



The Virtue of Charity and its Foils (2000)

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The Virtue of Charity and its Foils

JOHN GARDNER

1. *The variety of moral virtues*

[T]hat moral virtue, that we can truly measure by civil laws, which is different in different states, is justice and equity; that moral virtue which we measure purely by natural laws is only charity. Furthermore, all moral virtue is contained in these two.¹

Hobbes' restriction of the range of moral virtues to two may be thought excessively parsimonious. What about honesty, loyalty, courage, considerateness, tolerance, public-spiritedness, conscientiousness, trustworthiness, and all the rest? Hobbes evidently thinks that these are not distinct moral virtues. But is that because they are not *virtues*? Or because they are not *moral*? Or because they are not *distinct*? 'A bit of each' seems to be Hobbes' answer. But Hobbes doesn't stop to offer any very illuminating explanations. One has the impression that, like many other philosophers of the modern age, he finds the diversity of moral virtues a philosophical embarrassment. He hopes to tidy things up without making the kind of fuss that would only serve to draw attention to their untidiness.

Why would this be? Here is one obvious explanation. As well as varying in the spirit in which they act (warmer or colder, more spontaneous or more deliberate, with more levity or more gravitas, etc), people with different moral virtues vary in how astute they are, and how much importance they attach, to

¹ Thomas Hobbes, *De Homine*, in William Molesworth (ed), *The Latin Works of Thomas Hobbes* (London: Bohn 1839-1845), volume II, at 116-117.

different sub-groups of moral reasons. They have, to put it another way, different moral *priorities*. In particular, what one person is disposed to regard as sufficient moral reason in itself to **N**, another may well regard as insufficient. Hence people with different moral virtues often react differently to the same situation – one is inclined to **N** and the other to (– sometimes to the point of mutual antagonism or mutual frustration. When the only alternative to a betrayal is a deceit, for example, some (more loyal) will baulk more at the betrayal (‘what is a little white lie when my friend’s reputation is at stake?’), whereas others (more honest) will baulk more at the deceit (‘what friend worth his salt would have me tell lies merely for the sake of his reputation?’). Since each applies these distinctive priorities not only to herself but also to others – they are, after all, *moral* priorities – the two will sometimes look askance on each other’s actions. But in that case (the thinking goes) surely they can’t *both* be right? Surely at least one of them must be morally misguided, treating some reason as a sufficient reason for action when it is actually insufficient? Surely, in other words, it must be the case that either the more honest person is being *too* honest or the more loyal person is being *too* loyal? Otherwise we are landed with the embarrassing conclusion that the more loyal person is justified in doing as he does while the more honest person is no less justified in objecting, and *vice versa*.

Something like this line of thought led many philosophers of the modern age to attempt to isolate one single trait of character which is the *master* moral virtue, the one which consistently alights on the correct overall priorities for any moral agent and in the process (so to speak) *arbitrates* between the more selective moral priorities of virtues like loyalty and honesty. To fill this space some utilitarians alighted on a rather austere kind of public-spiritedness which has come to be known as ‘impartial

benevolence' or 'responsible benevolence';² Kant and some of his followers, meanwhile, opted for variations on the rather different, but no less austere, theme of diligence or conscientiousness.³ Insofar as other traits like honesty and loyalty are moral virtues at all, according to these tidy modern views, they are not *distinct* moral virtues but merely subsidiary aspects of the relevant master-virtue. On the Kantian view, for instance, a loyal person is strictly speaking morally virtuous only insofar as he is *diligently* (ie duty-observingly) loyal. If he is so loyal that his astuteness to the interests of his friend or his party or his country displaces, rather than subserving, his astuteness to considerations of duty pure and simple, his loyalty necessarily becomes, in Kantian eyes, a moral limitation rather than a moral virtue. Now he is loyal *to a fault*. Thus when his loyalty has him act differently from the way that the perfectly diligent person would act (ie has him breach his duty for any reason other than that he has another more pressing duty⁴) his action may very well be morally excused but it cannot possibly be morally justified. And there are well-known parallel utilitarian suggestions: justice, insofar as it is a moral virtue at all, is merely an aspect of the virtue of impartial benevolence, for one should always keep the interests of all in view even when judging among the few, etc.

These well-known Kantian and utilitarian abridgements of moral character are bound together by two shared assumptions, both of which are false. First, both assume that direct moral success is automatically superior to indirect moral success. Whether it be thanks to lack of information, weakness of will, or

² This custom-designed utilitarian virtue is nicely discussed in William Frankena, 'Beneficence/Benevolence', (1987) 4 *Social Philosophy and Policy* 1.

³ For a subtle rendition of the Kantian virtue, see Barbara Herman, *The Practice of Moral Judgment* (Cambridge Mass., Harvard University Press, 1993), ch 1.

⁴ Kant thought that moral duties cannot conflict and so would omit the qualification. I include it because this aspect of Kant's thought has no direct bearing on the issue at stake here.

other obstacles within or beyond themselves, there exists a wide range of cases over which people are more likely to hit the moral target – to act exactly as morality would have them act – if they aim instead at something else. And *habitually* aiming at something else may sometimes maximise one’s hit rate over time, thus fully justifying one’s occasional misses (even when those could have been avoided by taking a direct aim). In a way these ‘misses’ are none other than bigger hits. This was the insight of rule-utilitarians like Mill and Sidgwick, who accordingly kept open their lists of distinct moral virtues.⁵ The honest or loyal person who overshoots the moral target in a given case is not being too honest or too loyal if the consequence of her being that honest or that loyal is that she hits the moral target more often than she would if she were to have compromised her honesty or her loyalty sufficiently to hit the target in this particular case. This immediately opens up logical space for a more honest person and a more loyal person to look askance at each other’s actions without forcing us to the conclusion that either the former is too honest or the latter too loyal. All else being equal both may be justified (and not merely excused) in their actions and reactions, for in being pre-disposed to act and react as she does, prioritising some sub-group of moral reasons for action out of proportion to their real moral priority, each improves her overall hit rate judged not only according to her priority but according to the *real* moral priority.

But even in saying this we are granting the second false assumption underlying the ‘master virtue’ view. We are talking as if there *is* always a ‘real moral priority’, some singular moral target that should ideally be hit (whether directly or indirectly) in each case. In reality there is often no such thing. There are many distinct non-derivative moral values, and these are not

⁵ J.S. Mill, *Utilitarianism* (ed. Crisp, Oxford, Oxford University Press, 1998), ch 5; Henry Sidgwick, *The Methods of Ethics* (7th ed., London, Macmillan, 1907), ch. 11.

comprehensively ranked in respect of their relative importance. So there is no unified master-prioritisation by which to judge, and hence to rank, the diverse moral priorities of the honest person, the loyal person, the diligent person, the public-spirited person, and so forth. While some prioritisation of moral reasons is certainly the work of the reasons themselves – without this there could be no such thing as an error of judgment, no such thing as a vice or fault, etc – nevertheless there comes a point at which the reasons abdicate responsibility for their own prioritisation and leave the reasoner to his or her own devices. Different moral virtues, on this more Aristotelian view, are among the reasoner's own devices: they are dispositions to prioritise different sub-groups of moral reasons within the bounds fixed by the independent prioritisations imposed by the reasons themselves (after these have been adjusted for the possibility of indirect success).⁶ This does not mean that one can never be too honest or too loyal, etc. One is indeed too honest if one tends to spill one's thoughts on any subject, however sensitive, as soon as one is asked to. One is likewise too loyal if one tends to stand by people however nasty they turn. These are

⁶ There is a controversy over whether this really *is* Aristotle's view, or rather a reconstruction of what he ought to have thought given his other views. After all he does seem to pledge allegiance at NE 1144^b32 to 1145^a2 to the Platonic thesis of the unity of the virtues', according to which to possess one moral virtue is to possess them all. The tension is helpfully discussed, but not solved, by Terence Irwin in 'Disunity in the Aristotelian Virtues' in Julia Annas (ed), *Oxford Studies in Ancient Philosophy: Supplementary Volume 1988* (Oxford, Clarendon Press, 1988) 61. My own interpretation of the 'unity' passage is that it commits Aristotle only to the following theses: (a) that there is a 'threshold' moral virtue (the virtue of responsibility) such that if one does not exhibit it at all then one also exhibits no others; and (b) that to exhibit the threshold virtue impeccably is to exhibit all others *in some measure* though not necessarily impeccably, so long as any shortfall in one is owed to impeccability in another. Obviously this is not the place to defend this interpretation or to defend the view (as I think, correct) that it yields.

dispositions which violate the independent constraints of moral reasons, systematically overshooting even their own moral targets and thereby undershooting all others. But one is not, on the other hand, too honest merely because one's honesty compromises one's loyalty, or too loyal merely because one's loyalty compromises one's honesty. One is not too loyal or too honest merely because in hitting one target one misses another. Nor is this merely thanks to the logical space opened up by the insight of the rule-utilitarians. It is for the deeper reason that one cannot but continue to prioritise among moral reasons even after those moral reasons have ceased prioritising themselves, and so one cannot hope, even in principle, to hit every moral target only according to the order in which the target ought, morally, to be hit. Beyond a certain point, there *is* no such order independently of the customised way in which one's moral character represents it.

