

The Trouble with Justice

Christopher W. Morris

Introduction

Must we *always* be just? Presumably. Might we *sometimes* have reason *not* to be just? The answer to this second question is not obvious, since justice is different in some ways that make a difference.

Contrast justice with some of the other principal virtues, for instance, prudence, courage, temperance, or wisdom. Justice is a social virtue; its *interpersonal* element is central. Generosity, as well as benevolence or charity, are also interpersonal, but they are not owed to specific people. One should aid others, but the choice of when to act benevolently is up to one to decide. The obligation to be just, by contrast, is for the most part owed to specific individuals.

The “cautious, jealous virtue of justice,” as the eighteenth century moral philosopher David Hume puts it, is different in other ways. It is *jealous* in demanding obedience even on occasions when its usefulness is not obvious. It is *cautious* in that it would rarely have us

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aim for the best, seeming instead to settle for the stable and the secure.

Justice is also an *imperial* virtue, and its partisans often seek to secure its dominance, sometimes even by banishing other virtues from the realm of ethics or morality. In modern moral philosophy there is a disposition to identify justice with most or sometimes all of morality.

The trouble with justice can be stated simply: despite its apparent authority and preeminence, it seems that *sometimes we do not have reason to be just or, as we shall see, reasons of the right kind*. The problem is not, as the seventeenth-century political philosopher Thomas Hobbes’ Foole seems to have thought, that “there is no such thing as Justice”, or that, as the eighteenth-century moral thinker Immanuel Kant put it, “merely a

chimerical [i]dea without truth . . . [a] mere phantom of the brain. . . .”

Immoralists of the kind characteristically found in philosophical fiction are something of a distraction. Genuine immoralists sometimes seem to be psychopaths, humans who are defective in particular ways. More ordinary unjust or evil people usually recognize most of the simple norms of justice, apply them to many people, and have recognizable human dispositions and sympathies, however limited they may be. (It is said that “Goebbels loved children and dogs,” and we may imagine that Saddam Hussein treated his kin and tribesmen better than his other subjects.)

What I have dubbed the trouble with justice is more of an everyday problem. As thieves and ruffians all recognize, we need justice. But *sometimes* it seems to pay *not to be just*. More exactly, sometimes it appears that we do not have reason, or the right kind of reasons, to be just.

From the trouble with justice arises a suspicion, raised with startling explicitness in 1959 by the British philosopher Philippa Foot:

But what, it will be asked, of justice? For while prudence, courage and temperance are qualities which benefit the man who has them, justice seems rather to benefit others and to work to the disadvantage of the just man himself. . . . The man who avoids injustice will find himself in need of things he has returned to their owner, unable to obtain an advantage by cheating and lying. . . . We will be asked how, on our theory, justice can be a virtue and injustice a vice, since it will surely be difficult to show that any man whatsoever must need to be just as he needs the use of his hands and eyes, or needs prudence, courage or temperance?

Foot adds, infamously, “Before answering this question I shall argue that if it cannot be answered, then justice can no longer be recommended as a virtue.”

Justice seems to be in trouble.

Sources of the Trouble

The Interpersonal Nature of Justice. The question is whether one always has a reason to be just (and a reason of the right kind). It is not obvious that the answer is affirmative. Why is that? A number of features of justice may be the source of the trouble. The first has

already been mentioned: the interpersonal and other-regarding nature of justice. Just acts appear not to aim, at least not directly, at the good of the actor. Why be just in those circumstances where one does not care for the good of others?

It is easy to think that undue attention to the interests of the self—egoism—is the source of the trouble here, but that is a mistake. Selfishness and other vices of self-interestedness may not be uncommon. But they are not essential to the problem. Self-interestedness is only an extreme form of *partiality*, and it is partiality that is the source of the problem. Whenever justice asks us to benefit another, someone with whose interests we are not sufficiently concerned, the question arises as to *why* we should do as required. Our interests or the interests of friends and countrymen may appeal to us more.

The Jealous and Demanding Nature of Justice. Justice is not only cautious, but it is jealous and demanding as well. By this I do not necessarily mean that its requirements are onerous. Rather, what I am thinking of is the *constraining* nature of justice. It requires that we abide by certain norms or rules, that we respect the rights of others, and that we give them what they are due. We are not merely to strive to do this; we must do no less. We may think of justice as imposing normative *constraints* on our behavior.

