JUSTICE AS FAIRNESS[1]

1. IT MIGHT seem at first sight that the concepts of justice and fairness are the same, and that there is no reason to distinguish them, or to say that one is more fundamental than the other. I think that this impression is mistaken. In this paper I wish to show that the fundamental idea in the concept of justice is fairness; and I wish to offer an analysis of the concept of justice from this point of view. To bring out the force of this claim, and the analysis based upon it, I shall then argue that it is this aspect of justice for which utilitarianism, in its classical form, is unable to account, but which is expressed, even if misleadingly, by the idea of the social contract.

To start with I shall develop a particular conception of justice by stating and commenting upon two principles which specify it, and by considering the circumstances and conditions under which they may be thought to arise. The principles defining this conception, and the conception itself, are, of course, familiar. It may be possible, however, by using the notion of fairness as a framework, to assemble and to look at them in a new way. Before stating this conception, however, the following preliminary matters should be kept in mind.

Throughout I consider justice only as a virtue of social institutions, or what I shall call practices.[2] The principles of justice are regarded as formulating restrictions as to how practices may define positions and offices, and assign thereto powers and liabilities, rights and duties. Justice as a virtue of particular actions or of

[1] An abbreviated version of this paper (less than one-half the length) was presented in a symposium with the same title at the American Philosophical Association, Eastern Division, December 28, 1957, and appeared in the *Journal of Philosophy*, LIV, 653-662.

[2] I use the word "practice" throughout as a sort of technical term meaning any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments, markets and systems of property. I have attempted a partial analysis of the notion of a practice in a paper "Two Concepts of Rules," *Philosophical Review*, LXIV (1955), 3-32.

persons I do not take up at all. It is important to distinguish these various subjects of justice, since the meaning of the concept varies according to whether it is applied to practices, particular actions, or persons. These meanings are, indeed, connected, but they are not identical. I shall confine my discussion to the sense of justice as applied to practices, since this sense is the basic one. Once it is understood, the other senses should go quite easily.

Justice is to be understood in its customary sense as representing but *one* of the many virtues of social institutions, for these may be antiquated, inefficient, degrading, or any number of other things, without being unjust. Justice is not to be confused with an all-inclusive vision of a good society; it is only one part of any such conception. It is important, for example, to distinguish that sense of equality which is an aspect of the concept of justice from that sense of equality which belongs to a more comprehensive social ideal. There may well be inequalities which one concedes are just, or at least not unjust, but which, nevertheless, one wishes, on other grounds, to do away with. I shall focus attention, then, on the usual sense of justice in which it is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims.

Finally, there is no need to consider the principles discussed below as *the* principles of justice. For the moment it is sufficient that they are typical of a family of principles normally associated with the concept of justice. The way in which the principles of this family resemble one another, as shown by the background against which they may be thought to arise, will be made clear by the whole of the subsequent argument.

2. The conception of justice which I want to develop may be stated in the form of two principles as follows: first, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles

express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good.[3]

The term "person" is to be construed variously depending on the circumstances. On some occasions it will mean human individuals, but in others it may refer to nations, provinces, business firms, churches, teams, and so on. The principles of justice apply in all these instances, although there is a certain logical priority to the case of human individuals. As I shall use the term "person," it will be ambiguous in the manner indicated.

The first principle holds, of course, only if other things are equal: that is, while there must always be a justification for departing from the initial position of equal liberty (which is defined by the pattern of rights and duties, powers and liabilities, established by a practice), and the burden of proof is placed on him who would depart from it, nevertheless, there can be, and often there is, a justification for doing so. Now, that similar particular cases, as defined by a practice, should be treated similarly as they arise, is part of the very concept of a practice; it is involved in the notion of an activity in accordance with rules.[4] The first principle expresses an analogous conception, but as applied to the structure of practices themselves. It holds, for example, that there is a presumption against the distinctions and classifications made by legal systems and other practices to the extent that they infringe on the original and equal liberty of

[3] These principles are, of course, well-known in one form or another and appear in many analyses of justice even where the writers differ widely on other matters. Thus if the principle of equal liberty is commonly associated with Kant (see *The Philosophy of Law*, tr. by W. Hastie, Edinburgh, 1887, pp. 56 f.), it may be claimed that it can also be found in J. S. Mill's *On Liberty* and elsewhere, and in many other liberal writers. Recently H. L. A. Hart has argued for something like it in his paper "Are There Any Natural Rights?," *Philosophical Review*, LXIV (1955), 175-191. The injustice of inequalities which are not won in return for a contribution to the common advantage is, of course, widespread in political writings of all sorts. The conception of justice here discussed is distinctive, if at all, only in selecting these two principles in this form; but for another similar analysis, see the discussion by W. D. Lamont, *The Principles of Moral Judgment* (Oxford, 1946), ch. v.

[4] This point was made by Sidgwick, *Methods of Ethics*, 6th ed. (London, 1901), Bk. III, ch. v, sec. 1. It has recently been emphasized by Sir Isaiah Berlin in a symposium, "Equality," *Proceedings of the Aristotelian Society*, n.s. LVI (1955-56), 305 f.

the persons participating in them. The second principle defines how this presumption may be rebutted.

It might be argued at this point that justice requires only an equal liberty. If, however, a greater liberty were possible for all without loss or conflict, then it would be irrational to settle on a lesser liberty. There is no reason for circumscribing rights unless their exercise would be incompatible, or would render the practice defining them less effective. Therefore no serious distortion of the concept of justice is likely to follow from including within it the concept of the greatest equal liberty.

The second principle defines what sorts of inequalities are permissible; it specifies how the presumption laid down by the first principle may be put aside. Now by inequalities it is best to understand not *any* differences between offices and positions, but differences in the benefits and burdens attached to them either directly or indirectly, such as prestige and wealth, or liability to taxation and compulsory services. Players in a game do not protest against there being different positions, such as batter, pitcher, catcher, and the like, nor to there being various privileges and powers as specified by the rules; nor do the citizens of a country object to there being the different offices of government such as president, senator, governor, judge, and so on, each with their special rights and duties. It is not differences of this kind that are normally thought of as inequalities, but differences in the resulting distribution established by a practice, or made possible by it, of the things men strive to attain or avoid. Thus they may complain about the pattern of honors and rewards set up by a practice (e.g., the privileges and salaries of government officials) or they may object to the distribution of power and wealth which results from the various ways in which men avail themselves of the opportunities allowed by it (e.g., the concentration of wealth which may develop in a free price system allowing large entrepreneurial or speculative gains).

