



## Debate

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## Debate: Levels of Non-ideality\*

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**I**MAGINE you're sitting in an outdoor café, adjacent to Tokyo's Hachiko Square, which is one of the world's busiest intersections. You notice an elderly man, laden with shopping bags, completely stranded between two lanes of noisy traffic, and looking utterly bewildered. Should you go to his aid, or is it all right for you just to continue sipping your coffee and observing his plight? I believe that, on virtually all views of what morality requires of us, you should go to his aid. You have a duty to do so and, in an ideal world, you would comply with that duty. That is, your failure to comply makes some contribution to the non-ideality of this world.

An exasperated complaint levelled with increasing frequency against much current political philosophy is one deploring its utopian preoccupation with delineating features of an ideal world. Ideal Theory, as it has come to be called, is alleged to be so exclusively focused on constructing the best account of what justly should be done by whom and for whom, that it utterly fails to offer any guidance as to what should be done in the circumstances that actually confront us: circumstances pervasively shaped by both past and present non-compliance with moral duties. It fails to address the moral slack generated by non-compliance.

Now, while this complaint is not without some merit, I think it seriously overlooks several important distinctions and, in so doing, must be judged to carry less weight than its authors seem to suppose. For, as I shall argue, non-compliances come in significantly different types, and they thereby lend themselves to an ordering which is of particular relevance to the concerns of political philosophy.

Let me begin that argument with a true story that I told for many years in the opening lecture for the freshman introductory course in political philosophy at the University of Manchester. I entitled the story *Political Philosophy and the Redistribution of Bone Marrow*:

\*This paper has benefitted considerably from comments and queries offered by Bob Goodin, two anonymous referees, Zofia Stemplowska, Laura Valentini, and participants in conferences and seminars at the universities of Bayreuth, Cambridge, Manchester, North Carolina at Greensboro, and the London School of Economics.

In July 1978 several American newspapers reported that Robert McFall, age 39, an asbestos worker stricken with *aplastic anaemia*—a rare and usually fatal illness—was suing his cousin David Shimp, age 32, to obtain about 21 ounces of bone marrow that could save his life. Shimp was the only known compatible match for a marrow transplant, and the doctors agreed that, without such a transplant, McFall stood very little chance of surviving one year.

There was no reason to believe that the transplant would at all endanger Shimp: unlike transplanted organs, transplanted bone marrow grows back, and the donor avoids even the very modest long-term health risks that kidney donors undertake. Nonetheless, Shimp adamantly refused to donate the needed bone marrow.

In bringing the lawsuit, McFall's attorneys posed the following question: 'In order to aid a dying man ... may society compel an unwilling donor to undergo a medically safe, experientially proven, minor procedure?' Arguing for an affirmative answer to this question, McFall's attorneys invoked an English common law precedent, dating back to the 13th century, that states that society has the right to force an individual to uphold a moral and legal obligation to secure the well-being of other members of society.

However, McFall's request for an injunction forcing his cousin to supply the life-saving bone marrow was rejected by the U.S. Court of Common Pleas Judge John P. Flaherty. Acknowledging that he was thereby in effect condemning an innocent man to death, the judge claimed that he had based his decision on American common law precedents, saying that 'In our law, there's no duty to rescue someone or save someone's life. Our society is based on the right and sanctity of the individual.' The judge went on to state that, despite the moral implications involved in the case, to grant the injunction would be to set a dangerous precedent: 'For a society to sink its teeth into the jugular vein or neck of one of its members, is revolting to ... concepts of jurisprudence.'

Two weeks after the court's rejection of his request for the injunction, McFall died of a massive intracranial haemorrhage.<sup>1</sup>

As I indicated to the class, my principal purpose in telling this story was to exhibit the distinctive concerns of political philosophy and, more particularly, to show how those concerns circumscribe its domain within the larger terrain of moral philosophy, of which political philosophy is a subfield. And to sharpen their perception of that boundary, I used to put two questions to this class of some 500 students. I first asked them to indicate, by a show of hands, whether they believed that it was morally permissible for Shimp to have refused to donate his bone marrow. The virtually unanimous response of the class, decade after decade, was 'No', that Shimp was wrong to have refused. I then asked them

<sup>1</sup>See *McFall v. Shimp*, 10 Pa. D. & C. 3d 90—Pa: Court of Common Pleas 1978; see also 'McFall v. Shimp', *Wikipedia*, last modified 15 April 2017, available at <[http://en.wikipedia.org/wiki/McFall\\_v.\\_Shimp](http://en.wikipedia.org/wiki/McFall_v._Shimp)>.

whether the court's decision, against compelling Shimp to donate, was morally right. To this question, the class response was not unanimous but, invariably, an overwhelming majority supported the court. (I should say that the size of that overwhelming majority did tend to vary somewhat over the years: during the Thatcher-Reagan 1980s, I estimated that it climbed as high as 90% but, at other times, it was never less than around 75%. Interestingly, when I then suggested hypothetically changing the example, from a compulsory donation of bone marrow to one of blood, the size of the majority declined, but it still remained opposed to compulsion.)