Suppose that we think of justice as aiming at an end, the common good or the general interests of people (or something else). Then the question arises as to why one should abide by a particular requirement of justice when one could, more efficiently, secure by other

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means the common good or general welfare? It seems, then, that the norms or rules of justice at times appear to require us to act in non-consequential ways, that they instruct us not always to act on the balance of reasons. The problem is one of the rationality of action. It is especially acute if one thinks of practical rationality, as is customary in economics and much of social theory, as having a maximizing structure—or at least as requiring action in accordance with the balance of reasons. It is then puzzling how requirements that would have us eschew acting in a maximally effective way can be justified.

The Normative Nature of Justice. The third and last feature of justice that I wish to highlight is its normative nature, in the particular sense that justice guides

us principally through norms or rules or, in an archaic, non-specialized sense of the term, *laws*.

Norms or laws are usually imperfect means of securing our well being for the most part. This means that sometimes particular just acts will be useless. Hume notes this in his account of the artificial nature of justice. He argues that the rules of justice “seek their end in an oblique and indirect manner,” and he notes that:

tho’ the rules of justice are establish’d merely by interest, their connexion with interest is somewhat singular, and is different from what may be observ’d on other occasions. A single act of justice is frequently contrary to *public interest*; and were it to stand alone, without being follow’d by other acts, may, in itself, be very prejudicial to society. When a man of merit, of a beneficent disposition, restores a great fortune to a miser, or a seditious bigot, he has acted justly and laudably, but the public is a real sufferer.

If we think that justice must require, at least on occasion, that we be guided by (non-ideal) practices or conventions, then we should expect to find single acts of justice that appear to be useless or even harmful—restoring a fortune to a miser or bigot. Additionally, if a right to act is a right to act wrongly (though not in ways seriously unjust), then particular acts of guaranteeing people their rights may result in wrongful or harmful behavior.

The trouble with justice seems to be caused then by three features: the virtue’s other-regarding or interpersonal nature, its constraining nature (in the sense explained), and the fact that its requirements usually take the form of norms or rules. It might be helpful to step back and to ask why we need justice and what this tells us about the virtue.

The Need for Justice

Put simply, we need justice in order to live well. But the particular kinds of situations that give rise to the need for justice also create the trouble for justice. As many thinkers have observed, Hobbes and Hume notable among them, the human condition is generally one in which arises a certain amount of conflict that is based on our partiality and the prevalence of scarcity.

In small groups of friends, it may be possible to think that one can do without justice. But, as Hume notes, “. . . when society has become numerous, and has encreas’d to a tribe or nation . . .,” the interests that bind us are less apparent.

The norms or laws of justice seek to improve things, at least for all who strive to be just. They aim at the good of all, the common good, or the mutually advantageous. What is missing from our account to date is an analysis of the way in which justice tends to the good of all. Rules or norms which secure our common good may well elicit our approval or endorsement, and that may be good enough much of the time. But justice seems to entail more than can be delivered by

approval or endorsement. The norms of justice pretend to be reasons of a special kind. In terms introduced above, the norms of justice are said to be reasons that would have us act in ways that sometimes contravene the balance of reasons. We are to act as required, even if more good may be done by not so acting. The norms of justice are reasons that are meant to *preempt* some of the other reasons we may have to act.

The conflicts that are found in the circumstances of justice—the conditions of partiality and scarcity referred to above—and the possibility of mutually beneficial arrangements are what makes justice useful. The norms of justice aim to improve things, at least for those who strive to be just. We can see how a number of norms governing, for instance, what we may do regarding the lives and possessions of others (negative duties not to kill, assignment of liabilities for risky behavior, duties of rescue or of mutual aid), forms of interaction (norms governing truth-telling, fidelity, and the like), and status (norms governing treating others with respect) can be understood as addressing the problems we find in “the circumstances of justice.”

Accounts of this kind all make aspects of justice—specifically, the content of some norms—dependent on practices. Legal systems are an example of such practices (but much of justice is possible in the absence of positive law). Those constraints of justice that are reciprocal—that is, whose obligations are conditional on the constrained behavior of others—will also depend on practices. Frequently, practices may be indeterminate and need development. In the best of the worlds available to us, our practices and consequently our norms of justice will be imperfect in a number of ways. It is not clear how this could be avoided. As moral philosopher James Griffin has argued:

We have to give up the hope . . . that we can actually arrive at moral norms shaped solely by moral reasons for action, in contrast to the norms shaped, in no small degree, by convention and arbitrary decision that we have now. Moral philosophy can provide grounds for criticizing our present norms. But when we have gone as far as criticism will, for the moment, carry us, we shall still not have eliminated all elements of convention and arbitrariness. Since life with these less than ideal norms is the only moral life we are ever going to have, we must get on with it.