These remarks are directed against those modern philosophers who famously mined for the fool's gold of a single master moral virtue. But so far they do not seem to speak to Hobbes' more quirky proposal. For Hobbes, after all, there are two distinct moral virtues. If he has got this far, you may ask, then why not further? Why not three or seven or fifty? After all, even to recognise the existence of two distinct moral virtues he must surely have managed to overcome the embarrassment of which I spoke, the embarrassment at the thought that two people, one charitable and the other just, might both be entirely justified in objecting to, maybe even frustrating, each other's actions. Surely he must already have conceded either the Millian point or the Aristotelian point? And surely, with either of those points conceded, the further diversification of moral character beyond justice and charity poses no further philosophical threat? Philosophically, isn't it just more of the same? True enough. Which makes one wonder whether Hobbes really *has* conceded either the Millian or the Aristotelian point, ie whether, in treating justice and charity as distinct, he really *has* reconciled

himself to the possibility that a just person and a charitable person could be at odds with each other, without it following that either the first is too just or the second too charitable. One wonders whether there isn't perhaps some significance in Hobbes' choice of *these* two moral virtues to appear on his official list.

Perhaps the relationship of the just and the charitable is a special one, not analogous to that between the loyal and the honest, and so not opening the same philosophical can of worms. Could it be that, although they clearly act in different spirits, the impeccably just person and her charitable counterpart somehow end up not being at odds when it comes to the prioritisation of moral reasons? In which case Hobbes's view aligns with the 'master virtue' view, to which it merely adds an interesting twist. There is one ultimate set of moral priorities (*contra* Aristotle) and they are indeed to be served directly (*contra* Mill and Sidgwick), but there is nevertheless a moral division of labour, such that different people, acting in different spirits, deal with different parts of the moral operation, and (unless in error) never step on each other's toes. So neither justifiably shuns the other's justifiable actions, and the philosophical embarrassment of the opposite situation is avoided. In one sense, to be sure, the two virtues are distinct, for they involve acting in different *spirits*, and that means that, true enough, they cannot be impeccably manifested at the same time by one and the same person. But in another sense they are not distinct. Their rational priorities are mutually consistent and join up to form a single master set. It is, if you like, one master virtue with two subsidiary branches. Elsewhere Hobbes hints that this is the view he really has in mind. He talks as if there is only *one* real moral virtue - namely charity - of which justice is but a (more reliable, more organised) official or public branch.⁷

⁷ Thomas Hobbes, *The Elements of Law* (ed. Gaskin, Oxford, Oxford University Press, 1994), at 90-91, and (for the avoidance of doubt) at 101.

Even if one rejects all such ‘master virtue’ views (having recovered from the modern philosopher's embarrassment at the thought of mutual antagonism even among the morally unimpeachable), one may well still be tempted by the idea that the virtues of justice and charity, impeccably manifested, might indeed have some kind of special integrated or arbitrated relationship with each other. Isn't there, after all, a sense in which these two virtues are aspiring to occupy the very same moral space, identically defined? Aren't the just and the charitable both aspiring to provide answers to the moral question of *who gets what from whom*? Even if we grant that different and sometimes mutually antagonistic or frustrating priorities must emerge from people being concerned with different moral questions, it might still seem reasonable to expect compatible priorities among those who are especially concerned with the very *same* moral question. So if we temporarily narrow our moral attention down to the question of who gets what from whom, mightn't we expect morality *then* to give us a set of master priorities by which to judge people's own personal priorities – or in other words a kind of *localised* master-virtue (even if it is one requiring a division of labour between two temperamentally distinct types of agents)? I think this is a common view, especially among today's political philosophers who (under the influence of a myopic conception of the role of social organisation in human life) often do narrow their moral attention down to this one moral question.⁸ Arguably this is all that Hobbes himself is doing, for arguably he too regards the question of who gets what from whom as the key moral question facing what he calls ‘civil society’ (in fact, arguably today's myopic conception of the role of social organisation in human life is mainly his fault).

⁸ Most famously it is the question that dominates John Rawls' *A Theory of Justice* (Cambridge, Mass., Harvard University Press, 1971) and the vast literature that it has spawned.

But even with our attention artificially narrowed down to this one moral question, the ‘master virtue’ view is still, in my view, a profoundly mistaken one. There is no comprehensive prioritisation of priorities to be found that would arbitrate between the different moral priorities of the just and the charitable. Their quarrels – and quarrels they certainly have – are not signs that one or other of them is necessarily going too far, acting beyond her justified remit, usurping the other’s role, etc. Like the honest and the loyal, the just and the charitable may well resent or frustrate each other’s actions without any necessary implication that one of them is being too just or the other too charitable. Nor is this only for Millian reasons, ie because there are different indirect methods for hitting the same moral target. It is also for the deeper Aristotelian reason that, even in respect of the narrow question of who gets how much of what, there are various moral targets to aim at, multiple ultimate moral values at stake that are not transitively ranked by importance.

2. *Charity and justice*

[W]e feel ourselves to be under a stricter obligation to act according to justice, than agreeably to friendship, charity, or generosity; ... the practice of these last mentioned virtues seems to be left in some measure to our own choice, but ... somehow or other, we feel ourselves to be in a peculiar manner tied, bound, and obliged to the observation of justice.⁹

Smith is not alone in observing and trusting these feelings. One familiar account of the marriage of justice and charity portrays charity as justice’s Stepford Wife. If one wants to turn one’s case for getting more of something into a priority case, the story goes, one had best appeal direct to justice; charity is good-natured but

⁹ Adam Smith, *The Theory of Moral Sentiments* (ed. Raphael and Macfie, Oxford, Clarendon Press, 1976), at 80.

not very assertive. Many thoughts conspire to lend appeal to this view. One is Hobbes' thought, encountered above, that the priorities of the just, unlike those of the charitable, are suitable to be 'measured by civil laws'. If true (and we return to the question in section 5 below) doesn't this suggest that the priorities of the just are somehow more important, more insistent, or more fundamental than those of the charitable, and so fall to be satisfied first? And here is another apparently corroborating thought: Although people may well be regarded as too charitable, it sounds odd to say of someone - in the way that I did towards the end of the last section - that she is 'too just'.¹⁰ Perhaps one can never be too just. If that is right, then someone could in principle be insufficiently just thanks to being too charitable, but not the other way round. Could this apparent asymmetry be significant? It may be thought that it points to a dramatically one-sided relationship between the just and the charitable. A more just person may justifiably balk at what a more charitable person does, but not the other way round, for the more just person cannot be too just. And this in turn may seem to lend plausibility to the idea of an overarching moral prioritisation of the respective priorities of the just and the charitable. The moral priorities of the charitable play second fiddle. They can be overridden by but they cannot override those of the just.

How could this be so? Here are some well-known ways of distinguishing charity from justice which are supposed to explain and secure the kind of prioritisation between them that Smith claims to find reflected ordinary moral experience. All are mistaken.¹¹

¹⁰ Thanks to Janis Rosenthal for alerting me to this line of thought.

¹¹ Some of the views to be encountered here were also attacked by Allen Buchanan in 'Justice and Charity', (1987) 97 *Ethics* 558. However, his criticisms often do not square with mine. More sympathetic to my approach, although less detailed, are the remarks of Robert Goodin in *Protecting the Vulnerable* (Chicago, Chicago University Press, 1985), at 16-17.

Duty versus supererogation. Some think: If one does whatever impeccably just people do, then one does no more than one's moral duty, whereas what the charitable do is necessarily beyond the call of duty.¹² This would establish the lexical priority of justice on the assumption that one cannot justifiably fail to do one's duty in order to do something beyond the call of duty instead. In fact this assumption is false. If I break my promise to meet you for lunch because I stop off to save a drowning child from the canal at great personal risk, I act supererogatorily and yet my consequent breach of duty is amply justified.¹³ But be that as it may, the proposed mapping of the justice/charity distinction onto the duty/supererogation distinction distorts both virtues. What is certainly true – and important – is that the just are concerned, in a way in which the charitable are not, with people getting what is due to them from those from whom it is due. Possibly (let us concede for the time being) this does entail that the moral priorities of the just person are dominated, as those of the charitable are not, by duties. But even so, her actions *qua* just may go well beyond performing her *own* duties. They may include supererogatory actions of enabling, encouraging, persuading, cajoling, or even compelling others to render (and receive) their due. One may exhibit how just one is in campaigning tirelessly at great personal cost to organise appeals for people on death row, to secure compensation for impoverished victims of wrongdoing, etc.