It should be noted that the second principle holds that an inequality is allowed only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of *every* party engaging in it. Here it is important to stress that *every* party must gain from the inequality. Since the

principle applies to practices, it implies that the representative man in every office or position defined by a practice, when he views it as a going concern, must find it reasonable to prefer his condition and prospects with the inequality to what they would be under the practice without it. The principle excludes, therefore, the justification of inequalities on the grounds that the disadvantages of those in one position are outweighed by the greater advantages of those in another position. This rather simple restriction is the main modification I wish to make in the utilitarian principle as usually understood. When coupled with the notion of a practice, it is a restriction of consequence[5], and one which some utilitarians, e.g., Hume and Mill, have used in their discussions of justice without realizing apparently its significance, or at least without calling attention to it.[6] Why it is a significant

[5] In the paper referred to above, footnote 2, I have tried to show the importance of taking practices as the proper subject of the utilitarian principle. The criticisms of so-called "restricted utilitarianism" by J. J. C. Smart, "Extreme and Restricted Utilitarianism," *Philosophical Quarterly*, VI (1956), 344-354, and by H. J. McCloskey, "An Examination of Restricted Utilitarianism," *Philosophical Review*, LXVI (1957), 466-485, do not affect my argument. These papers are concerned with the very general proposition, which is attributed (with what justice I shall not consider) to S. E. Toulmin and P. H. Nowell-Smith (and in the case of the latter paper, also, apparently, to me); namely, the proposition that particular moral actions are justified by appealing to moral rules, and moral rules in turn by reference to utility. But clearly I meant to defend no such view. My discussion of the concept of rules as maxims is an explicit rejection of it. What I did argue was that, in the *logically special* case of practices (although actually quite a common case) where the rules have special features and are not moral rules at all but legal rules or rules of games and the like (except, perhaps, in the case of promises), there is a peculiar force to the distinction between justifying particular actions and justifying the system of rules themselves. Even then I claimed only that restricting the utilitarian principle to practices as defined strengthened it. I did not argue for the position that this amendment alone is sufficient for a complete defense of utilitarianism as a general theory of morals. In this paper I take up the question as to how the utilitarian principle itself must be modified, but here, too, the subject of inquiry is not all of morality at once, but a limited topic, the concept of justice.

[6] It might seem as if J. S. Mill, in paragraph 36 of Chapter v of *Utilitarianism*, expressed the utilitarian principle in this modified form, but in the remaining two paragraphs of the chapter, and elsewhere, he would appear not to grasp the significance of the change. Hume often emphasizes that *every* man must benefit. For example, in discussing the utility of general rules, he holds that they are requisite to the "well-being of every individual"; from a

modification of principle, changing one's conception of justice entirely, the whole of my argument will show.

Further, it is also necessary that the various offices to which special benefits or burdens attach are open to all. It may be, for example, to the common advantage, as just defined, to attach special benefits to certain offices. Perhaps by doing so the requisite talent can be attracted to them and encouraged to give its best efforts. But any offices having special benefits must be won in a fair competition in which contestants are judged on their merits. If some offices were not open, those excluded would normally be justified in feeling unjustly treated, even if they benefited from the greater efforts of those who were allowed to compete for them. Now if one can assume that offices are open, it is necessary only to consider the design of practices themselves and how they jointly, as a system, work together. It will be a mistake to focus attention on the varying relative positions of particular persons, who may be known to us by their proper names, and to require that each such change, as a once for all transaction viewed in isolation, must be in itself just. It is the system of practices which is to be judged, and judged from a general point of view: unless one is prepared to criticize it from the standpoint of a representative man holding some particular office, one has no complaint against it.

3. Given these principles one might try to derive them from a priori principles of reason, or claim that they were known by intuition. These are familiar enough steps and, at least in the case of the first principle, might be made with some success. Usually, however, such arguments, made at this point, are unconvincing. They are not likely to lead to an understanding of the basis of the principles of justice, not at least as principles of justice. I wish, therefore, to look at the principles in a different way.

Imagine a society of persons amongst whom a certain system

stable system of property "every individual person must find himself a gainer in balancing the account. . . ." "Every member of society is sensible of this interest; everyone expresses this sense to his fellows along with the resolution he has taken of squaring his actions by it, on the conditions that others will do the same." *A Treatise of Human Nature*, Bk. III, Pt. II, Section II, paragraph 22.

of practices is *already* well established. Now suppose that by and large they are mutually self-interested; their allegiance to their established practices is normally founded on the prospect of self-advantage. One need not assume that, in all senses of the term "person," the persons in this society are mutually self-interested. If the characterization as mutually self-interested applies when the line of division is the family, it may still be true that members of families are bound by ties of sentiment and affection and willingly acknowledge duties in contradiction to self-interest. Mutual self-interestedness in the relations between families, nations, churches, and the like, is commonly associated with intense loyalty and devotion on the part of individual members. Therefore, one can form a more realistic conception of this society if one thinks of it as consisting of mutually self-interested families, or some other association. Further, it is not necessary to suppose that these persons are mutually self-interested under all circumstances, but only in the usual situations in which they participate in their common practices.

Now suppose also that these persons are rational: they know their own interests more or less accurately; they are capable of tracing out the likely consequences of adopting one practice rather than another; they are capable of adhering to a course of action once they have decided upon it; they can resist present temptations and the enticements of immediate gain; and the bare knowledge or perception of the difference between their condition and that of others is not, within certain limits and in itself, a source of great dissatisfaction. Only the last point adds anything to the usual definition of rationality. This definition should allow, I think, for the idea that a rational man would not be greatly downcast from knowing, or seeing, that others are in a better position than himself, unless he thought their being so was the result of injustice, or the consequence of letting chance work itself out for no useful common purpose, and so on. So if these persons strike us as unpleasantly egoistic, they are at least free in some degree from the fault of envy.[7]

[7] It is not possible to discuss here this addition to the usual conception of rationality. If it seems peculiar, it may be worth remarking that it is analogous to the modification of the utilitarian principle which the argument as a whole

Finally, assume that these persons have roughly similar needs and interests, or needs and interests in various ways complementary, so that fruitful cooperation amongst them is possible; and suppose that they are sufficiently equal in power and ability to guarantee that in normal circumstances none is able to dominate the others. This condition (as well as the others) may seem excessively vague; but in view of the conception of justice to which the argument leads, there seems no reason for making it more exact here.

Since these persons are conceived as engaging in their common practices, which are already established, there is no question of our supposing them to come together to deliberate as to how they will set these practices up for the first time. Yet we can imagine that from time to time they discuss with one another whether any of them has a legitimate complaint against their established institutions. Such discussions are perfectly natural in any normal society. Now suppose that they have settled on doing this in the following way. They first try to arrive at the principles by which complaints, and so practices themselves, are to be judged. Their procedure for this is to let each person propose the principles upon which he wishes his complaints to be tried with the understanding that, if acknowledged, the complaints of others will be similarly tried, and that no complaints will be heard at all until everyone is roughly of one mind as to how complaints are to be judged. They each understand further that the principles proposed and acknowledged on this occasion are binding on future occasions. Thus each will be wary of proposing a principle which would give him a peculiar advantage, in his present circumstances, supposing it to be accepted. Each person knows that he will be bound by it in future circumstances the peculiarities of which cannot be known, and which might well be such that the principle is then to his disadvantage. The idea is that everyone should be required to make *in advance* a firm commitment, which others also may reasonably be expected to make, and

is designed to explain and justify. In the same way that the satisfaction of interests, the representative claims of which violate the principles of justice, is not a reason for having a practice (see sec. 7), unfounded envy, within limits, need not to be taken into account.

that no one be given the opportunity to tailor the canons of a legitimate complaint to fit his own special condition, and then to discard them when they no longer suit his purpose. Hence each person will propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown. These principles will express the conditions in accordance with which each is the least unwilling to have his interests limited in the design of practices, given the competing interests of the others, on the supposition that the interests of others will be limited likewise. The restrictions which would so arise might be thought of as those a person would keep in mind if he were designing a practice in which his enemy were to assign him his place.