The point of recounting this story here is not to invite still further discussion of whether Shimp was wrong, nor of whether the court was right: nothing in what follows depends on the answers to those two questions, so let's just suppose that the students' responses, in both cases, were correct. Rather, the point is that, on their view of what morality requires, there are (at least) two *types* of ideal conduct and, hence, two types of non-ideality and, what is more, these two types—though clearly distinct one from the other—nonetheless bear a close relation to one another. In an ideal world, Shimp would have voluntarily complied with a duty to rescue McFall. Shimp's non-compliance with that duty contributed to the non-ideality of this world, just as your failure to assist that stranded Tokyo pedestrian would have done.

Now, according to the students, the court, too, *could have* made a contribution to the non-ideality of this world. Had Judge Flaherty granted McFall the injunction he sought, the non-ideality of this world would have been still further increased. But notice that this latter instance of non-ideality could not have occurred—could not have been added to the world—had Shimp not first made his own non-ideal contribution. Shimp's non-ideal contribution is a necessary condition of the non-ideal contribution that the court might have made. And, of course, it's also a necessary condition of the ideal contribution that the court actually did make.

All of this may strike you as pretty elementary and hardly worth the somewhat contrived formulation I've just given it. We all appreciate that one of the important moral functions of the legal system is not to compound wrongdoings, and that while this function often involves compelling wrongdoers to desist from their wrongdoing (or to redress the wrongs they have done), there are other occasions—such as the *Bone Marrow* case—when what it requires is forbearance from such compulsion and, indeed, forcible interference with anyone who would engage in such compulsion. Yet, familiar as this fact undoubtedly is, what it implies is something that the standard anti-utopian criticism of Ideal Theory in political philosophising seems to overlook: namely, that the only kind of world to which such theory addresses itself is, inherently, a morally non-ideal world. It's a world that contains, inter alia, many Shimps and persons who decline to help stranded pedestrians. Or, in the

familiar understatement of Hume, Smith, and Rawls, it's a world of *limited altruism*.<sup>2</sup>

This oversight, we might well conjecture, may be due to an element of intellectual parochialism on the part of political philosophers, including some Ideal Theorists themselves, as well as their critics. Preoccupied, even obsessed, with the genuine complexities of constructing a plausible account of fully just entitlements and their correlatively entailed duties, Ideal Theorists themselves sometimes appear entirely to lose sight of the significant fact that *there is more to morality than only justice*. Failures to treat members of non-human species humanely, failures to assist the undeserving poor, and even—according to Kant—failures to develop one's own talents, are all, *ceteris paribus*, contributions to the world's non-ideality. So, too, are acts of greed, dishonesty, free-riding, cowardice, and discourtesy. It's true that, in some circumstances, some of these forms of wrong conduct may also be instances of injustice. But they are not inherently so. And when they are not, their non-ideal contributions are ones which theories of ideal justice simply take as given and do not address.

It is *not* the case, in other words, that the authors of such theories seek to delineate the features of a morally spotless world. The specific task to which they address themselves is, rather, one of identifying the properties of *morally second-best worlds*, in an effort to distinguish them from those of third-, fourth-, and fifth-best worlds. In an ideal world, a first-best world, McFall does not need to go to court in order to secure the donation of Shimp's bone marrow. In one particular *non-ideal* world, he secures that bone marrow by simply recruiting an obliging surgeon and a couple of friendly thugs. In another non-ideal world, he goes to court. What ideal justice theories aim at doing is to construct cohesive sets of reasons for determining which one of those two non-ideal worlds is *worse* than the other: which is the lesser evil. That hardly sounds like an exercise in utopianism.