¹² eg Alan Gewirth, 'Private Philanthropy and Positive Rights', (1987) 4 *Social Philosophy and Policy* 54, at 55. Gewirth speaks of 'philanthropy' but his definition of this includes all charitable giving as well as philanthropy in the strict sense discussed in section 3 below.

¹³ See Frances Kamm, 'Supererogation and Obligation', (1985) 82 *Journal of Philosophy* 118. To avoid begging any questions, my example in the text is one in which the conflict is not between justice and charity. Meeting you for lunch would not be a just thing to do (although it would be a considerate thing to do) and saving the child need not be unusually charitable (although it might be exceptionally courageous).

Conversely, people are sometimes only doing their duty in acting charitably. Or so, at any rate, they are apt to claim. Some, like Mother Theresa, even regard it as their duty to *devote their lives* to charitable endeavour *qua* charitable. It is one thing to say that these people are overzealous in holding themselves to have such an extensive duty of charity, but quite another to accuse them of defying logic in supposing that they could have any duties of charity at all. Could it really be true that the long history of such commitment to charitable endeavour, believed by the committed to be no more than their duty, is not only morally misguided but also conceptually confused? That defies belief. What might seem more credible, perhaps, is the thought that people only have duties of charity if they are sufficiently charitable types. That is to say, the value of the charitable spirit in which Mother Theresa acted made duties of actions that would not otherwise have been duties. By contrast, it may be said, we all have our duties of justice (eg to compensate those whom we have wronged) whether or not we are remotely just people. But that still cannot be right. It is a condition of the existence of any duty that it is possible in principle to perform it for no other reason than that it is one's duty. But performing a duty of charity for the sole reason that it is one's duty is inconsistent with performing it charitably. If one does this, one is not being charitable, but rather diligent or conscientious. One lacks the spirit of spontaneous fellow-feeling that animates one's charitable friends. It follows that being charitable cannot be a necessary condition of being under a duty of charity. You may object that the diligent or conscientious person's 'cold charity' has a rather poor reputation. True enough. But the explanation cannot be that such people are not doing their duty. A much more likely explanation is that they are doing it in a morally second-rate way, ie for second-best reasons and in a second-best spirit. *Pace* Kant and his followers, diligence is more like a fall-back virtue than a master-virtue. (All this is consistent, by the way, with the possibility that some duties of charity bind only those who

occupy certain roles, eg social workers, teachers, followers of certain religions, clerics, etc. The same is true of duties of justice, some of which only bind judges, others of which only bind parents, etc. That a duty is a moral one does not entail that it is *everyone's* duty.)

Rules versus decisions on the case. According to a different view, there may be duties of charity as well as duties of justice, but whereas duties of justice are embodied in rules, duties of charity arise one at a time, according to the merits of particular cases. The just person uses rules to settle who gets how much of what, but the charitable person is disposed to react *ad hoc* to localised variations in people's predicaments. This puts justice in the moral driving seat, it is thought, granted only the everyday assumption that even when we reason on the merits we must at least play by the rules.¹⁴ In fact, this latter assumption is groundless. Adherence to sound rules, even those establishing moral duties, is often just one of several justified ways to proceed. This is an elementary implication of what we learn from Mill and Sidgwick. But in any case, justice and charity cannot be differentiated according to the ruliness or unruliness of their respective priorities. That I make it my rule always to give everyone the benefit of the doubt in thinking about what is to be done for them or done to them makes me a decidedly charitable person. A just person might well be prepared to allow that rule, or even insist on it, in the particular context of criminal trials where someone is up against the might of the state, but would resist applying the rule more generally. Isn't this charitable rule (the just person might say) a kind of abdication of judgmental responsibility when those before us are all ordinary folk with their competing requests and requirements, and giving one the benefit of the doubt means (in effect) denying it to another? Isn't

¹⁴ A story along these lines emerges from Loren Lomasky, 'Justice to Charity', (1995) 12 *Social Philosophy and Policy* 32.

this rule a recipe for failing to give everyone their due? The debate here is not about *whether* rules are to be used but about *which* rules are to be used. Indeed in such a debate it might well be the just person rather than the charitable person who would be the first to abandon her resort to rules in favour of deliberation on the merits of the particular case. Solomon's most famous judicial intervention, after all, was tailor-made for a particular case and involved no rule-following on his part. Here we see the face of *equity*, which Hobbes classified, you will recall, as one of the faces of justice, not one of the faces of charity. And rightly so.

Perfect versus imperfect duties. Unlike duties of justice, it is sometimes said, duties of charity leave it to the duty-bearer to determine the particular occasions for compliance, so long as an adequate measure of compliance is chalked up over time.¹⁵ The latter are imperfect duties, whereas the former are perfect duties. Perfect duties surely take priority when they arise, the thinking goes, for (in view of their built-in flexibility) one generally has *other* opportunities to perform the imperfect ones without doing so at the expense of fulfilling perfect ones. One may doubt whether this distinction between types of duties is a distinction of substance, and (even if it is) whether it has the advertised implication for prioritisation.¹⁶ But even if the distinction works as its proponents say it does, it clearly fails to mark the difference between duties of justice and duties of charity. Recall the parable

¹⁵ The view is most closely associated with Kant: see his *Groundwork of the Metaphysic of Morals* (ed. Paton, New York, Harper and Row, 1964), at 89-91. There is more than one way to use the expression 'imperfect duty': see Onora O'Neill, 'The Great Maxims of Justice and Charity' in Neil MacCormick and Zenon Bankowski (eds), *Enlightenment, Rights, and Revolutions* (Aberdeen, Aberdeen University Press, 1989) 297, at 301-2. However I have interpreted it as Kant appears to interpret it in explaining why duties of charity are imperfect. For another interpretation, cf note 21 below.

¹⁶ See Jeremy Waldron, *Liberal Rights* (Cambridge, Cambridge University Press, 1993), at 14-16.

of the Good Samaritan. Even if the priest and the Levite have no duty of justice to help (even if the traveller in trouble has only himself to blame, even if helping would mean letting the original malefactors off the hook, even if the priest and the Levites have already done more than their bit for the sick and needy today, etc) it remains their duty of charity to help. If they do indeed have this duty, it is a duty of charity that is as perfect as could be. It is a duty to go to the aid of this particular traveller right here, right now. In fact, in this case the duties of justice seem to be the less perfect ones if any are, for they are the ones that seem to be chalking up credits and debits over time. Only a just person – dare I say someone who is *too* just, to the point of being a bit of a stickler? – would think, in a situation like this, about whether someone going to the injured traveller’s aid would be doing more than his due, or whether the traveller is asking for more than his due. ‘Who cares?’, a more charitable person would respond, ‘Can’t you see he’s in serious trouble? We can quibble later about what’s due to whom and from whom. Now is the time to lend a hand, no further questions asked.’ This imaginary exchange brings out that the ‘imperfect’ view of duties of charity is actually *the just person’s myopic view of what duties of charity are like*. It is a view which (predictably enough) turns duties of charity into (relatively unspecific) duties of justice instead, structured by the idea of *giving one’s due over time*. This idea of giving one’s due is the very idea that impeccably charitable people tend to regard as a distraction.

★

From these refutations there starts to emerge a positive picture of how the moral priorities of the just and the charitable really do contrast, a picture in which the sub-groups of moral reasons to which these character types are respectively astute differ not in their *force* but in their *content*. Of this emerging picture, however, various elements call for further explanation. The most important is the mysterious concept of the *due*, which the just person regards as central but the charitable person regards as distracting.

My explanation of the Samaritan case suggests that A can have a duty towards B even though, in the fulfilment of it, A will give more than her due and B will get more than his due. How can we make sense of this paradoxical-sounding suggestion? Here are a couple of explanations which get us closer to the truth about justice and charity, even though neither is spot on.

