

2008

Justice Versus Benevolence: A Modern Humean View

Mario J. Rizzo

Follow this and additional works at: <https://scholarship.law.umn.edu/mjlst>

Recommended Citation

Mario J. Rizzo, *Justice Versus Benevolence: A Modern Humean View*, 9 MINN. J.L. SCI. & TECH. 883 (2008). Available at: <https://scholarship.law.umn.edu/mjlst/vol9/iss2/20>

Justice Versus Benevolence: A Modern Humean View

Mario J. Rizzo*

A single act of justice is frequently contrary to the public interest; 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 seditious bigot, he has acted justly and laudably, but the public is the real sufferer. Nor is every single act of justice, consider'd apart, more conducive to private interest, than to public; and 'tis easily conceiv'd how a man may impoverish himself by a single instance of integrity, and have reason to wish, that with regard to that single act, the laws of justice were for a moment suspended in the universe. But however single acts of justice may be contrary, either to public or private interest, 'tis certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual. 'Tis impossible to separate the good from the ill. Property must be stable, and must be fix'd by general rules. Tho' in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which it establishes in society.¹

INTRODUCTION

A longstanding tradition has developed in political and legal philosophy, associated with such thinkers as Marcus Tullius Cicero, David Hume, Adam Smith and Herbert Spencer, that strongly differentiates justice from beneficence. Justice is the virtue necessary to create a framework of social stability in which individuals can pursue the other virtues, including beneficence, as they deem appropriate. Some have referred to justice as a "duty of perfect obligation"² while referring to beneficence as a "duty of imperfect obligation."³ Perfect duties are relatively determinate in the sense that there is a definite obligation to perform in a particular way at a particular time. Justice refers

* © 2008 Mario J. Rizzo.

¹ * Department of Economics, New York University.

. DAVID HUME, A TREATISE ON HUMAN NATURE 497 (L. A. Selby-Bigge ed., Oxford Univ. Press 1978) (1740) [hereinafter HUME, HUMAN NATURE].

² . JOHN STUART MILL, UTILITARIANISM 48-49 (George Sher ed., Hackett Publ'g Co. 1979) (1861).

³ . *Id.*

to the idea of restoring an individual to his condition prior to the commission of a wrong, such as breach of contract, violation of property rights, or an attack on his physical integrity. Since the moral obligation of justice is relatively determinate it can and should be enforceable by law. On the other hand, an imperfect duty is one which we may be "bound to practice, but not toward any definite person, [and] not at any prescribed time." Beneficence is just such a virtue and "though the act is obligatory, the particular occasions of performing it are left to our choice."⁴ The law, therefore, cannot appropriately enforce duties of beneficence.⁵ The fulfillment of these duties depends on many particular circumstances of time and place; that is, on local and personal knowledge that is *prima facie* unavailable to governments.⁶

The independence of justice from the particular circumstances of time and place *relative to* the dependence of beneficence on such circumstances is an important factor responsible for distinctive psychological aspects of these virtues. For reasons I discuss below, I see that justice is an abstract virtue which does not give the individual positive psychological feedback in all cases. Indeed, as Hume mentions in the opening quotation, a single act of justice

⁴ . *Id.* at 48.

⁵ . Adam Smith emphasizes the legal-enforceability issue in his *Lectures on Jurisprudence*:

Perfect rights are those which we have a title to demand and if refused to compel another to perform. What they [i.e., Pufendorf and Hutcheson] call imperfect rights are those which correspond to those duties which ought to be performed to us by others but which we have no title to compel them to perform; they having it entirely in their power to perform them or not A beggar is an object of our charity and may be said to have a right to demand it; but when we use the word right in this way it is not in a proper but a metaphorical sense. The common way in which we understand the word right, is the same as what we have called a perfect right, and is that which relates to commutative justice. Imperfect rights, again, refer to distributive justice. The former are the rights which we are to consider, the latter not belonging properly to jurisprudence, but rather to a system of morals as they do not fall under the jurisdiction of the laws.

ADAM SMITH, *LECTURES ON JURISPRUDENCE* 9 (R.L. Meek et al. eds., 1978) (1762-63).