Although we *need* justice, we should expect that there will be situations where we find ourselves without reason, or reasons of the requisite sort, to be just.

Three Responses

One can think of three possible responses to this situation:

Justice is not a virtue. Early in her career, the contemporary moral thinker, Philippa Foot entertained the hypothesis that justice is not a virtue. This is mistaken; Foot herself did not defend it, and she now most cer-

tainly rejects it. Justice is simply too important for *us*. But therein lies the problem: while prudence, courage, temperance, or wisdom are good for us, they are in the first instance good for *me* (each of us). Justice may be good for me, but indirectly; it is first of all good for us *collectively*. The difficulty is the familiar, even if rather oddly named, collective action problem.

Justice is conditional. Let me move immediately to the second response. This is that of Hobbes, Hume, and others. Essentially it consists in restricting the scope of norms of justice essentially to the set of agents able and willing to abide by them; the scope of justice is less than universal. Hobbes, for instance, argues that in the absence of the conditions required to stabilize norms of cooperation, “nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where there is no Law, no Injustice. . . .” And Hume asks us to entertain the notion that were

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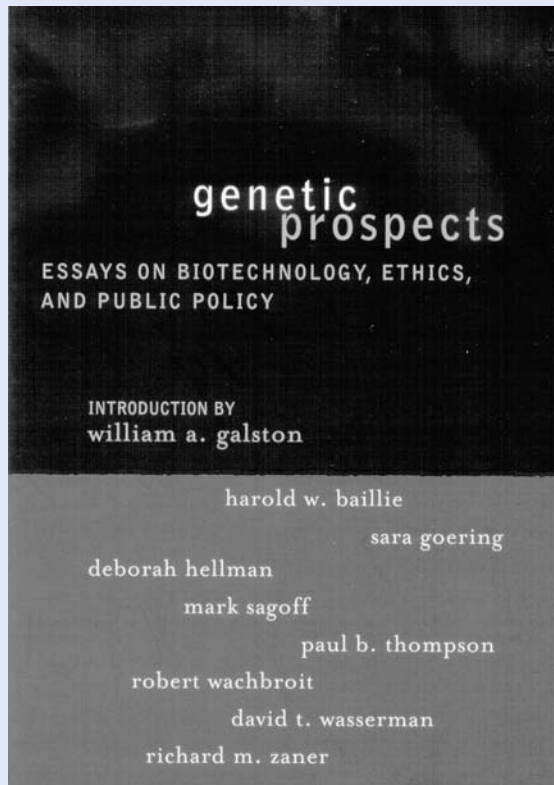
someone “to fall into the society of ruffians, remote from the protection of laws and government . . .” that he may “make provision of all means of defense and security: And his particular regard to justice being no longer of use to his own safety or that of others, he must consult the dictates of self-preservation alone . . .”

But it is not only ruffians who are in danger of losing the protection of justice, it is also those unable to benefit us:

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence, I think, is that we should be bound by the laws of humanity to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property, exclusive of such arbitrary lords.

Creatures such as these will not be completely unprotected; but “Our compassion and kindness [are] the only check, by which they curb our lawless will. . . .”

Hume notes that “This is plainly the situation of men, in regard to animals,” and that “In many nations, the female sex are reduced to like slavery. . . .” The infirm, unloved orphans, and the unproductive, among others, may also be left without the protection



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**Genetic Prospects: Essays on
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Public Policy Studies series)

While the collapse of the Soviet Union has diminished the force of George Orwell's *1984*, the other great dystopian tract of the twentieth century, Aldous Huxley's *Brave New World*, is timelier than ever. The ongoing process of genetic science may well revolutionize medicine and human reproduction, and it may end by giving us the ability to transform the human species itself. This new power has raised hopes that we will solve a range of genetically based problems that afflict us. It has also evoked fears that we are on the verge of a "post human" future in which precious but necessary norms regulating individual and social life will be set aside. Will we have the moral and political wisdom to avoid the pitfalls in using new biotechnologies?