Deserts versus needs. One explanation has the just person caring primarily about what people *deserve*, whereas the charitable person cares first and foremost about what people *need*.¹⁷ If 'due' means something like 'deserved', then the idea of a duty without due-ness no longer sounds so paradoxical. One could have a duty of charity based on need which competes for attention with a duty of justice based on desert. This would also harmonise nicely with another point already mentioned. As we saw, the just often disagree with the charitable about whether and how to *judge* people. As compared with the just, the charitable tend to help others more often and more freely but they also judge others less often and less harshly. What exactly is the connection between these two tendencies? The proposal now under scrutiny explains. Since they give priority to the deserved, the just begin by judging *people* in order to judge how much those people ought to contribute or receive. Whereas the charitable think that such a judgmental outlook misses the more pressing problem of meeting people's needs, which are typically quite unrelated to their deserts.

This explanation is half right. It is right regarding the charitable and their attitude to desert. But the explanation is wrong regarding the just and their attitude to need. 'To each according to his needs' is a principle of justice, not a principle of charity. That is because of the special work done by the words

¹⁷ See Tom Campbell, 'Humanity Before Justice' (1974) 4 *British Journal of Political Science* 1. In allying Campbell with the view in the text I do not distinguish, as in a fuller analysis one should, between the humane and the charitable. My excuse is that Campbell also fails to keep them distinct.

'according to'. The just person cares about needs as well as deserts, but she cares about needs *on the model of deserts*. She treats needs as reasons for deciding *among* people (or groups of people) as possible recipients or contributors. To put it another way, she sees every action of contributing to others as a kind of adjudication in their favour. Others (including her) are (in effect) the losers, she says, so the question always arises whether the right people were favoured. If she ends up favouring the wrong people (the less needy, the less deserving, or whatever) it is always a failure for her *qua* just. But for the more charitable type it is still a success so long as help was indeed rendered to people who did indeed need it. This is not to say that faced with the choice between meeting a more urgent and a less urgent need, where all else is equal, we might as well opt to deal with the less urgent need, for that is no less charitable. On the contrary: that would be irrationality and cannot be justified as the action of a charitable person any more than it could be justified as the action of a just person. But the question is not whether such an irrational adjudication is justified. The question is whether all actions of helping the needy are to be conceived by those facing them as primarily raising questions of this adjudicative type, ie whether their success is to be judged by applying the just person's test of success rather than the charitable person's.

Plainly the answer is no. Even if we assume (wrongly) that there is an overall transitive ranking of different kinds of needs, and even if we assume (wrongly) that 'to each according to his needs' is the only sound principle of justice, it does not follow that *using* this sound principle of justice as one's own principle is the only way justifiably to set about meeting people's needs. We know from the rule-utilitarians that direct success is not the only kind of success, nor always the most reliable. The charitable may say that (even applying the test of whether each does receive *according to* her needs) we do better on the whole by worrying about people's needs as we notice them (ie simply by being astute to them *as needs*) than we would by always worrying about

whether we have indeed noticed them in the right order (ie by being astute to them as possible grounds for adjudicating among different competing claims on our time and energy and money). ‘Even if we do get some of them in the wrong order,’ the more charitable may say to their more just friends, ‘at least we were out there meeting them, whereas you guys were still sitting around quibbling about *who* should meet *whose* needs, and which *first*, and so forth. Didn’t you notice that meanwhile some people were *dying*? What kind of sense of priority is that?’ Of course, as one would expect in a quarrel among those with different moral virtues, this scathing remark puts an excessively negative spin on what the just were doing. Unlike the depressing sticklers who take their concern with what is due too far (and sometimes do indeed quibble people to death), impeccably just people know where to draw the line. But still they draw the line differently from their more charitable friends. For they *do* think that adjudicative concerns – identifying who has the strongest claim and meeting it first – have a higher priority in sound reasoning than the charitable person is prepared to allow. Over a range of cases more charitable people will justifiably be shocked that their more just friends were willing to see A’s needs go unmet merely because A had already had a lot of needs met as compared with B, or B had already made his contribution to A’s needs and it was now C’s turn to do something for a change, etc. Meanwhile the more just types will justifiably get sniffy at the tendency of the charitable to go off and meet people’s needs willy nilly, without giving much weight to such important objections.

A fortiori once other adjudicative criteria, such as desert, are put back into play so that the just person has an even larger stock of adjudicative objections to draw on, and can accuse the charitable not only of overlooking the more needy, but also of letting the guilty off the hook or rewarding the malefactors, etc. At this point we leave behind the mainly Millian disagreement between the two characters and embark on what can only be a deeper Aristotelian one. For now there are clearly multiple moral

targets to hit and they cannot be comprehensively ranked independently of the moral characters of those who do the ranking. In particular there are undeserving people in dire need (eg child-murderers held for years in intolerable psychological conditions on death row) and deserving people with less pressing needs (eg innocent people who have been ripped off and lost part of their life-savings). It is logically impossible to reduce these two cross-cutting dimensions of morality - the evaluation of people and the evaluation of their predicaments - to a single-value moral project. As the failures of Kant and the classical utilitarians showed, doing so cannot but be reductive in respect of one or other of the two dimensions. Either one follows the utilitarian path and ends up missing out (or rather instrumentalising to the point of unrecognisability) the moral evaluation of people, or else one follows the Kantian path and ends up missing out (or rather relegating to the supposedly subordinate domain of prudence) the moral evaluation of their predicaments. Either way one has lost sight of an essential aspect of morality. I am not saying, I should stress, that this is the only irreducible schism to be found among ultimate moral concerns. Nor am I saying that the just are more Kantian in their priorities and the charitable more utilitarian. I am only saying that sometimes their differences of priority may bring that old philosophical division to mind, reminding us that *some* moral schisms are beyond being explained away as merely Millian or Sidgwickian differences.

Rights versus goals. But maybe (some will say) there is a more direct connection with the old philosophical dispute. Couldn't the difference between the two characters under discussion perhaps be summed up by saying that, to the extent that both care about helping others, the just care about honouring people's *rights* to be helped whereas the charitable downplay those rights in favour of the *goal* of helping? The contrast between rights and

goals is a well-known false contrast.¹⁸ It also has nothing much to do with the struggle between Kant and the utilitarians. All the same, it might have something to do with the struggle between the just and the charitable. A right to charity is admittedly an odder thing to claim than a right to justice. Could this point to an easy way of restating the relevant notion of ‘dueness’? Maybe what is due to me from you is no more and no less than what I have a right to as against you. In which case there can be a duty to provide more than is due to another, as in the Good Samaritan story, if and only if there can be duties not based on that other’s rights. And indeed there can be such duties. Many moral duties, such as my duty to pay my taxes and my duty to vote and my duty not to pollute the river, are not rights-based. Maybe duties of charity belong in the same class?¹⁹

Well actually, they cannot *quite* belong in the same class. The duties just mentioned are not rights-based duties because they are not duties to serve any distinct person’s (or any distinct group of people’s) interests.²⁰ But the moral duty of the priest, the Levite, and the Samaritan is clearly a duty to serve the interests of the forlorn traveller. Isn’t that enough to make it a rights-based duty of charity? I think it is: the duty is owed to the traveller, it is based on his right. So there is indeed a right to charity here. The oddness of talking about such rights is not semantic but pragmatic. We live in such legalistic times that when we think about rights to charity, we tend to think first about the traveller *claiming* such a right against someone. Thinking in those terms,

¹⁸ Rights are possible goals. Cf Amartya Sen, ‘Rights and Agency’, (1982) 11 *Philosophy and Public Affairs* 3.

¹⁹ Mill, *Utilitarianism*, above note 5, at 305. Mill regards this as a restatement of the view that duties of charity are imperfect. This shows another possible interpretation of the expression ‘imperfect duty’. However my argument shows that duties of charity are still not imperfect, even on this interpretation.

²⁰ I borrow my explanation of the nature of rights from Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986), chs 7 and 8.

we cannot but transpose the whole issue into an adjudicative idiom. Now there is an imaginary *dispute* about what should be done, a *competition* for the energy or time or money of others, and someone has to be the winner and someone else the loser. At this point the duty can no longer be conceived or discussed as a duty of charity, for it has been transformed by the adjudicative context. If it is to be recognised as a duty in this context, it can only be recognised as a duty of justice. For those who think that rights *are* claims, this sets up a logical obstacle to the idea of a right to charity.²¹ But rights are not claims. They are reasons why others have duties to serve the interests of the right-holder. They can be mentioned, discussed, infringed, honoured, and acted on, as well as being, and without being, claimed. So while the thought of *claiming* a right to charity may be close to oxymoronic (thanks to the overtone of dispute or contest) the idea of *having* such a right, or *honouring* one, or *violating* one, is not. Accordingly, the relevant notion of ‘getting (or giving) one’s due’, the one that preoccupies the just and differentiates their priorities from those of the charitable, is not that of having one’s rights honoured. It is close to the notion of having one’s rights honoured *in the resolution of a dispute or competition*. To the extent that talk of rights is regarded as the natural language of disputes and competitions, it may seem natural to think that justice is the virtue of those who care most about rights. And to the extent that morality is seen as a kind of adjudicative framework for disputes and competitions, the just may be seen as bearers of the most important moral virtue, even (perhaps) the *master* moral virtue. But in fact the second view is as distorted a view of

²¹ Cf O’Neill, ‘The Great Maxims’, above note 15, who notices that performance of a duty of charity cannot be *claimed* and regards that as supporting the view that such a duty is not rights-based. But then she makes a subtle modification which gives her error away. She articulates her view as the view that duties of charity, unlike those of justice, are not based on ‘claimable rights’. Quite so: but this does not show that they are not based on rights.

morality as the first is a distorted view of rights. While life is competitive and yields many disputes, resolving these is not the whole art of life. In fact much of the art of life (taking in not only charity but also, as we will see, loyalty and public-spiritedness) is the art of remaining charmingly oblivious to them.

