaware, of course, of the unsatisfactoriness in some ways of endorsement of the existing distribution of property. Thus, noting that *persons and possessions must often be very ill adjusted - a grand inconvenience, which calls for a remedy* - he speaks of the rules of justice as *seek(ing) some medium betwixt a rigid stability and the changeable and uncertain adjustment which would be the result of allow(ing) every man to seize by violence what he judges to be fit for him*. (T514) Yet so mindful is he of the potential for chaos inherent in any tampering with existing property law that he allows, in this context, only for the kind of redistribution which takes place spontaneously when individuals freely divest themselves of their property, through gifts to others or through

voluntary exchanges. ...*Possession and property shou'd always be stable, except when the proprietor agrees to bestow them on some other person.* (T514)

Hume's confidence that the rules which make up the law of property are in the public interest may also owe something to his failure to give due weight to the distinction between the question whether there is a case, on grounds of social utility, for legal regulation of control over the use and enjoyment of goods and the question whether there is a case, on grounds of utility, for the maintenance of the property rules which happen to be in force at any given time. It may well be true, as Hume supposes, that it is on broadly utilitarian grounds that we think it necessary to have reasonably stable - legal - rules for the regulation of ownership. But it does not follow that the question how goods ought to be distributed can be answered in the utilitarian fashion favoured by Hume - that is, by application of his public interest criterion. That there ought to be rules - reasonably stable rules, legal rules - regulating property relations is a claim which can plausibly enough be advanced on grounds of social utility. What, in detail, the content of these rules ought to be need not, however, be settled on a merely utilitarian basis. Indeed once the need for rules is clear, it becomes important among other things to ensure that the rules will serve to secure as just a distribution of property as possible; and justice here is a standard neither identical with, nor derivable from, utility.

Hume's identification of the "rules of justice" with existing property rules thus seems to be a function in part of scepticism about the possibility of rational settlement of normative questions about the content of property law, in part of his fear that the attachment of property-owners to what they have got hold of (whether by "fortune" or "industry") is so powerful that redistributive measures are likely to precipitate the kind of breakdown in law and order

which would be to no one's advantage, and in part of his failure to give adequate weight to the distinction between the claim that the public has a stake in the existence of property law and the claim that the public has a stake in the maintenance of existing property law. But whatever the sources of Hume's assumption that maintenance of the status quo is the only alternative to total collapse of stable property arrangements, it is at least clear that if these were the only alternatives his claim that all the members of the community stand to benefit from compliance with existing property law would have a good deal of plausibility; and from this claim it would follow, of course, that existing property law is in the public interest in Hume's sense. By the same token, the more obvious we take it to be that these are not the only alternatives, the stronger the case becomes for outright rejection of the Humean thesis that existing property rules qualify as "rules of justice" in virtue of their social advantageousness.

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1. This interpretation of Hume's position is endorsed by David Gauthier in his paper, 'David Hume, Contractarian.' Indeed, it furnishes part of the basis for his view that Hume should be regarded as a contractarian rather than as a utilitarian. If I do not follow Gauthier in his characterisation of Hume's theory it is mainly because I think he defines utilitarianism too strictly and contractarianism too loosely and not because of any disagreement with his exegesis of Hume. (See 'David Hume, Contractarian', The Philosophical Review, Vol. LXXXVIII, No. 1 (Jan. 1979), p. 17.)