Genetic Prospects considers the resources from which the needed norms and maxims might be drawn, scrutinizing carefully the contributions of common sense, religion, and moral sentiment. Taken together, the essays in this volume apply philosophical analysis to address three kinds of questions: What are the implications of genetic science for our understanding of nature? What might it influence in our conception of human nature? What challenges does genetic science poses for specific issues of private conduct or public policy?

Contributors: Harold W. Baillie, William A. Galston, Sara Goering, Deborah Hellman, Mark Sagoff, Paul B. Thompson, Robert Wachbroit, David T. Wasserman, and Richard M. Zaner

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of justice, sheltered only by our compassion and kindness.

There are other sorts of cases where it seems that some people will be left out. In conditions of emergency many norms of justice could be overridden or suspended. But not all such norms: it would simply not be plausible to think that it would cease ever to be wrong intentionally to kill innocent, non-threatening people—for instance, children, even those of our enemy. Suppose that the only effective means of defending ourselves against an adversary would be to harm, or to threaten to harm, the families and countrymen of our enemy. May we retaliate against a nuclear attack by destroying enemy cities? Or may we torture

and kill the families of terrorists who plant nuclear weapons in our cities? Presumably not. That is, it would be an injustice to do those things to innocent people. That is not to say that in the circumstances we have no reason to act unjustly; that is, I do not assume that understanding a course of action to be *unjust* necessarily makes it *irrational* or unreasonable. That is precisely the question under consideration.

The universal scope of justice. I shall move right away to the third and only credible position that I can think of or understand. Many of the norms of justice seem to have universal scope in two respects: virtually all humans or persons are assumed to have moral standing, and all human agents have a number of

obligations to anyone with moral standing. The scope of the norms of justice is not unlike that of law: the universal quantifiers are to be interpreted literally.

The scope of many norms of justice are universal in these ways. In addition, the norms are supposed to be *authoritative*; that is, they are meant to be reasons (to act or to refrain from acting, to adopt certain attitudes, to assign responsibility, etc.) applicable to all (to whom they apply) on all occasions (when they apply). A *reason for action* here is a consideration favoring an action that ought, in the absence of other considerations, to motivate an agent so to act. The authority justice claims over us is more than an additional consideration favoring action, to be added to the balance of reasons. For one, the reasons in question are meant not to be conditional on our interests or desires. The reasons justice claims to offer are not considerations which are just to be added to all the other factors that ought to determine one's deliberations, as I noted earlier. Rather, they are to settle the matter and to determine one's conduct.

Because they are meant to settle the matter, authoritative reasons are *preemptive*. As the legal theorist and philosopher Joseph Raz explains, "authoritative reasons are preemptive: the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them."

Now the norms of justice which are, at least in part, "artificial" in Hume's sense are dependent for their force on the existence of certain conventions and practices. This is clear in the case of property: whether walking across someone's land or drawing from someone's well constitutes trespass or theft depends on the moral and legal conventions of the setting. In some cultures or societies lost objects become the property of the finder, whereas in others finders have some obligation to find the owners. Norms of truth-telling and fidelity seem especially sensitive to the particularities of given practices.

We might, then, as with other systems of *conventional* norms, such as manners and the law, anticipate the existence of conflict between parts of justice as well as between justice and some of the other virtues. We would expect the laws of nature, whether established by an omniscient, benevolent deity or by nature itself, to form a consistent set. But we should have no such expectation of any complex set or system of conventional norms. Just as we expect to find conflicts between different laws or different parts of the law, so we might expect to find conflicts between different norms of justice or between different virtues insofar as these have conventional aspects. The conflicts may not be deep or may only be apparent, but we have no reason to expect human-made conventions, developed

over a long time, in varying settings, to be consistent. As James Griffin insightfully observes:

Our norms are unlikely to have grown in a way that would make them a system; they have grown, by fits and starts, in response to pressing, heterogeneous practical needs. . . . I think we come to ethics with a false assumption. We expect the content of morality to derive from one kind of source—namely, from principles of one sort or another. We expect it to derive from the good, or from the right, or from fairly normative standards of rationality. The reality seems to me quite different. When we understand the forces shaping moral norms of property, say, we see how heterogeneous the forces are.

If this is the case, we should not be surprised to find many instances of norms of justice which are not, in fact, always preemptive reasons.

In many parts of the world today it sometimes seems that resolving certain long-lasting conflicts and securing peace comes at the price of sacrificing justice. Recently, in Argentina, South Africa, the Middle East, Northern Ireland, and several Central and Eastern European countries, many accommodations have been defended in the name of peace with the understanding, implicit or explicit, that justice is thereby sacrificed. Amnesties of different kinds have been defended as necessary for peace, even though they allow many crimes to go unpunished.