⁶ . Consider, for example, the conclusion of Athol Fitzgibbons: "[B]enevolence [for Smith] could not be legally enforced, because the civic obligations of citizens depended on circumstances that usually were too complex for codification." ATHOL FITZGIBBONS, *ADAM SMITH'S SYSTEM OF LIBERTY, WEALTH AND VIRTUE: THE MORAL AND POLITICAL FOUNDATIONS OF THE WEALTH OF NATIONS* 112 (1995).

2008] JUSTICE VERSUS BENEVOLENCE 885

may be (rightly) perceived as contrary to the public or private interest. It often takes a cognitive act of abstract construal to see and to appreciate the value of justice. Beneficence, on the other hand, is a concrete virtue. It has a psychological core, which is the sympathy generated in the agent by the pleasure or relief of suffering the patient experiences in the particular, often immediate, circumstances that present themselves.⁷ Thus we often find a "bias"⁸ in favor of approving acts of beneficence relative to approving acts of justice. Unfortunately, such a bias has social costs because less justice and more beneficence will tend to be produced than is socially optimal. This holds true at the level of inter-individual behavior, in the legislative process, and in the judicial process.

1. HUME'S MORAL PSYCHOLOGY

Hume primarily concerned himself with explaining why and how we approve or disapprove of mental dispositions or character traits that act as the basis of actions. We approve of those that are "*useful or agreeable to the person himself or to others.*"⁹ We regard mental dispositions as useful if their associated actions tend to benefit the self, others, or society-at-large. Justice and integrity are two examples. But since Hume is not a Benthamite utilitarian,¹⁰ approbation is not reduced entirely to the utility of the act. Sometimes acts fail to produce benefit through no fault of the agent, even if they have a tendency, under normal conditions, to produce such a benefit.¹¹ Nevertheless, we see such a disposition as

⁷ . One of the reasons that beneficence is greater among close relatives, friends, and even strangers in Good Samaritan cases than in cases of people in need in far away and unpublicized places is that the psychological and social distance between the agent and patient is less in the former. And thus the positive psychological feedback deriving from sympathy is greater.

⁸ . The word "bias" is used in a non-normative sense. The normativity focuses on the consequence of the biased behavior in producing a negative external effect.

⁹ . DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 268 (L. A. Selby-Bigge ed., Clarendon Press 1975) (1770) [hereinafter HUME, ENQUIRIES] (emphasis added).

¹⁰ . A Benthamite utilitarian believes that we ought to approve or disapprove of an act solely because of its consequences for the happiness of human beings. See JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Laurence J. LaFleur ed. Hafner Publ'g Co. 1948) (1789).

¹¹ . As Hume explains,

2008] *JUSTICE VERSUS BENEVOLENCE* 887
comfort, relief of suffering for others. We sympathetically identify with these emotions and associate the sympathetic feelings with the dispositions and the actions.

The value of Hume's approach for our purposes is that he emphasizes the importance of motives for virtuous actions. Furthermore, these motives consist of *mental associations* we make between actions and their agreeable consequences. Thus the critical question we must face is: Does the human mind *always* make the appropriate mental associations?

To put the question in a more specific way: Is the human mind subject to certain biases of association that lead us to prefer beneficence to justice in certain predictable circumstances? If the answer to this question is yes, then we further ask: Does this biased preference have socially harmful results?

2. NATURAL AND ARTIFICIAL VIRTUES

From the perspective of Hume's moral psychology one of the most important distinctions he makes is between "natural virtues" and "artificial virtues."¹⁵ Benevolence is a natural virtue and justice is an artificial virtue. The difference lies primarily in the nature of motive that is behind our approval or disapproval of a mental disposition and its associated actions. Approval of natural virtues can be explained *only* on the basis of fundamental human propensities that are unrelated to the establishment of moral conventions or, more generally, to the coordinated behavior of other people. As Hume explains:

A parent flies to the relief of his child; transported by that natural sympathy which actuates him, and which afford no leisure to reflect on the sentiments or conduct of the rest of mankind in like circumstances. A generous man cheerfully embraces the opportunity of saving his friend; because he then feels himself under the dominion of beneficent affections, nor is he concerned whether any other person in the universe were ever before actuated by such noble motives, or will ever afterwards prove their influence.¹⁶

Furthermore, the rationale of the beneficent actions in these cases will depend on specific circumstances of the

¹⁵ . For an extremely useful discussion of Hume's view of virtues, see JAMES BAILLE, *HUME: ON MORALITY* 143-88 (2000).