For utopianism, as I understand it, does two things: (a) it describes a world in which *all* moral duties are fulfilled; (b) it posits that such a world is possible. The ideal theorising that I'm defending responds by implicitly accepting both (a) and (b), but also insisting (c) that as a matter of empirical fact, our actual world is not the one delineated in (a), and suggesting (d) that one reason why it's not is that

<sup>2</sup>Some have objected that Shimp's voluntary donation of bone marrow and your rescue of the stranded pedestrian count as *supererogatory* acts, rather than compliances with the moral duties constitutive of an ideal world. I find this objection unpersuasive, for three reasons. First, I share the view, held by such otherwise different moral philosophers as Kant and Bentham, that any act performed with a morally good intention (Kant) or likely to bring about morally good consequences (Bentham) is, *ceteris paribus*, a matter of duty: the category of supererogatory acts is an empty one. Second, this objection seems to suggest, implausibly, that only acts owed to persons as a matter of their moral *rights* can count as being ones of moral duty. Third, and even if the category of supererogatory acts is non-empty, any normal understanding of what a morally ideal world consists of will include supererogatory acts among its components: a world in which there is *both* full compliance with moral duties *and* performance of supererogatory acts is clearly morally superior to one that contains only the former.

many of the moral duties that are unfulfilled in it are those which are correlative to persons' rights (that is, duties of justice). What ideal theorising focuses on is (e) the delineation of what those rights are, that is, what a world in which those correlative duties are fulfilled would look like. Numerous critics of that theorising mistake (e) for (a).

Nor is any of this very surprising, for it's all largely implicit in the very way the concept of justice figures in our pre-theoretical thinking. Perhaps the most prominent feature that such thinking assigns to justice is that it serves as the primary moral standard for assessing legal systems: adorning many courthouses is the familiar figure holding the scales of justice. Easily the most common form of moral complaint against a legal rule or a judicial decision is not that it is uncompassionate or inefficient, but rather that it is unjust. Such rules and decisions can, of course, be uncompassionate or inefficient as well as unjust. However, even if they *are* uncompassionate or inefficient but are nonetheless just, their being just is commonly viewed as a sufficient reason for regarding them as morally correct. A legal rule or judicial decision requiring that Shimp be compelled to donate bone marrow to McFall might readily be defended on grounds of compassion and, arguably, efficiency as well. But, at least according to my students and Judge Flaherty, it would fail the test of justice and, accordingly, would be morally wrong.

And this tells us a bit more about the place of justice in our pre-theoretical thinking. A legal system, as we know, is defined as consisting inter alia of that set of rules that enforcibly dominate all other rules in society: that aforementioned familiar figure also holds a sword. That the rules of my religion or my club or my employer require that I do X, standardly constitutes no defence against the charge that I violated the legal prohibition against doing X. Nor, therefore, does it normally exempt me from whatever legal penalty is forcibly imposed for that violation. Now, what significantly and fairly readily follows from these two familiar facts is what I've elsewhere called the *Moral Primacy Thesis*.<sup>3</sup> As the primary standard for the moral evaluation of that dominantly enforceable set of rules, the demands of justice enjoy moral primacy over the demands of other rules, including other moral principles or values. Whether that primacy is understood in terms of lexical priority, or side-constraints, or trumps, or reasons with peremptory force, in circumstances where duties of justice are not jointly performable with duties generated by other moral principles, it is performance of the former that morality requires.<sup>4</sup>

It's equally important and equally relevant, however, to be clear about what this Moral Primacy Thesis does *not* entail. It does not entail the impossibility of

<sup>3</sup>Hillel Steiner, 'Directed duties and inalienable rights', *Ethics*, 123 (2013), 230–44, at pp. 233ff.

<sup>4</sup>Cf. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), pp. 42ff.; Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), pp. 28–33; Ronald Dworkin, 'Is there a right to pornography?', *Oxford Journal of Legal Studies*, 1 (1981), 177–212; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 192.