★

The remarks of this section go well beyond an attack on the dismissive ‘Stepford wife’ view of the virtue of charity. They tell against all views which portray the virtues of justice and charity as standing in a special harmonious relationship with each other, whether thanks to lexical ranking or otherwise. That the two virtues stand in a special relationship cannot be denied. But it is the stormy relationship of *foils*. Of course, only two characters closely bound together can be foils. And so it is with the just and the charitable. Of any just action or reaction there is an intelligible charitable variation, and *vice versa*. And whoever can be treated justly can also be treated charitably, and *vice versa*. This was the idea conveyed in the thought, with which we embarked upon our comparison of the two character-types, that both aspire to provide answers to the moral question of *who gets what from whom?* We can now see that this way of bringing out their common starting-point was misleading. With its undertone of a pending adjudication this is already a just person’s way of putting the question. So it predisposes us to a just person’s answer.²² But it nevertheless helps to remind us that the just and the charitable are not just occasionally and accidentally at odds over tricky cases, in the way that the honest and the loyal find themselves at odds over some tricky cases where one must deceive to avoid betrayal and *vice versa*. On the contrary, the just and the charitable are *set up* to collide; to be more charitable *is*, you might say,

²² Cf Charity Commission, *The Hallmarks of a Well-Run Charity* (CC60, 1999), para (g): ‘a charity should be ready [publicly] to explain and justify the policies and practices it has chosen to adopt.’ Does this also predispose to a just person’s explanation or justification?

partly a matter of being at odds with one's more just friends. One can see why this fact might strike some as frustrating. In an age when so few react to the serious problems of strangers for anything other than morally unimpressive reasons, such as making a profit out of their misery, why can't all the 'caring and sharing' types join forces, stop quarrelling, get on with the business?²³ The answer – if I may end this section by simplifying and thereby slightly parodying the distinction between the two virtues – is that the just person's sharing is a fair-weather friend to the charitable person's caring. Unlike the care of the charitable, the care of the just, *qua* just, tends to run out once people have given or taken their share.

3. Charity and public-spiritedness

[G]ood dispositions are those which are suitable for entering into civil society; and good manners (that is, moral virtues) are those whereby what was entered into can best be preserved. For all the virtues are contained in justice and charity.²⁴

We already noted the myopic Hobbesian tendency to think that *who gets what from whom* is the main or even the only issue facing 'civil society'. We might reply that there are, on the contrary, many civic virtues, such as neighbourliness and public-spiritedness, the priorities of which have nothing much to do with who gets what. But this reply grants Hobbes' further assumption, spelt out in the passage just quoted, that charity and

²³ Cf Francis Gladstone, *Charity, Law, and Social Justice* (London, Bedford Square Press, 1982), at 32. In an attempt to marshal the troops Gladstone claims that charity, like justice, is a virtue of 'equal and unconditional concern'. The obvious objection is that equal concern – if the word 'equal' is to mean anything – cannot be unconditional. It has to be conditional on the recipient's not already having had her (equal) share.

²⁴ Hobbes, *De Homine*, above note 1, at 117.

justice are indeed to be listed among the *civic* virtues. In reality they are not. They are virtues of what might be called the *humanitarian* class. Their default constituency is that of all human beings.²⁵

The just *qua* just may care as readily about prisoners of conscience on the other side of the globe, the charitable as much about starvation on another continent. The slogan ‘charity begins at home’ is not, you will notice, something that the charitable tend to say. It is normally a complaint of the rather uncharitable who wish that the charitable would be more loyal and less charitable. If I am charitable or just, however, people are *people*, never mind whether they are *my* people. This is not to deny, of course, that some just people and some charitable people, occupying certain specialist roles, have their energies diverted into the problems of smaller constituencies than the whole of humankind. Of course there are divisions of moral labour with specialised duties attached. Judges have special duties of justice as between litigants, teachers have special duties of charity towards their pupils, etc. That is not the point. The point is that to be impeccably just or impeccably charitable, across even these small constituencies, one must exhibit the capacity to look upon those involved as human beings with none of whom one has any special personal bonds – no special loyalties, if you like – beyond those of shared humanity. As we saw in the previous section, there are two contrasting ways of doing this, which are foils to each other. The charitable person emphasises human *commonality*, the fact that all human beings are by their nature needy,

²⁵ All living creatures? I think not. I think it is impossible to be either just or charitable towards donkeys or squirrels. At any rate one cannot be charitable towards them unless one can also be just towards them, which requires in turn that they be moral agents (and thus can be judged morally on what they do). The question of whether the constituency of moral agents goes beyond humanity cannot be discussed here, and anyway does not affect the main point.

vulnerable creatures, in the same boat, all at risk of drowning, be it through natural disaster, disaster brought about by others, even disaster of their own making. The just, by contrast, emphasise human *separateness*, the fact that all human beings have their own distinctive interests and which may conflict, and which need to be adjudicated, so that lines constantly need to be drawn between disasters made by another and disasters of one's own making, or between greater and lesser disasters, etc. Although sometimes the disasters in question may be local to particular societies, they need not be. Unlike a specifically civic virtue, justice and charity can be exhibited no less perfectly in one's global relations, and without any buttressing belief in the existence of a global civil society. In fact, the suggestion of a global civil society is usually a piece of propaganda designed to capture the work of some people with civic virtues for the wider humanitarian cause. It is an attempt to globalise the more parochial virtues by conjuring up the image of a global parish. Often this is the reaction of the just or the charitable who are justifiably frustrated with those whose virtues lie in their relations with a narrower, often more parochial, constituency. These in turn divide into two main groups. First there are those, like the loyal and the patriotic, whose virtues lie in their relationship with a *particular* person or group of people, or a *particular* society. These people are foils to the just and the charitable alike, and I return to them in the next section. But secondly there are those, notably the public-spirited and the neighbourly, whose virtue lies in their relationship with and participation in aspects of civil society *as such*, never mind which *particular* society. These people are not exactly foils to the just and the charitable, but nor are they simply more of the same. The label 'civic virtue' is, in my view, most helpfully reserved for this group. A common tendency to assimilate the humanitarian virtue of charity to the civic virtues, and in particular to confuse it with public-spiritedness, has some unhappy contemporary consequences.

Duties of charity may, as we saw, be rights-based. Not so duties of public-spiritedness. This is because the distinctive priority of the public-spirited is the provision and maintenance of public goods, such as sensitive policing, public education, a vibrant artistic culture, fine cityscapes, good government, etc. They care, in Hobbesian terms, about how civil society can best be preserved or improved. Although public-spiritedness takes many forms – including participation in local politics, giving up a lucrative city job to work in the civil service, working in the community garden, etc – those who are public-spirited in how they use their own resources have the special title of *philanthropist*. The philanthropic and the charitable are particularly easily confused.²⁶ The main reason is that tackling some human deprivations can also be a public good. It is not only the formerly poor who are better off for the eradication of poverty, nor only those educated by it who are better off for a strong culture of public education. We are all better off for inhabiting a less fractured, or as the case may be more cultivated, society. I do not mean that we will each see further benefits, eg higher wages or reduced crime, thanks to more cordial social relations or a more skilled workforce or something like that. I mean that living in a less fractured or more cultivated society (or a more politically active or more tolerant society, etc, as the case may be) *is* the benefit. It is the very fact that this is a benefit to all if it is a benefit to any that makes it a public good, and thus a matter of interest to the public-spirited. By contrast it is the different fact that it helps the poor or illiterate (or the disenfranchised or the victimised etc) that makes it of interest the more charitable person.