Justice is a virtue that would have us shun compromise and accommodation, at least in most contexts. But in the contemporary cases, the conflict with the cause of peace seems so clear and pressing that it is not unreasonable to think that justice should lose; in nearly all of the cases alluded to above, it does lose. If so, the norms of justice are not always preemptive reasons.

Do We Always Have Reasons to Be Just?

The failure of all norms of justice to be authoritative is a blow to the self-image of justice. This seems plausible with regard to some moral norms, for instance, those governing truth-telling or fidelity. Critics will respond by trying to show that apparent violations of these norms, where it appears we lack preemptive reasons to tell the truth or to be faithful to engagements, are in fact instances of the rules being defeated or our disregard of them excused. This response will undoubtedly be right in some such cases.

But it is not plausible that *all* the cases where we have sufficient reason to tell a lie will be covered by the complex defeasibility or excusing conditions governing this norm. Consider cases where someone has told a falsehood with the intention to deceive, where it seems a violation of our norms of truth-telling to do so; are *all* the cases ones where the exceptions are handled by the norm or by some other moral consideration? We do not often think about the case of lying when pleading in a criminal trial, presumably because we expect and excuse lying about one's guilt in a criminal pro-

ceeding. We might say that wrongdoers may lie and plead innocent when accused of a crime because such pleas are part of a system designed to secure justice through adversarial proceedings. But what about the guilty criminal who pleads innocence solely in the hope of acquittal, where there is no danger that a guilty (or *nolo contendere*) plea would risk increasing the penalty? This plea of innocence seems wrong even if legally permissible, but that we do not for a moment think that the criminal has preemptive reasons to concede guilt.

Consider cases of theft. The poor who steal a loaf of bread to feed their hungry children are perhaps excused given their plight. And we suppose that certain emergencies can override normal property rights so that stealing someone's car in order to save someone's life may be justifiable in certain circumstances.

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But what about those who help themselves to some neglected cash found in an office safe or drawer? Presumably they are doing wrong or committing an injustice. Are there *never* any cases of this sort where we act wrongly without disregarding any preemptive reasons against stealing? Suppose the cash we take belongs to a person or institution which will not miss it—Hume's miser—and that we want to use it for our children's education or to take a long trip abroad with a friend. It seems somewhat farfetched to think that *all* such cases of theft are instances of acting against preemptive reasons. Similarly, a physician may be tempted to favor a relative or friend in decisions on the allocation of spare organs, or a university official may be tempted to favor a friend's child in college admissions decisions. Are there really *no* such cases where the person would be acting wrongly but without preemptive reasons? That seems unlikely.

The denial of the thesis that the norms of justice are *always* preemptive reasons may appear much less plausible regarding certain central norms of justice—for instance, the principle prohibiting the intentional killing of non-threatening innocent persons. This may also be true with the prohibition of cruelty. Do we not *always* have preemptive reasons to abide by these norms? If not, are *all* cases of where it seems reasonable to disregard these norms ones where one is so *justified* or *excused*?

Justice undoubtedly is understood to forbid such things; what is doubtful is that *every agent in every situ-*

ation in fact has preemptive reasons to comply. Consider particular cases of intentional killings of the innocent in wartime, for instance, the targeting of German cities at the beginning of the Second World War (when the survival of Great Britain was uncertain) or the bombing of Japanese cities at the end. It is not implausible to think that at least some of these bombings were unjust. It is also certainly possible that some of the bombings were wrong though the statesmen who ordered them did not, in fact, have preemptive reasons to desist. They were not justified in bombing, and the situation did not excuse their acts; they acted wrongly but not against reason.

Suppose you have in your possession the family of the leader of a group of homicide bombers known to be planning to detonate several small nuclear weapons throughout your country. Would it not be unjust to coerce or torture them so as to deter the bombers, even if that would be an effective means to defend oneself? I should have thought so. But the injustice of this act would not necessarily be a reason, much less a preemptive reason for action.