The two main parts of this conjectural account have a definite significance. The character and respective situations of the parties reflect the typical circumstances in which questions of justice arise. The procedure whereby principles are proposed and acknowledged represents constraints, analogous to those of having a morality, whereby rational and mutually self-interested persons are brought to act reasonably. Thus the first part reflects the fact that questions of justice arise when conflicting claims are made upon the design of a practice and where it is taken for granted that each person will insist, as far as possible, on what he considers his rights. It is typical of cases of justice to involve persons who are pressing on one another their claims, between which a fair balance or equilibrium must be found. On the other hand, as expressed by the second part, having a morality must at least imply the acknowledgment of principles as impartially applying to one's own conduct as well as to another's, and moreover principles which may constitute a constraint, or limitation, upon the pursuit of one's own interests. There are, of course, other aspects of having a morality: the acknowledgment of moral principles must show itself in accepting a reference to them as reasons for limiting one's claims, in acknowledging the burden of providing a special explanation, or excuse, when one acts contrary to them, or else in showing shame and remorse and a desire to make amends, and so on. It is sufficient to remark here that having

a morality is analogous to having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage.[8] A man whose moral judgments always coincided with his interests could be suspected of having no morality at all.

Thus the two parts of the foregoing account are intended to mirror the kinds of circumstances in which questions of justice arise and the constraints which having a morality would impose upon persons so situated. In this way one can see how the acceptance of the principles of justice might come about, for given all these conditions as described, it would be natural if the two principles of justice were to be acknowledged. Since there is no way for anyone to win special advantages for himself, each might consider it reasonable to acknowledge equality as an initial principle. There is, however, no reason why they should regard this position as final; for if there are inequalities which satisfy the second principle, the immediate gain which equality would allow can be considered as intelligently invested in view of its future return. If, as is quite likely, these inequalities work as incentives to draw out better efforts, the members of this society may look upon them as concessions to human nature: they, like us, may think that people ideally should want to serve one another. But as they are mutually self-interested, their acceptance of these inequalities is merely the acceptance of the relations in which they actually stand, and a recognition of the motives which lead them to engage in their common practices. *They* have no title to complain of one another. And so provided that the conditions of the principle are met, there is no reason why they should not allow such inequalities. Indeed, it would be short-sighted of them to do so, and could result, in most cases, only from their being dejected by the bare knowledge, or perception, that others

[8] The idea that accepting a principle as a moral principle implies that one generally acts on it, failing a special explanation, has been stressed by R. M. Hare, *The Language of Morals* (Oxford, 1952). His formulation of it needs to be modified, however, along the lines suggested by P. L. Gardiner, "On Assenting to a Moral Principle," *Proceedings of the Aristotelian Society*, n.s. LV (1955), 23-44. See also C. K. Grant, "Akrasia and the Criteria of Assent to Practical Principles," *Mind*, LXV (1956), 400-407, where the complexity of the criteria for assent is discussed.

are better situated. Each person will, however, insist on an advantage to himself, and so on a common advantage, for none is willing to sacrifice anything for the others.

These remarks are not offered as a proof that persons so conceived and circumstanced would settle on the two principles, but only to show that these principles could have such a background, and so can be viewed as those principles which mutually self-interested and rational persons, when similarly situated and required to make in advance a firm commitment, could acknowledge as restrictions governing the assignment of rights and duties in their common practices, and thereby accept as limiting their rights against one another. The principles of justice may, then, be regarded as those principles which arise when the constraints of having a morality are imposed upon parties in the typical circumstances of justice.

4. These ideas are, of course, connected with a familiar way of thinking about justice which goes back at least to the Greek Sophists, and which regards the acceptance of the principles of justice as a compromise between persons of roughly equal power who would enforce their will on each other if they could, but who, in view of the equality of forces amongst them and for the sake of their own peace and security, acknowledge certain forms of conduct insofar as prudence seems to require. Justice is thought of as a pact between rational egoists the stability of which is dependent on a balance of power and a similarity of circumstances.[9] While the previous account is connected with this

[9] Perhaps the best known statement of this conception is that given by Glaucon at the beginning of Book II of Plato's *Republic*. Presumably it was, in various forms, a common view among the Sophists; but that Plato gives a fair representation of it is doubtful. See K. R. Popper, *The Open Society and Its Enemies*, rev. ed. (Princeton, 1950), pp. 112-118. Certainly Plato usually attributes to it a quality of manic egoism which one feels must be an exaggeration; on the other hand, see the Melian Debate in Thucydides, *The Peloponnesian War*, Book V, ch. VII, although it is impossible to say to what extent the views expressed there reveal any current philosophical opinion. Also in this tradition are the remarks of Epicurus on justice in *Principal Doctrines*, XXXI-XXXVIII. In modern times elements of the conception appear in a more sophisticated form in Hobbes *The Leviathan* and in Hume *A Treatise of Human Nature*, Book III, Pt. II, as well as in the writings of the school of natural law such as Pufendorf's

tradition, and with its most recent variant, the theory of games,[10] it differs from it in several important respects which, to forestall misinterpretations, I will set out here.

First, I wish to use the previous conjectural account of the background of justice as a way of analyzing the concept. I do not want, therefore, to be interpreted as assuming a general theory of human motivation: when I suppose that the parties are mutually self-interested, and are not willing to have their (substantial) interests sacrificed to others, I am referring to their conduct and motives as they are taken for granted in cases where questions of justice ordinarily arise. Justice is the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights on each other. That persons are mutually self-interested in certain situations and for certain purposes is what gives rise to the question of justice in practices covering those circumstances. Amongst an association of saints, if such a community could really exist, the disputes about justice could hardly occur; for they would all work selflessly together for one end, the glory of God as defined by their common religion, and reference to this end would settle every question of right. The justice of practices does not come up until there are several different parties (whether we think of these as individuals, associations, or nations and so on, is irrelevant) who do press their claims on one another, and who do regard themselves as representatives of interests which deserve to be considered. Thus the previous account involves no general theory of human motivation. Its intent is simply to incorporate into the conception of justice

De jure naturae et gentium. Hobbes and Hume are especially instructive. For Hobbes's argument see Howard Warrender's *The Political Philosophy of Hobbes* (Oxford, 1957). W. J. Baumol's *Welfare Economics and the Theory of the State* (London, 1952), is valuable in showing the wide applicability of Hobbes's fundamental idea (interpreting his natural law as principles of prudence), although in this book it is traced back only to Hume's *Treatise*.