One can quickly see the scope here for another fair-weather friendship. The public-spirited person, especially the

²⁶ eg Jeremy Waldron, *Liberal Rights*, above note 16, at 15; Michael Chesterman, *Charities, Trusts and Social Welfare* (London, Weidenfeld and Nicolson, 1979), at 2.

philanthropist, may well be a reliable dispenser of what I referred to earlier as ‘cold charity’ – cold, because it is not a human deprivation *as such* that animates her to get involved, so much as the broader social advance that comes of dealing with that deprivation. Her spirit is that of earnest concern rather than that of spontaneous fellow-feeling: she cares about *the problem of poverty*, say, more than about *the plight of the poor*. To the more charitable person she is missing the point. And yet, precisely as the just and the charitable may productively collaborate up to a point, so may the charitable and the public-spirited. In English law, notice, the concept of charity has been adapted to blur the boundaries between the virtue of charity on the one hand and that of public-spiritedness on the other. The requirement that, to be legally charitable, activities must be ‘for the public benefit’ is one that equivocates between a charitable person’s interpretation (that a wide enough constituency of people must stand to have their deprivations ameliorated) and a public-spirited person’s interpretation (that a public good must be served, whether or not by ameliorating anyone’s deprivations).²⁷ Many tensions in the law of charity reflect this ambivalence. Most notoriously: Is educational provision ‘for the public benefit’ (eg in fee-paying schools and the elite universities) even when it doesn’t tackle anybody’s educational deprivations?²⁸ The problem arises

²⁷ To judge by the remarks of Lord Wilberforce in *In re Resch's Will Trusts* [1969] 1 AC 514, the two types of public benefit (which he calls ‘direct’ and ‘indirect’) both count independently towards charitable status, so that enough of one, or enough of the other, or enough of a mixture of the two, will do. I should add that the law judges the public benefit of the objectives that the contributor *expressed* herself to have, and does not look behind these to see if she also had some ulterior reason. Obviously this additional move allows some whose actions are *neither* charitable *nor* public-spirited (but rather eg prudent uses of tax allowances) to be classed as legally charitable as well.

²⁸ Compare *In re Macduff* [1896] 2 Ch 451, at 471, per Lindley LJ, with *Governors of Campbell College Belfast v Commissioner of Valuation for Northern Ireland* [1964] 2 All ER 705.

because here the two virtues part company; more charitable types (often here with the support of their more just friends) reckon that their more public-spirited friends have lost the plot (and likewise when the latter opens another art gallery or opera house, beautifies another landscape or stately home, etc). While some people are in such great need, aren't there more pressing things to be done than supporting esoteric research or operatic excellence, especially if the main enthusiasts for these goods are the already advantaged? Possibly. Maybe some people are being *too* public-spirited, at the price of not being charitable enough. Or possibly their public-spiritedness is a failure even in its own terms (what they thought to be a valuable public good really isn't one). On the other hand maybe these are cases in which the impeccably charitable and the impeccably public-spirited simply part company, in which there are two incompatible and mutually incomprehensible ways to be morally unimpeachable. Be that as it may, the law talks as if this is not an issue by fudging the difference between the two virtues and calling them both 'charity'.

This is one of several legal fudges which lead to schisms among organisations involved in (legally) charitable pursuits. Some quite justifiably have no wish to be associated with others. A common proposal is that purely public-spirited activities (such as setting up orchestras or running art galleries) ought also to have to meet an *additional* test of genuine charitability (say, of working mainly to bring musical or artistic training or experience to those hitherto deprived of it) before they can join the world of 'charity'.²⁹ The fact that, in using the label 'charity', the law is probably misleading some people into thinking that this is *already*

²⁹ See eg Chesterman, above note 26, at 338-9. Interestingly, Chesterman here relies on the key distinction between charity and philanthropy that he denies on page 2. [cross-ref to Chesterman's chapter]

the test gives power to the moral elbow of this proposal.³⁰ On the other hand, the fact that people systematically undervalue public goods (because their benefits are diffuse) provides a strong counterargument (viz. that unless they are sneaked in under some other heading, public goods will be inadequately supported). On top of this there is the complicating factor that a strong institutional arrangement to support (genuinely) charitable action is *itself* a public good, to which the public-spirited often do contribute thanks to the fact that they are legally bundled in with the charitable and to some extent collaborate in their activities. On top of this there is the question of whether truly charitable activities must also reciprocate by meeting the 'public good' standard (which may pose new problems for, eg, emergency overseas famine-relief projects). Obviously this is not the place for a full critique of the law of charity. Like most law it represents a great deal of political compromise and has to be approached in that light. Its interest to us here is mainly that the ambiguity of the 'public benefit' test captures nicely, and yields nice illustrations of, the inevitable instability of the alliance between the charitable and the public-spirited.

Would another way to put the contrast be to say that the charitable have a more *individualistic* outlook than the public-spirited? After all it is sometimes thought to be the hallmark of moral individualists that they do not see value in public goods as such, but only in the further benefits they bring to particular

³⁰ An interesting example concerns animal welfare. Many people support animal welfare causes under the heading of charity (meaning their actions to alleviate the suffering of animals). The law, however, accords these causes charitable status only *qua* public-spirited, ie only for their contribution to civilised human life by their war against human cruelty: *In re Wedgwood* [1915] 1 Ch 113. That the donors may be in error to regard their actions as genuinely charitable in the moral sense (see note 26 above) does not eliminate the worry that the error is being exploited by the law's use of the label 'charity' to describe a cause recognised in law only for its public-spiritedness.

people. On this basis it is often said that justice is a virtue with individualistic priorities.³¹ Maybe charity too? I find the label 'individualist' misleading in this context, and misleading as applied to justice as well as to charity. Among the things that can be treated justly or charitably are not only people but also *groups* of people. It is possible to be charitable towards whole nations, or to be just in one's dealings with aboriginal peoples, etc. Possibly, when one is just or charitable towards a group, what one provides them with is sometimes a public good. But notice how one must *regard* it in order to be just or charitable. One must regard it as giving the group its due (to be just) or as going to the group's aid (to be charitable). The mere fact that it is a public good does not suffice as a reason for providing it, as it does for the public-spirited. You may say that in this last sentence I am back-tracking from my suggestion that public-spiritedness is a civic virtue. Couldn't one be public-spirited in building a school or a church for another society but one's own? Of course. My suggestion that the public-spirited have a civic virtue, recall, was not the suggestion that they contribute specifically to the shape of their *own* society. It was that their interest lies in contributing to the shape of *some* society, and (unlike the charitable and the just) not merely to some of the groups or individuals that inhabit it. Even though they are not humanitarian – they do not see people merely as human beings, but rather as inhabitants of a society – there is no built-in element of partisanship towards any *particular* people or any *particular* society in the civic virtues.

4. *Charity and loyalty*

Charity is that virtue by which part of the sincere Love we have for our selves is transferr'd pure and unmix'd to others, not tied to us by

³¹ See eg Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1982), at 168-173.

the Bonds of Friendship or Consanguinity, and even mere Strangers, whom we have no obligation to, nor hope or expect any thing from.³²

Mandeville's remark brings us to another group of virtues which *do* involve the extra element of partisanship – for a particular person or group or nation or culture – and it is this element of partisanship that makes these virtues true foils to both justice and charity. Moreover these partisan virtues – notably loyalty, solidarity, and patriotism – are virtues of notoriously problematic standing in eyes of moral philosophers. The austerity of the Kantian and utilitarian ‘master-virtue’ proposals came partly of the thought that loyalty, solidarity, patriotism, etc are the chief moral *enemy*, moral vices masquerading as virtues, fit only to be slain by an authentic moral virtue that knows no deep attachment any person or group of people over any other. Part of their bad reputation comes, of course, of the fact that loyalty, solidarity, and patriotism have been systematically tarnished with the brush of their own immoral excesses. Patriotism is not a virtue, it is said, because some nations are vile and their so-called patriots are actually sad chauvinists, solidarity is not a virtue because it creates the hostile climate of class or family antagonisms, loyalty is not a virtue because it leads to some people covering up each other's war crimes, etc. All that such examples really show, of course, is that it is possible to be too loyal or too patriotic or too solidary to the point of vice, exactly as it is possible to be too just or too charitable to the point of vice.³³ They do not show that patriotism and solidarity and

³² Bernard Mandeville, ‘An Essay on Charity and Charity-Schools’, in *The Fable of the Bees* (ed Kaye, Oxford, Clarendon Press, 1924), vol 1, 253, at 253.