¹⁶ . HUME, *ENQUIRIES*, *supra* note 9, at 303.

2008] *JUSTICE VERSUS BENEVOLENCE* 889
consequences which may result from the determination of these laws in any particular case which offers.²⁰

However, sympathetic particulars exert a powerful pull on our sense of benevolence:

Now as everything, that is contiguous to us, either in space or time, strikes upon us with such an idea, it has a proportional effect on the will and passions, and commonly operates with more force than any object, that lies in a more distant and obscure light. Tho' we may be fully convinc'd, that the latter object excels the former, we are not able to regulate our actions by this judgment, but yield to the solicitations of our passions, which always plead in favor of what is near and contiguous.²¹

In Hume's moral psychology, then, there is a conflict between benevolence and justice arising from the often stronger pull of sympathetic concrete particulars compared to the more rational or abstract appreciation of the value of suppressing consideration of these particulars in the service of justice.

3. CONSTRUAL LEVELS: AN INTRODUCTION

The law finds a poor, elderly, and ill person to have inadequate title to the land upon which her home is built. The law returns the property to a rich miser who will have the house demolished and simply hold the vacant land for possible future use.

How will such an event be characterized? Is it a failure of benevolence? If so, the observer will experience moral disapproval. Is it the return of property to its rightful owner? If so, the observer will view it as an unfortunate, but necessary, application of the rules of justice. He will, on the whole, experience moral approval.

We can characterize any event in more than one way. How we characterize it is significant for both evaluation and for behavior. We can shed some light on the evaluative and behavioral implications of the above event by applying the findings of modern Construal Level Theory (CLT).²²

Events, objects and actions can be construed at either a low or high level. "Low-level construals are relatively unstructured, contextualized representations that include

²⁰ . *Id.* (emphasis added).

²¹ . HUME, *HUMAN NATURE*, *supra* note 1, at 535.

²² . Yaacov Trope et al., *Construal Effects and Psychological Distance: Effects on Representation, Prediction, Evaluation, and Behavior*, 17 J. CONSUMER PSYCHOL. 83, 83 (2007).

subordinate and incidental features of events. High-level construals, in contrast, are schematic, decontextualized representations that extract the gist from the available information."²³ Acts of beneficence have the hallmarks of the relatively concrete. They are discrete or self-contained acts. Many particulars are relevant to their moral worth. Whether the potential beneficiary is rich or poor, happy or sad, world-wise or somewhat incompetent, ill or healthy, etc. are all important. We consider similar factors as relevant in the condition of the potential benefactor. Thus, the immediate context is essential. Acts of justice, on the other hand, have the characteristics of a high-level construal. In the first place, we suppress many particular circumstances, relevant to beneficence, in the characterization of situations to which the rules of justice are applied. For example, the above litany of sympathetic characteristics is at least *prima facie* irrelevant in cases of justice. Furthermore, we see that acts of justice are not discrete or self-contained in terms of their moral rationale. Their relatively abstract or decontextualized conceptualization makes it easier to see the connection among single acts of justice. It is an abstract understanding that holds, "the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and the well-being of every individual."²⁴

The findings of CLT support the general conclusion that, the smaller the psychological distance between the event and the evaluator-agent, the more likely it will be construed at a low level. Psychological distance can be measured across several dimensions, including the temporal, spatial, social and hypothetical. Thus when individuals are asked to characterize an event in the present or near future, in close spatial proximity, involving people they care about, in a realistic or probable scenario, they are more likely to characterize it concretely. When the psychological distance along any of these dimensions becomes greater, they are more likely to characterize the event at an abstract level.

Consider now an individual who faces a real situation like the one with which we started this section. He sees or hears of an old, poor, ill person being displaced right now by a rich, miserly land owner. It is occurring in a town very near to the

²³ . *Id.*

²⁴ . HUME, HUMAN NATURE, *supra* note 1, at 497.

2008] *JUSTICE VERSUS BENEVOLENCE* 891

observer. The observer has a mother similar in age and condition to the displaced old person. And since it is happening, it is not a hypothetical scenario. In these circumstances, CLT predicts a low-level construal of the event. In our terms, this means it will be more likely to be viewed as a failure of beneficence than as an application of justice.