[10] See J. von Neumann and O. Morgenstern, *The Theory of Games and Economic Behavior*, 2nd ed. (Princeton, 1947). For a comprehensive and not too technical discussion of the developments since, see R. Duncan Luce and Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (New York, 1957). Chs. VI and XIV discuss the developments most obviously related to the analysis of justice.

the relations of men to one another which set the stage for questions of justice. It makes no difference how wide or general these relations are, as this matter does not bear on the analysis of the concept.

Again, in contrast to the various conceptions of the social contract, the several parties do not establish any particular society or practice; they do not covenant to obey a particular sovereign body or to accept a given constitution.[11] Nor do they, as in the theory of games (in certain respects a marvelously sophisticated development of this tradition), decide on individual strategies adjusted to their respective circumstances in the game. What the parties do is to *jointly* acknowledge certain *principles* of appraisal relating to their common *practices* either as already established or merely proposed. They accede to standards of judgment, not to a given practice; they do not make any specific agreement, or bargain, or adopt a particular strategy. The subject of their acknowledgment is, therefore, very general indeed; it is simply the acknowledgment of certain principles of judgment, fulfilling certain general conditions, to be used in criticizing the arrangement of their common affairs. The relations of mutual self-interest between the parties who are similarly circumstanced mirror the conditions under which questions of justice arise, and the procedure by which the principles of judgment are proposed and acknowledged reflects the constraints of having a morality. Each aspect, then, of the preceding hypothetical account serves the purpose of bringing out a feature of the notion of justice. One could, if one liked, view the principles of justice as the "solution" of this highest order "game" of adopting, subject to the procedure described, principles of argument for all coming particular "games" whose peculiarities one can in no way foresee. But this comparison, while no doubt helpful, must not obscure the fact that this highest order "game" is of a special sort.[12] Its significance is that its various pieces represent aspects of the concept of justice.

[11] For a general survey see J. W. Gough, *The Social Contract*, 2nd ed. (Oxford, 1957), and Otto von Gierke, *The Development of Political Theory*, tr. by B. Freyd (London, 1939), Pt. II, ch. II.

[12] The difficulty one gets into by a mechanical application of the theory of

Finally, I do not, of course, conceive the several parties as necessarily coming together to establish their common practices for the first time. Some institutions may, indeed, be set up *de novo;* but I have framed the preceding account so that it will apply when the full complement of social institutions already exists and represents the result of a long period of development. Nor is the account in any way fictitious. In any society where people reflect on their institutions they will have an idea of what principles of justice would be acknowledged under the conditions described, and there will be occasions when questions of justice are actually discussed in this way. Therefore if their practices do not accord with these principles, this will affect the quality of their social relations. For in this case there will be some rec-

games to moral philosophy can be brought out by considering among several possible examples, R. B. Braithwaite's study, *Theory of Games as a Tool for the Moral Philosopher* (Cambridge, 1955). On the analysis there given, it turns out that the fair division of playing time between Matthew and Luke depends on their preferences, and these in turn are connected with the instruments they wish to play. Since Matthew has a threat advantage over Luke, arising purely from the fact that Matthew, the trumpeter, prefers both of them playing at once to neither of them playing, whereas Luke, the pianist, prefers silence to cacophony, Matthew is alloted 26 evenings of play to Luke's 17. If the situation were reversed, the threat advantage would be with Luke. See pp. 36 f. But now we have only to suppose that Matthew is a jazz enthusiast who plays the drums, and Luke a violinist who plays sonatas, in which case it will be fair, on this analysis, for Matthew to play whenever and as often as he likes, assuming, of course, as it is plausible to assume, that he does not care whether Luke plays or not. Certainly something has gone wrong. To each according to his threat advantage is hardly the principle of fairness. What is lacking is the concept of morality, and it must be brought into the conjectural account in some way or other. In the text this is done by the form of the procedure whereby principles are proposed and acknowledged (Section 3). If one starts directly with the particular case as known, and if one accepts as given and definitive the preferences and relative positions of the parties, whatever they are, it is impossible to give an analysis of the moral concept of fairness. Braithwaite's use of the theory of games, insofar as it is intended to analyze the concept of fairness, is, I think, mistaken. This is not, of course, to criticize in any way the theory of games as a mathematical theory, to which Braithwaite's book certainly contributes, nor as an analysis of how rational (and amoral) egoists might behave (and so as an analysis of how people sometimes actually do behave). But it is to say that if the theory of games is to be used to analyze moral concepts, its formal structure must be interpreted in a special and general manner as indicated in the text. Once we do this, though, we are in touch again with a much older tradition.

ognized situations wherein the parties are mutually aware that one of them is being forced to accept what the other would concede is unjust. The foregoing analysis may then be thought of as representing the actual quality of relations between persons as defined by practices accepted as just. In such practices the parties will acknowledge the principles on which it is constructed, and the general recognition of this fact shows itself in the absence of resentment and in the sense of being justly treated. Thus one common objection to the theory of the social contract, its apparently historical and fictitious character, is avoided.

5. That the principles of justice may be regarded as arising in the manner described illustrates an important fact about them. Not only does it bring out the idea that justice is a primitive moral notion in that it arises once the concept of morality is imposed on mutually self-interested agents similarly circumstanced, but it emphasizes that, fundamental to justice, is the concept of fairness which relates to right dealing between persons who are cooperating with or competing against one another, as when one speaks of fair games, fair competition, and fair bargains. The question of fairness arises when free persons, who have no authority over one another, are engaging in a joint activity and amongst themselves settling or acknowledging the rules which define it and which determine the respective shares in its benefits and burdens. A practice will strike the parties as fair if none feels that, by participating in it, they or any of the others are taken advantage of, or forced to give in to claims which they do not regard as legitimate. This implies that each has a conception of legitimate claims which he thinks it reasonable for others as well as himself to acknowledge. If one thinks of the principles of justice as arising in the manner described, then they do define this sort of conception. A practice is just or fair, then, when it satisfies the principles which those who participate in it could propose to one another for mutual acceptance under the afore-mentioned circumstances. Persons engaged in a just, or fair, practice can face one another openly and support their respective positions, should they appear questionable, by reference to principles which it is reasonable to expect each to accept.

It is this notion of the possibility of mutual acknowledgment of principles by free persons who have no authority over one another which makes the concept of fairness fundamental to justice. Only if such acknowledgment is possible can there be true community between persons in their common practices; otherwise their relations will appear to them as founded to some extent on force. If, in ordinary speech, fairness applies more particularly to practices in which there is a choice whether to engage or not (e.g., in games, business competition), and justice to practices in which there is no choice (e.g., in slavery), the element of necessity does not render the conception of mutual acknowledgment inapplicable, although it may make it much more urgent to change unjust than unfair institutions. For one activity in which one can always engage is that of proposing and acknowledging principles to one another supposing each to be similarly circumstanced; and to judge practices by the principles so arrived at is to apply the standard of fairness to them.