³³ Cf Alastair MacIntyre, ‘Is Patriotism a Virtue?’ in Michael Rosen and Jonathan Wolff (eds), *Political Thought* (Oxford, Oxford University Press, 1999) 269, whose analysis makes the concept of an ‘immoral excess’ of patriotism hard to accommodate, this giving succour to those who regard patriotism as a vice.

loyalty are not moral virtues any more than the fact that some people are appalling sticklers for what is due shows that justice is not a moral virtue, or the fact that some are soppy sentimentalists who lavish support on cuddly causes shows that there is no moral virtue in charity.

Nevertheless it is important to grasp just how sharply these virtues do contrast with justice and charity. One can be loyal etc only to someone or something *in particular*. It has to be the very thing that it is. No substitute will do, even one that has all the same rationally significant properties. It is no good reminding me, as a patriotic Scot, that in every significant way Sweden is no less fine a country than Scotland. The point is that it is not Scotland, and Scotland is my country. And even if this fellow you have introduced me to is just as splendid as my friend, and in just the same situation, and making just the same request for assistance, and even if he would be a great friend, he is *not* my friend, and that means that I don't have the same duties towards him as I do towards my friend. My friend is invested with special value, and his good is made a special priority, simply because *he is the one* that is my friend. One may, of course, be just or charitable in respect of one's friends (or one's family or country or social class etc). But to do so in the right spirit one must have the capacity to overcome one's attachment to them, temporarily to abstract oneself and think of them as just like other people. Often, happily, this can be done without disloyalty. But there is a constant risk of conflict thanks to the opposition between seeing human beings *simply as* human beings and seeing them as the particular human beings they are (or as defined in terms of the particular affiliations they have). So often - and again it is no mere accidental conflict - one cannot be impeccably loyal except at the price of compromising one's justice or one's charity, and *vice versa*.

In the case of charity, the directness of this collision is sometimes overlooked thanks to the theological association of charity with *love*, of which Mandeville reminds us. If the spirit of

charity is a kind of love then surely all the virtues of successful love – including loyalty – are naturally at ease with it? At any rate, it belongs to the same family of virtues, what we may call the *warm* virtues (contrasted with the colder virtues of justice, diligence, etc).³⁴ The problem with this line of thought is brought out by Aquinas.³⁵ Just as we may show austere Kantian ‘philosophical respect’ for those whom we rightly despise, so we may have a kind of ‘philosophical love’ for those who are nothing to us personally, even for those we rightly hate. It is the love of common humanity. It is not the love of particular people, which by its very nature depends on the contrastive purchase of there being others out there who are *unloved*. And the virtue of loyalty is the virtue which supplies this contrastive purchase, which prioritises the good of the object of one's affections and in the process deprioritises the good of others. If one wants to think of charity as a kind of loyalty to (or solidarity with) one's fellow human beings, so be it. But in the process one misses the key point about loyalty. One misses the fact that loyalty is a virtue of selective attachment. If there are none to whom one has no loyalty at all then there are none to whom one is loyal either. Whereas charity prizes its own indiscriminateness as between particular (ie nominate) people. One can, of course, be a charitable enthusiast for certain *causes*, and to that extent loyalty and charity may go hand-in-hand. But notice that those causes cannot entail loyalty to any particular (nominate) beneficiaries without losing their charitable character. And notice too that one is not very charitable if one's loyalty to a cause means that one denigrates or bemoans other charitable causes (for then one is not being very charitable in judging those who support them).

Again the conflict between charity and loyalty is familiar from contemporary debates about the law of charity. At the

³⁴ Cross-ref to Rob Atkinson's chapter.

³⁵ *Summa Theologica* II-II, Q25.

slightly permeable margins of charitable status, in English law, lie self-help groups and other mutual benefit organisations.³⁶ It is often said that they must be brought into the centre of things from the wasteland of uncertain legal status. They are more democratic or grass-roots, they epitomise the way forward for the charitable sector, they replace the old idea of charity as something graciously passed down from on high with the more modern and less demeaning idea of people being helped to help themselves, etc. Now, no doubt the proliferation of more complex types of deprivation does mean that beneficiary involvement in organised charitable pursuits is a guard against various kinds of ignorance and blunder. But notice that the idea of mutuality as a paradigm goes much further than this. It moves away from the idea of a common humanity in the direction of an idea of special loyalties to those with whom one shares a predicament, including special duties of reciprocity of the kind that characterise personal friendship, marriage, and neighbourly and collegial relations. Genuine charitable people – as opposed to pseudo-charitable self-aggrandisers – expect none of this reciprocity. It is nothing to them if their help goes unthanked and even unrecognised. To have helped one's fellow human beings is enough. The Good Samaritan, for instance, asks nothing in return. His intervention is unconditional. Some loyalty, of course, is equally unconditional, like that of parents for their children. It too asks for nothing in return. But still it is the foil of charity: you are *you*, brother, you are *one of us*, you are *part of the family*, you are *not* just another human being, a stranger, nobody in particular. In this contrast between the charitable and the loyal, unlike the contrast between the charitable and the public-spirited, the English law of charity has remained largely true to its name and has resisted moves to embrace the dramatically contrasting 'one of us' paradigm. It has hesitated

³⁶ *In re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194.

over beneficiary-trustees, beneficiary-members, beneficiary-contributors, and all the other trappings of mutualism.³⁷ If mutualism is the one true way forward, then the law of *charity* – properly so called – is clearly on its way out. For this is not charity but a form of loyalty or solidarity.

Three cheers for that, some will say: it is indeed time we said goodbye to the law of charity properly so called. It is demeaning for people to rely on charitable help and patronising for others to dispense it. Even its classification as a moral virtue, which has been taken for granted throughout this essay, is really a sad vestige of long-defunct status relationships. It is time we saw it for the moral weakness it really is. Insofar as people in need want anything from strangers, it is sometimes said, they want no more than their due. Beyond that they would rather rely on their ‘own people’ to help them (eg in mutual aid or familial relationships). People just don’t want charity.³⁸ Personally, I am never sure what to make of such objections. Are they really moral objections, which carry with them the implication that others are demeaning themselves (and hence acting unjustifiably, albeit perhaps excusably) if they collaborate with the charitable by accepting help from them? Not only don’t people want charity, in other words, but anyone who does shouldn’t? If so, does this extend to all, or only to some (eg only to those who have a claim of justice against those very people now offering them charity, or only to those who accept charity from people who are ignorant of the real character of their predicaments, or only to those who are too craven or gracious in their reactions to the charitable)? Sometimes the objections seem not to be directed at the charitable at all, but rather at the cold charity of the public-

³⁷ Cf Charity Commission, *Users on Board: Beneficiaries Who Become Trustees* (CC24, 2000).

³⁸ It is not clear whether the same people also don’t want to be treated mercifully or humanely. These virtues have something in common with charity and something in common with justice.

spirited ('they treat us like some kind of social disgrace') or of the diligent ('we are just another pang of conscience to them'.) Perhaps general alienated cynicism (possibly coupled with facile psychoanalytical beliefs about subconscious ulterior motives and/or facile economic views about the nature and role of self-interest in human life³⁹ and/or facile ideological attachments to ideas of false consciousness) leads some people to interpret the acts of the genuinely charitable as acts of cold charity or (worse still) as people's self-serving attempts to ingratiate themselves or to feel good about themselves?⁴⁰ In which case the objections are not objections to *charity* but rather to the *lack* of it. On other occasions the objections seem rather to be only to *misguided* charity, ie to charitable intervention which fails in its own terms by not meeting people's real needs or by upsetting the people it aims to help by making clumsy assumptions about their needs and the best way to meet them. In which case the protest, again, is not against charity itself but against its aberrations. And yet there remains a strand of thought which does appear to rail against charity itself, demanding that it be recognised for the vice it really is. At any rate, if philosophers find charity less morally problematic than partisan virtues like loyalty, solidarity and patriotism, the reverse is clearly true for non-philosophers. This explains why many will defend charity only at the price of

³⁹ Cross-ref to David Stevens' paper.