Conclusion

I think it is quite clear what *justice* requires in each of these examples. Details may have to be changed in order to achieve consensus about the examples. They will reinforce the conviction of consequentialists that "morality" would have us override the concerns of justice. But I am not interested in battling these foes here. I take justice more seriously than they do; I take it at face value. Recall nineteenth century moral philosopher John Stuart Mill's well-known view that "justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice." The "other social duty" he mentions does not necessarily derive from some other part of justice. I do not know what other parts of morality could serve to override justice. In any case, my main concern has been to suggest that we may not in fact have reasons of the requisite sort to be just in all of the situations where we ought to be, and that there has to be more than a handful such cases.

Justice may still be *practical* even if its norms fail to be authoritative in all circumstances in which they apply. For one, even if one lacks the preemptive reasons that justice is said to give us, there are many other reasons to do what is right. One might fear being caught or merely be squeamish or worry what others might think. These are not the right sorts of reasons, of course. But most of the time, just behavior seems over

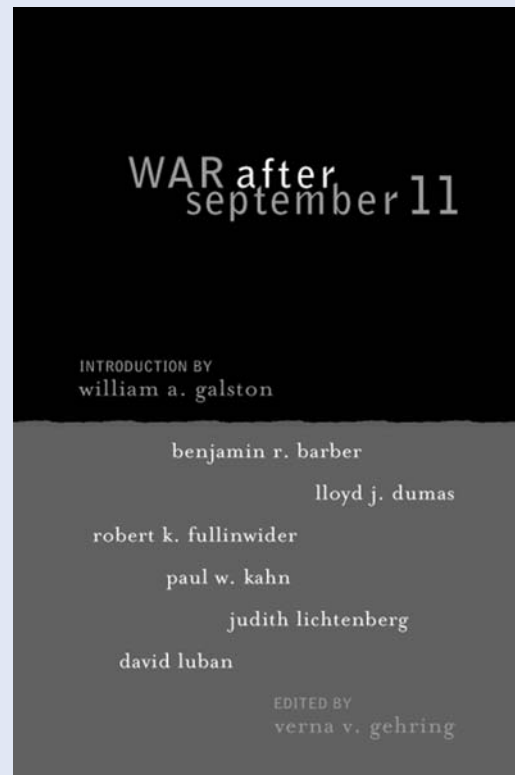
WAR AFTER SEPTEMBER 11

What are the limits of justified retaliation against aggression? What actions are morally permissible in preventing future aggression? Against whom may retaliation be aimed? These questions have long been part of the debate over the ethics of warfare. They all took on new meaning after terrorists hijacked four US airliners on September 11, 2001.

War after September 11 considers the just aims and legitimate limits of the United States' response to the terrorist attacks. Six essayists from the Institute for Philosophy and Public Policy at the University of Maryland pair off to discuss ethical questions such as, What are the moral challenges posed by terrorism? Can modern terrorism be addressed within the existing paradigms of just war and international law? Should the U.S. respond militarily or by some other means? Taken together, the essays in this volume ask the fundamental question: How should the United States use its power to combat terrorism?

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determined, and so the trouble with justice may not, in practice, be all that troublesome. But it is troubling for moral theorists.

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Sources: David Hume, *An Enquiry Concerning the Principles of Morals* (also referred to as the *Second Enquiry*), edited by L.A. Selby-Bigg (Oxford: Clarendon Press, 1902) Sec. III, Part I, 145; Thomas Hobbes, *Leviathan*, translated by Edwin Curley (Hackett, Indianapolis: 1994) chapter xv; Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by H.J. Paton (New York: Harper & Row, 1964) Part II; Philippa Foot, "Moral Beliefs," in her *Virtues and Vices: And Other Essays in*

Moral Philosophy (Oxford: Blackwell, 1978); the quotes from Hume that appear in "The Normative Nature of Justice" section occur in David Hume, *A Treatise of Human Nature*, edited by L.A. Selby-Bigg (Oxford: Clarendon, second ed., 1975), Book III, Part II; James Griffin, "On the Winding Road from Good to Right," in *Value, Welfare, and Morality*, edited by R.G. Frey and Christopher W. Morris (Cambridge UP, 1993); Hume's quote concerning the "society of ruffians" occurs in the *Second Enquiry*, section III, Part I, and for further discussion see: Christopher W. Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy*, vol. 21 (March 1991). To Hume's point that some may be left without the protection of justice, I wish to add that it is possible that the scope of the norms of justice can be extended in ways that will protect the infirm and non-autonomous. I have tried to do this elsewhere; see my "Moral Standing and Rational-Choice Contractarianism," in *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement*, edited by Peter Vallentyne (Cambridge UP, 1991); Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) (emphasis deleted).