Now if the participants in a practice accept its rules as fair, and so have no complaint to lodge against it, there arises a prima facie duty (and a corresponding prima facie right) of the parties to each other to act in accordance with the practice when it falls upon them to comply. When any number of persons engage in a practice, or conduct a joint undertaking according to rules, and thus restrict their liberty, those who have submitted to these restrictions when required have the right to a similar acquiescence on the part of those who have benefited by their submission. These conditions will obtain if a practice is correctly acknowledged to be fair, for in this case all who participate in it will benefit from it. The rights and duties so arising are special rights and duties in that they depend on previous actions voluntarily undertaken, in this case on the parties having engaged in a common practice and knowingly accepted its benefits.[13] It is not, however, an obligation which presupposes a deliberate performative act in the sense of a promise, or contract, and the

[13] For the definition of this prima facie duty, and the idea that it is a special duty, I am indebted to H. L. A. Hart. See his paper "Are There Any Natural Rights?," *Philosophical Review*, LXIV (1955), 185 f.

like.[14] An unfortunate mistake of proponents of the idea of the social contract was to suppose that political obligation does require some such act, or at least to use language which suggests it. It is sufficient that one has knowingly participated in and accepted the benefits of a practice acknowledged to be fair. This prima facie obligation may, of course, be overridden: it may happen, when it comes one's turn to follow a rule, that other considerations will justify not doing so. But one cannot, in general, be released from this obligation by denying the justice of the practice only when it falls on one to obey. If a person rejects a practice, he should, so far as possible, declare his intention in advance, and avoid participating in it or enjoying its benefits.

This duty I have called that of fair play, but it should be admitted that to refer to it in this way is, perhaps, to extend the ordinary notion of fairness. Usually acting unfairly is not so much the breaking of any particular rule, even if the infraction is difficult to detect (cheating), but taking advantage of loop-holes or ambiguities in rules, availing oneself of unexpected or special circumstances which make it impossible to enforce them, insisting that rules be enforced to one's advantage when they should be suspended, and more generally, acting contrary to the intention of a practice. It is for this reason that one speaks of the sense of fair play: acting fairly requires more than simply being able to follow rules; what is fair must often be felt, or perceived, one wants to say. It is not, however, an unnatural extension of the duty of fair play to have it include the obligation which participants who have knowingly accepted the benefits of their common practice owe to each other to act in accordance with it when their performance falls due; for it is usually considered unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it. Thus one might say of the tax-dodger that he violates the duty of fair play: he accepts the benefits of government but will not do his part in releasing resources to it; and members of labor unions often say that fellow workers who

[14] The sense of "performative" here is to be derived from J. L. Austin's paper in the symposium, "Other Minds," *Proceedings of the Aristotelian Society*, Supplementary Volume (1946), pp. 170-174.

refuse to join are being unfair: they refer to them as "free riders," as persons who enjoy what are the supposed benefits of unionism, higher wages, shorter hours, job security, and the like, but who refuse to share in its burdens in the form of paying dues, and so on.

The duty of fair play stands beside other prima facie duties such as fidelity and gratitude as a basic moral notion; yet it is not to be confused with them.[15] These duties are all clearly distinct, as would be obvious from their definitions. As with any moral duty, that of fair play implies a constraint on self-interest in particular cases; on occasion it enjoins conduct which a rational egoist strictly defined would not decide upon. So while justice does not require of anyone that he sacrifice his interests in that *general position* and procedure whereby the principles of justice are proposed and acknowledged, it may happen that in particular situations, arising in the context of engaging in a practice, the duty of fair play will often cross his interests in the sense that he will be required to forego particular advantages which the peculiarities of his circumstances might permit him to take. There is, of course, nothing surprising in this. It is simply the consequence of the firm commitment which the parties may be supposed to have made, or which they would make, in the general position, together with the fact that they have participated in and accepted the benefits of a practice which they regard as fair.

Now the acknowledgment of this constraint in particular cases, which is manifested in acting fairly or wishing to make amends, feeling ashamed, and the like, when one has evaded it, is one of the forms of conduct by which participants in a common practice exhibit their recognition of each other as persons with

[15] This, however, commonly happens. Hobbes, for example, when invoking the notion of a "tacit covenant," appeals not to the natural law that promises should be kept but to his fourth law of nature, that of gratitude. On Hobbes's shift from fidelity to gratitude, see Warrender, *op. cit.*, pp. 51-52, 233-237. While it is not a serious criticism of Hobbes, it would have improved his argument had he appealed to the duty of fair play. On his premises he is perfectly entitled to do so. Similarly Sidgwick thought that a principle of justice, such as every man ought to receive adequate requital for his labor, is like gratitude universalized. See *Methods of Ethics*, Bk. III, ch. v, Sec. 5. There is a gap in the stock of moral concepts used by philosophers into which the concept of the duty of fair play fits quite naturally.

similar interests and capacities. In the same way that, failing a special explanation, the criterion for the recognition of suffering is helping one who suffers, acknowledging the duty of fair play is a necessary part of the criterion for recognizing another as a person with similar interests and feelings as oneself.[16] A person who never under any circumstances showed a wish to help others in pain would show, at the same time, that he did not recognize that they were in pain; nor could he have any feelings of affection or friendship for anyone; for having these feelings implies, failing special circumstances, that he comes to their aid when they are suffering. Recognition that another is a person in pain shows itself in sympathetic action; this primitive natural response of compassion is one of those responses upon which the various forms of moral conduct are built.

Similarly, the acceptance of the duty of fair play by participants in a common practice is a reflection in each person of the recognition of the aspirations and interests of the others to be realized by their joint activity. Failing a special explanation, their acceptance of it is a necessary part of the criterion for their recognizing one another as persons with similar interests and capacities, as the conception of their relations in the general position supposes them to be. Otherwise they would show no recognition of one another as persons with similar capacities and interests, and indeed, in some cases perhaps hypothetical, they would not recognize one another as persons at all, but as complicated objects involved in a complicated activity. To recognize another as a person one must respond to him and act towards him in certain ways; and these ways are intimately connected with the various prima facie duties. Acknowledging these duties in *some* degree, and

[16] I am using the concept of criterion here in what I take to be Wittgenstein's sense. See *Philosophical Investigations*, (Oxford, 1953); and Norman Malcolm's review, "Wittgenstein's *Philosophical Investigations*," *Philosophical Review*, LXIII (1954), 543-547. That the response of compassion, under appropriate circumstances, is part of the criterion for whether or not a person understands what "pain" means, is, I think, in the *Philosophical Investigations*. The view in the text is simply an extension of this idea. I cannot, however, attempt to justify it here. Similar thoughts are to be found, I think, in Max Scheler, *The Nature of Sympathy*, tr. by Peter Heath (New Haven, 1954). His way of writing is often so obscure that I cannot be certain.

so having the elements of morality, is not a matter of choice, or of intuiting moral qualities, or a matter of the expression of feelings or attitudes (the three interpretations between which philosophical opinion frequently oscillates); it is simply the possession of one of the forms of conduct in which the recognition of others as persons is manifested.

These remarks are unhappily obscure. Their main purpose here, however, is to forestall, together with the remarks in Section 4, the misinterpretation that, on the view presented, the acceptance of justice and the acknowledgment of the duty of fair play depends in every day life solely on there being a *de facto* balance of forces between the parties. It would indeed be foolish to underestimate the importance of such a balance in securing justice; but it is not the only basis thereof. The recognition of one another as persons with similar interests and capacities engaged in a common practice must, failing a special explanation, show itself in the acceptance of the principles of justice and the acknowledgment of the duty of fair play.