⁴⁰ eg Marcel Mauss, *The Gift* (trans Cunnison, London, Cohen and West, 1954), at 63: 'Charity wounds him who receives and our whole moral effort is directed towards suppressing the unconscious harmful patronage of the rich almoner.' So presumably the ordinary charity of ordinary (non-rich) people who forgo a pint at the pub to help someone who fell ill on the bus, or who put the last pound of their weekly pension towards a disaster appeal, is not wounding. In which case one may wonder why there could not be better-off people who are similarly motivated, ie who do not exhibit the 'unconscious' attitude expressed here. One thing that is notable is how little charity Mauss himself is exhibiting in his interpretations of others, and he is not alone.

making it seem closer to other moral virtues – such as justice and solidarity – than it really is, ie by dressing it up as one of its foils.⁴¹

If there is a problem with charity it is clearly located in the *expressive* rather than the instrumental side of the virtue's value. I doubt whether (in the grand scheme of things) the moral virtues vary much in respect of their purely instrumental contributions to the state of the world, as conceived independently of the presence of the virtues themselves. Where they vary importantly lies in what the exhibition of those virtues expresses. Acting for certain reasons and in a certain spirit not only improves one's chances (rule-utilitarian style) of bringing certain value to the world, but also plays a constitutive role in *shaping* the value that one thereby brings. For the fact that they were virtuously performed lends meaning, and hence expressive value, to one's actions, at least when they were successful in their own terms.⁴² This in turn contributes to the Aristotelian diversification of value, for it is part of the nature of these expressive values that they cannot be created other than by different people with different virtues (so that they cannot be reduced to any common overarching value that all the virtues conspire to yield). Sometimes some actions associated with some virtues, if they are distinctive enough, actually take on some of the associated meaning even when not performed for the relevant reasons or in the relevant spirit. But be that as it may, the expressive value of the actions that manifest it is crucial to each moral virtue's status as a virtue. It is a moral virtue only if it expresses a morally acceptable attitude to those whose good it prioritises. Those who challenge the status of charity as a moral virtue may be denying that this is true of charity in one of two ways. They may be

⁴¹ In my view the contributions of Alison Dunn and Sue Moody to this volume are examples. Dunn draws charity towards justice and Moody draws it towards solidarity.

⁴² A common mistake is to reduce all such expressive value to symbolic value by thinking that it is only the attempt and not the success that counts.

denying whether the ‘philosophical love’ of the charitable is a morally acceptable attitude to others. Or they may be doubting whether charitable actions truly succeed in expressing that attitude. The second possibility strikes me as an incoherent objection. It would have the implication that what some people mean by their actions is not among the things that those actions could conceivably mean. It seems to me that this makes it logically impossible to mean them, which turns this into another cynical objection portraying the charitable as insincere. As for the first possibility it requires more investigation. But it seems highly unlikely to me that an attitude according to which we are all in this boat together, according to which we are all human beings in common, could end up being a morally unacceptable one. The very idea bites at the heels of the concept of morality.

5. *The justiciability of charity*

[T]hat moral virtue, that we can truly measure by civil laws, which is different in different states, is justice and equity; that moral virtue which we measure purely by natural laws is only charity. Furthermore, all moral virtue is contained in these two.⁴³

I repeat this passage because we never got round to discussing Hobbes’ thought that charity is a virtue which cannot be ‘measured by civil laws’. It is important to grasp what the point is that Hobbes is making here. It is not that charity is a private person’s virtue, beyond the concern of state officials and institutions. On the contrary, Hobbes believes, and rightly so, that public officials and institutions (including legal officials and institutions) should be charitable as well as just.⁴⁴ Nor is Hobbes making the obvious point that law cannot make anyone act

⁴³ Thomas Hobbes, *De Homine*, above note 1.

⁴⁴ Thomas Hobbes, *Leviathan* (ed. Oakeshott, Oxford, Basil Blackwell, 1960), at 227.

charitably, where this implies acting for charitable reasons and in a charitable spirit.⁴⁵ Of course it can't. But in *this* sense the law can't make anyone act justly either, or honestly, or loyally, or even diligently. It can't make anyone exhibit *any* moral virtue. All it can do is get people to *emulate* morally virtuous behaviour, by getting them to perform their duties of justice (eg their duty to pay damages to those whom they wronged), or their duties of honesty (eg their duty not to defraud), or their duties of considerateness (eg their duty to drive carefully), etc. What Hobbes is suggesting is that, in the case of charity, it is beyond the capacity of the law *even to do this much*, ie even to get people (albeit uncharitably) to perform their duties of charity. Why on earth would this be?

This chapter points to an answer. It is not (as some have imagined) that there are no duties of charity, nor that duties of charity are unruly, or imperfect, or not rights-based. It is that law cannot give effect to duties of charity – such as the Good Samaritan's duty – without subjecting them to adjudicative testing in the courts. Such testing is the law's only mechanism for settling (ie settling in any given case) the proper extent of the duties that it recognises. And viewing a duty of charity through this adjudicative lens means changing its moral classification. It means giving effect to it, if one gives effect to it, as a duty of justice rather than a duty of charity. A duty of charity cannot be made an object of adjudication without losing its identity as a duty of charity. As lawyers are wont to put it, a duty of charity is not *justiciable*. And that means precisely that it defies 'measurement by civil laws'.

Notice that this is not, as it stands, an attack on the *legitimacy* of laws such as Good Samaritan laws imposing duties of easy rescue. A common mistake is to think that since duties of charity

⁴⁵ Cf the remarks of Murray Rothbard cited by Waldron in *Liberal Rights*, above n 16, at 227-8.

are not justiciable, any law which requires that we do what charitable people would do is an illegitimate excursion by the law beyond its proper jurisdiction. This mistake helps to ground many pompous right-wing objections to the welfare state. The source of the error is the confusion of a logical point with a moral one. To say that charity is not justiciable is *not* to say that duties of charity cannot legitimately be transformed into legal duties. It is merely to say that they cannot be transformed into legal duties *without also being transformed into duties of justice*. The latter transformation may well be morally unobjectionable. There is no reason to think that once a duty of charity, always a duty of charity. Perhaps it is high time some were turned into duties of justice, for there is a shortage of charitable people, or the most charitable people around here are unfortunately overlooking these particular duties, etc. Moreover, there is no reason to think that once duty of charity, *only* a duty of charity. Perhaps contributing to the elderly poor having a decent holiday once a year is both my duty of charity (boy, do they need it) and my duty of justice (it's the least we can do in return for all they did for my generation). Perhaps, indeed, it is also a duty of public-spiritedness (it cheers the country up), of trustworthiness (they were promised a happy old age by governments we supported), of loyalty (they are after all *our* elders), and so on. In which case there are plenty of grounds for legislating their holiday entitlement; the case for doing so is overdetermined without even relying on the charitable case. (It is also subject, of course, to many possible countervailing considerations; I do not deny that there might be some. I deny only that Hobbes' point is one of them.)

Although the non-justiciability of charitable priorities does not pose any obstacles to the meeting of people's needs by law (eg through ordinary social security or health care laws) it clearly does put a logical question mark over another body of legal doctrine, namely the law of charity itself. If the priorities of the charitable person are not justiciable then how is such a thing as

the law of charity possible? One answer familiar to lawyers: charity in the legal sense is quite distinct from charity in the moral sense, so these questions about the justiciability of charity don't arise when 'charity' is understood as a legal term of art. But this is simply not true. The connections between the legal concept of charity and the moral concept are close. It is true, as we saw, that many public-spirited activities are also regarded in law as charitable, but not to the systematic exclusion of charitable ones.⁴⁶ On the contrary, the law's trick, for better or for worse, is to lend support to public-spirited activities on the back of genuinely charitable ones.

The simpler answer, and the right one, is that the law of charity creates only legal *powers* to do the charitable thing, not legal duties to do so. The legal duties imposed on others when those powers are exercised (ie the duties imposed on charitable trustees, and the directors of charitable corporations, and their auditors and regulators, etc) are not themselves, and do not purport to be, duties of charity. On the contrary, as the word 'trustee' suggests, they are mainly legal duties of trustworthiness (to keep faith with the objects of the charitable contribution), with which are associated some duties of prudence (directed towards maximising the net value of the contribution). While duties of trustworthiness and duties of prudence are not themselves duties of justice, and may conflict with duties of justice, it does not follow that they are not justiciable. Charity has to be understood in opposition to justice - as justice's foil - but trustworthiness and prudence (and most other moral virtues) can be understood independently of both and can be made subject to the constraints of justice without entirely selling out their distinctiveness. Thus it is possible to provide legal support for people to perform their moral duties of charity, by giving them legal powers that can be used to impose legal duties on

⁴⁶ Text to nn 27 and 28, above.

others to perform moral duties that are *not* duties of charity, and yet to do so for charitable ends. This allows the courts to pass the buck of deciding how far these duties extend – pass it back to the charitable person – and hence to avoid destroying them as duties of charity by attempting to render them justiciable. Of course the question will still arise, and must still be rendered justiciable, when the legal power of the charitable person has been exceeded, ie when a given object lies outside the bounds of the charitable. This is not a surprise. For one can of course be *too* charitable, and at that point it is the job of other virtues (including justice) to rein one back in. The courts must merely avoid the temptation to rein the charitable in too soon, as if there were no possibility of an impeccably charitable person doing something, with perfect justification, at which a perfectly just person (such as the best judge in the world) would balk.