my exercising my just rights wrongly: we *can* have just rights to do wrong.<sup>5</sup> Of course, and following Hohfeld, no one can ever be strictly said to have a *right* to do anything: at most, persons have *liberties* or *powers* to act, and having a liberty or a power to do something does not entail a constraint (duty or disability) in anyone else. But we can have just rights—claims—that others not interfere with our acting in certain ways, and those persons would thereby hold just correlative duties of non-interference. Among the ways of acting that are protected by such claims may be ones which, in certain circumstances, are wrong on grounds other than justice. Thus, one of morality's other principles is *charity*—a norm which encumbers me with duties to transfer some of my resources to those more in need of them than I am.<sup>6</sup> Assuming that I am justly entitled to those resources—that I hold just rights that others not interfere with my disposition of them—the Moral Primacy Thesis does *not* entail that I do no wrong in refusing to act charitably and insist on withholding those resources from needier persons. All that is entailed by assigning primacy to just rights is that others would be committing a *worse* wrong by forcing me to make that transfer. In other words, morality's assigning such primacy entails that the following three alternatives are listed in descending order of desirability: (a) my choosing to transfer my resources to the needy; (b) my withholding those resources; (c) my attempting to withhold those resources but being forced by others to transfer them. It is alternative (b) that represents having (that is, exercising) a right to do wrong. The fact that my withholding is an exercise of my just rights is insufficient morally to justify that act. All that it would suffice to justify are whatever actions might be necessary to prevent or remedy my being forced to transfer. Justice here is what blocks a second-best world from becoming a third-best world. It does not secure—and does not seek to secure—a first-best world. In short, the Moral Primacy Thesis is not a utopian recipe for an ideal world.

Now, I can well imagine that thoughtful critics of Ideal Theory may be willing to concede all this:

Yes, [they might say], a world in which there is full compliance with the duties correlative to everyone's just rights is not necessarily a morally ideal world: it can still sustain lots of Shimp-like conduct. And in that respect it is, admittedly, a non-ideal world. So our concern, stated more accurately, is with Ideal Theory's excessive focus on second-best worlds, when what we daily confront is a fourth-, fifth-, or sixth-best world, and what we therefore need is a theory—a Non-Ideal Theory—that tells us what real world rights and duties would get us closer to that second-best world of full compliance with justice. We acknowledge that Ideal Theory is not appropriately described as 'utopian'. Nonetheless, we want to insist, with Amartya Sen and others, that, inasmuch as the real world is

<sup>5</sup>Cf. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), pp. 188–9; Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), pp. 266ff.; Jeremy Waldron, 'A right to do wrong', *Ethics*, 92 (1981), 21–39.

<sup>6</sup>I assume here, purely for the sake of illustration, that this moral duty to transfer resources to those needier than myself is *not* itself a duty of justice. Many conceptions of justice hold otherwise.

pervasively inhabited by clear injustices—such as racial and sexual discrimination and extreme poverty—the fine tuning that seems to preoccupy Ideal Theory bears some resemblance to fiddling while Rome burns. What political philosophers should be focusing on are not the requirements of perfect justice but rather remediable injustices and, hence, how to distinguish the features of morally *third-best* worlds from those that are of an even worse provenance.<sup>7</sup>

I think that there is much to be said for this line of argument, but not quite enough: not quite enough, because what it unremarkably warrants is, at best, a division of intellectual labour—a division that already exists and is, perhaps, paradigmatically represented these days by the burgeoning philosophical literature on the ethics of war. But also not quite enough because of that argument's heavy reliance on the idea of *clear injustices*.

Many choices that persons make are racially or sexually discriminating ones. Are they *all* clearly unjust? In the case of choosing persons for inclusion on electoral rolls, it seems clear that they are. Almost equally clear are choices of whom to employ and whom to admit as an immigrant. In each of these cases, many of the world's cultures and most theories of perfect justice assign to individuals rights against rejection on racial or sexual grounds. Less clear are, say, choices about whom to accept as a lodger in one's own home, choices about whom to befriend, choices about one's college roommate, and choices about where to seek employment. In these cases, only *some* cultures and *some* perfect justice theories would agree that rejection on racial or sexual grounds is thoroughly immoral. But even they would balk at judging that immorality to be specifically *unjust*: that is, as being an immorality against which persons should have legally enforceable rights. And when it comes to sexual discrimination in choosing one's civil or marriage partner, many of us would say that such choices are not even immoral, let alone unjust and, indeed, that denying individuals the choice to discriminate in this way—as many jurisdictions do—is profoundly *unjust*.

Cultural and theoretical differences equally beset the issue of whether extreme poverty is a clear injustice. For while there may be widespread agreement that failures to relieve extreme poverty are morally deplorable and greatly contribute to the world's non-ideality, this does not entail agreement on whether or not the *causes* of extreme poverty are *justice-relevant* and, if so, what form just remedial measures should take. For some theories of ideal justice, it makes a difference whether instances of that poverty are largely self-inflicted, or largely due to unforeseeable natural disasters, or largely due to the harmful actions of others—and, if the latter, whether those harmful actions occurred recently or in the more remote past. For other ideal theories, however, such causal questions are irrelevant, and the immorality of failures to relieve extreme poverty—however caused—simply *is* a form of injustice.