The conception at which we have arrived, then, is that the principles of justice may be thought of as arising once the constraints of having a morality are imposed upon rational and mutually self-interested parties who are related and situated in a special way. A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or to acknowledge before one another when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be their peculiar condition, and thus when it meets standards which the parties could accept as fair should occasion arise for them to debate its merits. Regarding the participants themselves, once persons knowingly engage in a practice which they acknowledge to be fair and accept the benefits of doing so, they are bound by the duty of fair play to follow the rules when it comes their turn to do so, and this implies a limitation on their pursuit of self-interest in particular cases.

Now one consequence of this conception is that, where it applies, there is no moral value in the satisfaction of a claim incompatible with it. Such a claim violates the conditions of

reciprocity and community amongst persons, and he who presses it, not being willing to ackowledge it when pressed by another, has no grounds for complaint when it is denied; whereas he against whom it is pressed can complain. As it cannot be mutually acknowledged it is a resort to coercion; granting the claim is possible only if one party can compel acceptance of what the other will not admit. But it makes no sense to concede claims the denial of which cannot be complained of in preference to claims the denial of which can be objected to. Thus in deciding on the justice of a practice it is not enough to ascertain that it answers to wants and interests in the fullest and most effective manner. For if any of these conflict with justice, they should not be counted, as their satisfaction is no reason at all for having a practice. It would be irrelevant to say, even if true, that it resulted in the greatest satisfaction of desire. In tallying up the merits of a practice one must toss out the satisfaction of interests the claims of which are incompatible with the principles of justice.

6. The discussion so far has been excessively abstract. While this is perhaps unavoidable, I should now like to bring out some of the features of the conception of justice as fairness by comparing it with the conception of justice in classical utilitarianism as represented by Bentham and Sidgwick, and its counterpart in welfare economics. This conception assimilates justice to benevolence and the latter in turn to the most efficient design of institutions to promote the general welfare. Justice is a kind of efficiency.[17]

[17] While this assimilation is implicit in Bentham's and Sidgwick's moral theory, explicit statements of it as applied to justice are relatively rare. One clear instance in *The Principles of Morals and Legislation* occurs in ch. x, footnote 2 to section XL: ". . . justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward on certain occasions, and by certain means, the purposes of benevolence. The dictates of justice are nothing more than a part of the dictates of benevolence, which, on certain occasions, are applied to certain subjects. . . ." Likewise in *The Limits of Jurisprudence Defined*, ed. by C. W. Everett (New York, 1945), pp. 117 f., Bentham criticizes Grotius for denying that justice derives from utility; and in

Now it is said occasionally that this form of utilitarianism puts no restrictions on what might be a just assignment of rights and duties in that there might be circumstances which, on utilitarian grounds, would justify institutions highly offensive to our ordinary sense of justice. But the classical utilitarian conception is not totally unprepared for this objection. Beginning with the notion that the general happiness can be represented by a social utility function consisting of a sum of individual utility functions with identical weights (this being the meaning of the maxim that each counts for one and no more than one),[18] it is commonly assumed that the utility functions of individuals are similar in all essential respects. Differences between individuals are ascribed to accidents of education and upbringing, and they should not be taken into account. This assumption, coupled with that of diminishing marginal utility, results in a prima facie case for equality, e.g., of equality in the distribution of income during any given period of time, laying aside indirect effects on the future. But even if utilitarianism is interpreted as having such restrictions built into the utility function, and even if it is supposed that these restrictions have in practice much the same result as the application of the principles of justice (and appear, perhaps, to be ways of expressing these principles in the language of mathematics and psychology), the fundamental idea is very different from the conception of justice as fairness. For one thing,

The Theory of Legislation, ed. by C. K. Ogden (London, 1931), p. 3, he says that he uses the words "just" and "unjust" along with other words "simply as collective terms including the ideas of certain pains or pleasures." That Sidgwick's conception of justice is similar to Bentham's is admittedly not evident from his discussion of justice in Book III, ch. v of *Methods of Ethics*. But it follows, I think, from the moral theory he accepts. Hence C. D. Broad's criticisms of Sidgwick in the matter of distributive justice in *Five Types of Ethical Theory* (London, 1930), pp. 249-253, do not rest on a misinterpretation.

[18] This maxim is attributed to Bentham by J. S. Mill in *Utilitarianism*, ch. v, paragraph 36. I have not found it in Bentham's writings, nor seen such a reference. Similarly James Bonar, *Philosophy and Political Economy* (London, 1893), p. 234 n. But it accords perfectly with Bentham's ideas. See the hitherto unpublished manuscript in David Baumgardt, *Bentham and the Ethics of Today* (Princeton, 1952), Appendix IV. For example, "the total value of the stock of pleasure belonging to the whole community is to be obtained by multiplying the number expressing the value of it as respecting any one person, by the number expressing the multitude of such individuals" (p. 556).

that the principles of justice should be accepted is interpreted as the contingent result of a higher order administrative decision. The form of this decision is regarded as being similar to that of an entrepreneur deciding how much to produce of this or that commodity in view of its marginal revenue, or to that of someone distributing goods to needy persons according to the relative urgency of their wants. The choice between practices is thought of as being made on the basis of the allocation of benefits and burdens to individuals (these being measured by the present capitalized value of their utility over the full period of the practice's existence), which results from the distribution of rights and duties established by a practice.

Moreover, the individuals receiving these benefits are not conceived as being related in any way: they represent so many different directions in which limited resources may be allocated. The value of assigning resources to one direction rather than another depends solely on the preferences and interests of individuals as individuals. The satisfaction of desire has its value irrespective of the moral relations between persons, say as members of a joint undertaking, and of the claims which, in the name of these interests, they are prepared to make on one another;[19]

[19] An idea essential to the classical utilitarian conception of justice. Bentham is firm in his statement of it: "It is only upon that principle [the principle of asceticism], and not from the principle of utility, that the most abominable pleasure which the vilest of malefactors ever reaped from his crime would be reprobated, if it stood alone. The case is, that it never does stand alone; but is necessarily followed by such a quantity of pain (or, what comes to the same thing, such a chance for a certain quantity of pain) that the pleasure in comparison of it, is as nothing: and this is the true and sole, but perfectly sufficient, reason for making it a ground for punishment" (*The Principles of Morals and Legislation*, ch. II, sec. iv. See also ch. X, sec. x, footnote 1). The same point is made in *The Limits of Jurisprudence Defined*, pp. 115 f. Although much recent welfare economics, as found in such important works as I. M. D. Little, *A Critique of Welfare Economics*, 2nd ed. (Oxford, 1957) and K. J. Arrow, *Social Choice and Individual Values* (New York, 1951), dispenses with the idea of cardinal utility, and use instead the theory of ordinal utility as stated by J. R. Hicks, *Value and Capital*, 2nd ed. (Oxford, 1946), Pt. I, it assumes with utilitarianism that individual preferences have value as such, and so accepts the idea being criticized here. I hasten to add, however, that this is no objection to it as a means of analyzing economic policy, and for that purpose it may, indeed, be a necessary simplifying assumption. Nevertheless it is an assumption which cannot be made in so far as one

and it is this value which is to be taken into account by the (ideal) legislator who is conceived as adjusting the rules of the system from the center so as to maximize the value of the social utility function.