The predictions of CLT are also supported by the kind of psychological feedback associated with seeing or performing acts of beneficence compared to that associated with acts of justice. The positive feedback from an act of justice requires an abstract mental "image" or conception of the value of the institution of property. This is less likely to be experienced when psychological distance is small. On the other hand, the feedback from an act of beneficence seems more concrete and direct. It is *more* likely to be perceived under conditions of less psychological distance.

4. EVALUATIVE AND BEHAVIORAL IMPLICATIONS OF CONSTRUAL LEVELS

CLT has implications for evaluation of options at different levels of construal and for the behavior of agents with respect to those options.

The case of returning land to the person with the better property title discussed above can provide a good example of the impact of construal on valuation. This event has a more favorable affective value at a high-level than a low-level of construal.²⁵ At the high level the observer sees the strengthening of the institution of justice. At the low level he sees a poor person deprived of something she needs. This event will seem more and more positive as psychological distance increases. This occurs because, as distance increases, there will be a greater weighting of high-level values than low-level values.²⁶

On the other hand, imagine that a very benevolent judge decides that the land should remain with the current occupier due to her need. This event appears more positive at a low level of construal than at a high-level. At the low

²⁵ . This is a contingent value, that is, contingent on the level of construal being determined. Construal is in turn determined by the psychological distance between observer and event.

²⁶ . It will also appear more negative as psychological distance decreases because there will be greater weighting of low-level values.

level the particular circumstances stand out and the observer sees the comfort provided to the elderly woman. At the high level the observer sees the weakening of the institution of justice. Greater psychological distance will reduce the evaluation of this event as the lower-level values are weighted less. When psychological distance decreases this act of leaving the land in the possession of the poor woman will be construed at a low level and as an instance of beneficence. The positive evaluation will be weighted more than the negative high-level construal of a failure of justice.

Therefore, at the moment when the judicial or moral decision is made, when psychological distance is small, there will be a *tendency* for the decision-maker to approve acts of beneficence rather than single acts of justice. This does not mean that all spectators will prefer beneficence to justice. Some decision-makers may place a very small low-level construal value on beneficence and a very great high-level construal value on justice. Thus, even when the low-level value carries more weight, they may prefer justice. Nevertheless, for any given distribution of low-level valuations of justice (or beneficence), *as psychological distance falls there will be movement of the population of decision-makers in the direction of valuing beneficence more and justice less.*

There are important implications for behavior. The decision-maker is in a position to implement either an act of justice or beneficence. Should "a man . . . of a beneficent disposition [restore] a great fortune to a miser, or seditious bigot"?²⁷ If he possesses a beneficent disposition then he will experience some cost or pain in returning the fortune to a great miser at the expense of someone who is needy. This cost, however, will not *in itself* be sufficient to prevent him from doing so. CLT predicts that his behavior will depend on whether he thinks of this cost as relating to *only* "secondary" features of the situation. If he construes the situation at a low level he will not. Furthermore, CLT predicts he will, in fact, construe matters at a low level when psychological distance is small. I have argued that psychological distance will be small when the situation is immediately before the decision-maker or observer either in person or in his mind. In this case, he will focus on the unique, specific, and concrete.

²⁷ . HUME, HUMAN NATURE, *supra* note 1, at 497.

2008] *JUSTICE VERSUS BENEVOLENCE* 893

The beneficent disposition will dominate and he will not return the property.

On the other hand, if he construes the situation at a high level, he will divide it into "primary" or general features and "secondary" or incidental features. The primary features relate the return of property to the miser to the institution of justice as well as its vital role in ensuring property rights. High-level construal downplays the unique, concrete considerations of the poor, elderly woman and her troubles. As we have seen, this construal will be more likely the greater the psychological distance. In these circumstances, the man of beneficent disposition will still experience displeasure at the thought of returning property to the miser.²⁸ Nevertheless, CLT research has found support for the hypothesis that construal at a high level enhances "self-control." In other words, it increases the likelihood that the individual will act in accordance with the primary or global features of the situation and sacrifice the secondary when that is required. Thus, high-level construal will encourage deciding consistently with justice or approving such decisions of others in like cases.