<sup>7</sup>See Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), *passim*.



This is not to deny that there are cases of clear injustice. It is meant, rather, to suggest that the clarity of those clear cases owes much to the work of Ideal Theory. After all, it is ideal theorising, past and present, that has developed and refined the structure of reasons needed to challenge a view widely endorsed throughout most of human history: namely, the view that *slavery* is justly permissible. The fact that there are still many grey areas, many issues on which ideal theorists disagree with one another, is surely a fact that points to the need for more—not less—ideal theorising. And this can be seen to be all the more pressing—not least for Non-Ideal Theory—when we recognise that remedies for cases which are *unclearly* unjust run the considerable risk of violating the just rights of others, and thereby moving us even further away from securing a third-best world, let alone a second-best one.

Thus, suppose that the judge and my students were mistaken in the *Bone Marrow* case: suppose McFall *did* have a just right to Shimp's bone marrow. It follows that by refusing to grant McFall the injunction he sought, the judge was committing an injustice. Conversely, if McFall had no such just right, then granting the injunction would have violated Shimp's just rights. My point here is simply that there is very little conceptual space between the just rights which different persons are alleged to possess. For each such right is *funded* by the correlative duties of others: duties consisting of resources and services owed by the duty-bearers to the right-holder and, consequently, duties that restrict—or come at the *cost* of—the rights of those duty-bearers themselves.<sup>8</sup> So when those allegedly just rights actually intersect with one another—as they did in *Bone Marrow*—anyone who is concerned to avoid augmenting this world's justice-deficit will need to know which right, in any pair of intersecting allegedly just rights, is the *authentically* just one. And it would appear that such information can be obtained from one or the other of only two sources, which we can respectively label as *external* and *internal*.

The external source of information that can resolve such conflicts of rights consists in a determination as to which one of them possesses *more* of some nominated morally valuable feature. We would place Shimp's inconvenience and McFall's premature death on some common numerical scale, and allow that metrication exercise to be dispositive of the issue before the court.

But there are two serious and not unrelated problems besetting this type of solution. The first is that it is incompatible with the Moral Primacy Thesis which, as I noted, is deeply embedded in our pre-theoretical thinking about justice. That thesis implies a *plural set* of basic moral principles or values that are not mutually

<sup>8</sup>I here make what I take to be the uncontroversial assumption that, for a set of rights to be just, it must be *possible*. And for it to be possible, all the rights in that set must be *compossible*: that is, compliances with all those rights' respectively entailed correlative duties must be conjunctively possible rather than mutually obstructive; cf. Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), pp. 2–3, 74–101. Colin Farrelly, a non-ideal theorist, correctly charges some ideal theories of justice with adopting 'a *cost-blind* approach to rights'; see his 'Justice in ideal theory: a refutation', *Political Studies*, 55 (2007), 844–64, at p. 845.

reducible, one to another. Justice—that is, respect for just rights—is a member of that set. To resolve conflicts between allegedly just rights by reference to some other value is simply to *deny* that membership. It denies that membership because what such a method of resolution is implicitly doing is instrumentalising justice in the service of that other value. That method presupposes that, in this world, where each person's rights restrict everyone else's rights, only those rights which contribute to the maximisation of that metricated other value are to be considered authentically just.

The second, and closely related, problem with this external mode of resolution is that it is inconsistent with the essentially *distributive* function of just rights. For the conflict resolutions it generates would be ones which are extensionally equivalent to those that would be generated by a monistic moral code entirely devoid of rights and containing only a single basic principle enjoining the maximisation of that metricated value. Who has what rights against whom are questions the answers to which would entirely depend on contingent facts about which interpersonal allocation of enforceable correlative duties, in any given set of circumstances, would most probably yield that required maximum.

Hence, if the information provided by that external method is thereby ineligible for resolving rights conflicts, the only other information source available is an internal one, which consists in further analysis of the *meaning* of our foundational principles of ideal justice. We have to explore their implications and presuppositions more fully, in an effort to identify the interpretation of them that most plausibly resolves *Bone Marrow* and other conceivable cases of intersection that relevantly resemble it. And that kind of fine-grained analysis and exploration is nothing other than the familiar and characteristic function of ideal theorising. So again, and in conclusion, more—rather than less—such theorising is what is needed, if we are to avoid incurring a justice-deficit even greater than the one we already confront.