It is thought that the principles of justice will not be violated by a legal system so conceived provided these executive decisions are correctly made. In this fact the principles of justice are said to have their derivation and explanation; they simply express the most important general features of social institutions in which the administrative problem is solved in the best way. These principles have, indeed, a special urgency because, given the facts of human nature, so much depends on them; and this explains the peculiar quality of the moral feelings associated with justice.[20] This assimilation of justice to a higher order executive decision, certainly a striking conception, is central to classical utilitarianism; and it also brings out its profound individualism, in one sense of this ambiguous word. It regards persons as so many *separate* directions in which benefits and burdens may be assigned; and the value of the satisfaction or dissatisfaction of desire is not thought to depend in any way on the moral relations in which individuals stand, or on the kinds of claims which they are willing, in the pursuit of their interests, to press on each other.

7. Many social decisions are, of course, of an administrative nature. Certainly this is so when it is a matter of social utility in what one may call its ordinary sense: that is, when it is a question of the efficient design of social institutions for the use of common means to achieve common ends. In this case either the benefits and burdens may be assumed to be impartially distributed, or the question of distribution is misplaced, as in the instance of maintaining public order and security or national defense. But as an interpretation of the basis of the principles of justice, classical

is trying to analyze moral concepts, especially the concept of justice, as economists would, I think, agree. Justice is usually regarded as a separate and distinct part of any comprehensive criterion of economic policy. See, for example, Tibor Scitovsky, *Welfare and Competition* (London, 1952), pp. 59-69, and Little, *op. cit.*, ch. VII.

[20] See J. S. Mill's argument in *Utilitarianism*, ch. V, pars. 16-25.

utilitarianism is mistaken. It *permits* one to argue, for example, that slavery is unjust on the grounds that the advantages to the slaveholder as slaveholder do not counterbalance the disadvantages to the slave and to society at large burdened by a comparatively inefficient system of labor. Now the conception of justice as fairness, when applied to the practice of slavery with its offices of slaveholder and slave, would not allow one to consider the advantages of the slaveholder in the first place. As that office is not in accordance with principles which could be mutually acknowledged, the gains accruing to the slaveholder, assuming them to exist, cannot be counted as in *any* way mitigating the injustice of the practice. The question whether these gains outweigh the disadvantages to the slave and to society cannot arise, since in considering the justice of slavery these gains have no weight at all which requires that they be overridden. Where the conception of justice as fairness applies, slavery is *always* unjust.

I am not, of course, suggesting the absurdity that the classical utilitarians approved of slavery. I am only rejecting a type of argument which their view allows them to use in support of their disapproval of it. The conception of justice as derivative from efficiency implies that judging the justice of a practice is always, in principle at least, a matter of weighing up advantages and disadvantages, each having an intrinsic value or disvalue as the satisfaction of interests, irrespective of whether or not these interests necessarily involve acquiescence in principles which could not be mutually acknowledged. Utilitarianism cannot account for the fact that slavery is always unjust, nor for the fact that it would be recognized as irrelevant in defeating the accusation of injustice for one person to say to another, engaged with him in a common practice and debating its merits, that nevertheless it allowed of the greatest satisfaction of desire. The charge of injustice cannot be rebutted in this way. If justice were derivative from a higher order executive efficiency, this would not be so.

But now, even if it is taken as established that, so far as the ordinary conception of justice goes, slavery is always unjust (that is, slavery by definition violates commonly recognized principles of justice), the classical utilitarian would surely reply

that these principles, as other moral principles subordinate to that of utility, are only generally correct. It is simply for the most part true that slavery is less efficient than other institutions; and while common sense may define the concept of justice so that slavery is unjust, nevertheless, where slavery would lead to the greatest satisfaction of desire, it is not wrong. Indeed, it is then right, and for the very same reason that justice, as ordinarily understood, is usually right. If, as ordinarily understood, slavery is always unjust, to this extent the utilitarian conception of justice might be admitted to differ from that of common moral opinion. Still the utilitarian would want to hold that, as a matter of moral principle, his view is correct in giving no special weight to considerations of justice beyond that allowed for by the general presumption of effectiveness. And this, he claims, is as it should be. The every day opinion is morally in error, although, indeed, it is a useful error, since it protects rules of generally high utility.

The question, then, relates not simply to the analysis of the concept of justice as common sense defines it, but the analysis of it in the wider sense as to how much weight considerations of justice, as defined, are to have when laid against other kinds of moral considerations. Here again I wish to argue that reasons of justice have a *special* weight for which only the conception of justice as fairness can account. Moreover, it belongs to the concept of justice that they do have this special weight. While Mill recognized that this was so, he thought that it could be accounted for by the special urgency of the moral feelings which naturally support principles of such high utility. But it is a mistake to resort to the urgency of feeling; as with the appeal to intuition, it manifests a failure to pursue the question far enough. The special weight of considerations of justice can be explained from the conception of justice as fairness. It is only necessary to elaborate a bit what has already been said as follows.

If one examines the circumstances in which a certain tolerance of slavery is justified, or perhaps better, excused, it turns out that these are of a rather special sort. Perhaps slavery exists as an inheritance from the past and it proves necessary to dismantle it piece by piece; at times slavery may conceivably be an advance

on previous institutions. Now while there may be some excuse for slavery in special conditions, it is never an excuse for it that it is sufficiently advantageous to the slaveholder to outweigh the disadvantages to the slave and to society. A person who argues in this way is not perhaps making a wildly irrelevant remark; but he is guilty of a moral fallacy. There is disorder in his conception of the ranking of moral principles. For the slaveholder, by his own admission, has no moral title to the advantages which he receives as a slaveholder. He is no more prepared than the slave to acknowledge the principle upon which is founded the respective positions in which they both stand. Since slavery does not accord with principles which they could mutually acknowledge, they each may be supposed to agree that it is unjust: it grants claims which it ought not to grant and in doing so denies claims which it ought not to deny. Amongst persons in a general position who are debating the form of their common practices, it cannot, therefore, be offered as a reason for a practice that, in conceding these very claims that ought to be denied, it nevertheless meets existing interests more effectively. By their very nature the satisfaction of these claims is without weight and cannot enter into any tabulation of advantages and disadvantages.

Furthermore, it follows from the concept of morality that, to the extent that the slaveholder recognizes his position vis-a-vis the slave to be unjust, he would not choose to press his claims. His not wanting to receive his special advantages is one of the ways in which he shows that he thinks slavery is unjust. It would be fallacious for the legislator to suppose, then, that it is a ground for having a practice that it brings advantages greater than disadvantages, if those for whom the practice is designed, and to whom the advantages flow, acknowledge that they have no moral title to them and do not wish to receive them.

For these reasons the principles of justice have a special weight; and with respect to the principle of the greatest satisfaction of desire, as cited in the general position amongst those discussing the merits of their common practices, the principles of justice have an absolute weight. In this sense they are not contingent; and this is why their force is greater than can be accounted for by the general presumption (assuming that there is one) of the

effectiveness, in the utilitarian sense, of practices which in fact satisfy them.

If one wants to continue using the concepts of classical utilitarianism, one will have to say, to meet this criticism, that at least the individual or social utility functions must be so defined that no value is given to the satisfaction of interests the representative claims of which violate the principles of justice. In this way it is no doubt possible to include these principles within the form of the utilitarian conception; but to do so is, of course, to change its inspiration altogether as a moral conception. For it is to incorporate within it principles which cannot be understood on the basis of a higher order executive decision aiming at the greatest satisfaction of desire.

It is worth remarking, perhaps, that this criticism of utilitarianism does not depend on whether or not the two assumptions, that of individuals having similar utility functions and that of diminishing marginal utility, are interpreted as psychological propositions to be supported or refuted by experience, or as moral and political principles expressed in a somewhat technical language. There are, certainly, several advantages in taking them in the latter fashion.[21] For one thing, one might say that this is what Bentham and others really meant by them, as least as shown by how they were used in arguments for social reform. More importantly, one could hold that the best way to defend the classical utilitarian view is to interpret these assumptions as moral and political principles. It is doubtful whether, taken as psychological propositions, they are true of men in general as we know them under normal conditions. On the other hand, utilitarians would not have wanted to propose them merely as practical working principles of legislation, or as expedient maxims to guide reform, given the egalitarian sentiments of modern society.[22]

[21] See D. G. Ritchie, *Natural Rights* (London, 1894), pp. 95 ff., 249 ff. Lionel Robbins has insisted on this point on several occasions. See *An Essay on the Nature and Significance of Economic Science*, 2nd ed. (London, 1935), pp. 134-43, "Interpersonal Comparisons of Utility: A Comment," *Economic Journal*, XLVIII (1938), 635-41, and more recently, "Robertson on Utility and Scope," *Economica*, n.s. XX (1953), 108 f.

[22] As Sir Henry Maine suggested Bentham may have regarded them. See *The Early History of Institutions* (London, 1875), pp. 398 ff.

When pressed they might well have invoked the idea of a more or less equal capacity of men in relevant respects if given an equal chance in a just society. But if the argument above regarding slavery is correct, then granting these assumptions as moral and political principles makes no difference. To view individuals as equally fruitful lines for the allocation of benefits, even as a matter of moral principle, still leaves the mistaken notion that the satisfaction of desire has value in itself irrespective of the relations between persons as members of a common practice, and irrespective of the claims upon one another which the satisfaction of interests represents. To see the error of this idea one must give up the conception of justice as an executive decision altogether and refer to the notion of justice as fairness: that participants in a common practice be regarded as having an original and equal liberty and that their common practices be considered unjust unless they accord with principles which persons so circumstanced and related could freely acknowledge before one another, and so could accept as fair. Once the emphasis is put upon the concept of the mutual recognition of principles by participants in a common practice the rules of which are to define their several relations and give form to their claims on one another, then it is clear that the granting of a claim the principle of which could not be acknowledged by each in the general position (that is, in the position in which the parties propose and acknowledge principles before one another) is not a reason for adopting a practice. Viewed in this way, the background of the claim is seen to exclude it from consideration; that it can represent a value in itself arises from the conception of individuals as separate lines for the assignment of benefits, as isolated persons who stand as claimants on an administrative or benevolent largesse. Occasionally persons do so stand to one another; but this is not the general case, nor, more importantly, is it the case when it is a matter of the justice of practices themselves in which participants stand in various relations to be appraised in accordance with standards which they may be expected to acknowledge before one another. Thus however mistaken the notion of the social contract may be as history, and however far it may overreach itself as a general theory of social and polit-

ical obligation, it does express, suitably interpreted, an essential part of the concept of justice.[23]

8. By way of conclusion I should like to make two remarks: first, the original modification of the utilitarian principle (that it require of practices that the offices and positions defined by them be equal unless it is reasonable to suppose that the representative man in *every* office would find the inequality to his advantage), slight as it may appear at first sight, actually has a different conception of justice standing behind it. I have tried to show how this is so by developing the concept of justice as fairness and by indicating how this notion involves the mutual acceptance, from a general position, of the principles on which a practice is founded, and how this in turn requires the exclusion from consideration of claims violating the principles of justice. Thus the slight alteration of principle reveals another family of notions, another way of looking at the concept of justice.

Second, I should like to remark also that I have been dealing with the *concept* of justice. I have tried to set out the kinds of principles upon which judgments concerning the justice of practices may be said to stand. The analysis will be successful to the degree that it expresses the principles involved in these judgments when made by competent persons upon deliberation and reflection.[24] Now every people may be supposed to have the

[23] Thus Kant was not far wrong when he interpreted the original contract merely as an "Idea of Reason"; yet he still thought of it as a *general* criterion of right and as providing a general theory of political obligation. See the second part of the essay, "On the Saying 'That may be right in theory but has no value in practice' " (1793), in *Kant's Principles of Politics*, tr. by W. Hastie (Edinburgh, 1891). I have drawn on the contractarian tradition not for a general theory of political obligation but to clarify the concept of justice.

[24] For a further discussion of the idea expressed here, see my paper, "Outline of a Decision Procedure for Ethics," in the *Philosophical Review*, LX (1951), 177-197. For an analysis, similar in many respects but using the notion of the ideal observer instead of that of the considered judgment of a competent person, see Roderick Firth, "Ethical Absolutism and the Ideal Observer," *Philosophy and Phenomenological Research*, XII (1952), 317-345. While the similarities between these two discussions are more important than the differences, an analysis based on the notion of a considered judgment of a competent person, as it is based on a kind of judgment, may prove more helpful in understanding the features of moral judgment than an analysis based on

concept of justice, since in the life of every society there must be at least some relations in which the parties consider themselves to be circumstanced and related as the concept of justice as fairness requires. Societies will differ from one another not in having or in failing to have this notion but in the range of cases to which they apply it and in the emphasis which they give to it as compared with other moral concepts.

A firm grasp of the concept of justice itself is necessary if these variations, and the reasons for them, are to be understood. No study of the development of moral ideas and of the differences between them is more sound than the analysis of the fundamental moral concepts upon which it must depend. I have tried, therefore, to give an analysis of the concept of justice which should apply generally, however large a part the concept may have in a given morality, and which can be used in explaining the course of men's thoughts about justice and its relations to other moral concepts. How it is to be used for this purpose is a large topic which I cannot, of course, take up here. I mention it only to emphasize that I have been dealing with the concept of justice itself and to indicate what use I consider such an analysis to have.

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the notion of an ideal observer, although this remains to be shown. A man who rejects the conditions imposed on a considered judgment of a competent person could no longer profess to *judge* at all. This seems more fundamental than his rejecting the conditions of observation, for these do not seem to apply, in an ordinary sense, to making a moral judgment.