The self-control exhibited in this case is not primarily a matter of preferring future benefits over immediate benefits. The act of beneficence that is juxtaposed to the act of justice in our example need not be construed in this way. One might think of the single act of beneficence as one of many instances of helping the unfortunate and, as such, an application of a *principle* of beneficence.²⁹ Under this characterization the high-construal agent does not so much sacrifice immediate for long-term benefits but, rather, secondary for primary values.

5. THE "BIAS" AND ITS SOCIAL CONSEQUENCES

From the point of view of greater temporal distance, these preferences will seem "biased" toward beneficence. Thus, looking at such events either retrospectively or prospectively, justice will seem to be inadequately served.

²⁸ . He might "have reason to wish, that with regard to that single act, the laws of justice were for a moment suspended in the universe." *Id.*

²⁹ . Even as a principle, however, beneficence still requires in its application attention to many more concrete details than an application of a principle of justice. The latter, as we have seen above, suppresses many facts of time and place both with respect to persons and their situations.

Economic theory contains no tool or idea, however, that enables us to say that the valuations and behavior relative to high-level construal are correct and those relative to low-level construal are incorrect. All we can say as economists or, more generally, as value-free social scientists is that the perspectives are different. They are certainly inconsistent with each other; but rendering them consistent can be done by privileging *either* the low-level construal *or* the high.

The high-level construal is important, however, insofar as it explains why individuals might seek to constrain their beneficent behavior. Those in authoritative positions in academia may strive not to get too deeply involved with a particular student so as to be just in grading, granting extensions, recommendation letters, etc. They may also seek to impose rules on themselves such as grading according to certain objective indicia instead of by general impression or asking the students to put their ID number and not their name on the exam paper.

It may also explain why individuals in their private capacity approve of social and political rules that restrain impulsive beneficent behavior or why, in their public capacity, they write constitutions and laws that strictly apply the rules of justice.

In addition to these purely positive explanations there is some normative component. Each act that is contrary to justice imposes a negative externality on the rest of society.³⁰ This occurs because it weakens the general institutions that protect property, contract or personal integrity. To the extent that the individual bias toward

³⁰ . This raises the thorny problem of whether every beneficent exception to justice imposes a negative externality. There are, of course, well-known arguments that sometimes the rules of justice can be too strict and that "equity" demands exceptions in accordance with beneficence. This is a complex issue. In the first place, if we are talking about incorporating rule-like exceptions to, say, the return of property to rightful title holders, we are not talking about beneficence in its particularistic sense at all. We may be talking about some welfare-enhancing tweaking that itself requires a fairly abstract construal. For example, in certain class of situations defined in fairly precise and objective terms, the optimal rule may require some other decision. Low-level construals are not adequate to this task. Secondly, if we are talking about a one-off exception based on very high concrete costs in a particularly harsh case of the application of justice, then it is hard to say anything systematic about that. The point of the analysis above is that the bias toward beneficence is not confined to these extreme cases.

2008] *JUSTICE VERSUS BENEVOLENCE* 895
beneficence is not entirely offset by long-run self- or institutional-constraints, the bias will reflect a negative externality. In this sense only, can we label the "bias" as undesirable.

6. POSSIBLE APPLICATIONS OF THE THEORY

In this section I address two possible applications of the theoretical considerations outlined above. The first is rent-seeking through the legislative process. The second is a mechanism of possible decay in judicial decision-making consistent with the rules of justice. These applications are highly speculative and tentative.

A. RENT-SEEKING

Most individuals understand that special interests will seek rents through any political process in which there is possible entry. In the case of the application of the rules of justice, we have seen that there exists a negative externality attendant on deviations from those rules in the direction of beneficence. In some cases we will find large concentrated benefits to particular groups that make it worthwhile for them to push for a specific weakening of the rules of justice. Imposition of tariffs, for example, violates justice in the form of freedom of contract.³¹

Suppose that the domestic steel producers and workers' union support a rise in the protective tariff on imported steel to assist workers who would otherwise lose their jobs and localities which would be devastated by further closure of steel plants. Some who are favorably inclined toward this measure might call it "beneficence."³²

Our concern here is not the political economy of rent-seeking but the effect of rent-seeking on the ways in which ordinary citizens perceive the activities of the rent-seekers.

³¹ . A tariff on imported products is not only an economic issue but it is an issue of justice as well. There is certainly a strong presumption that people ought to be able to trade on whatever terms at which they voluntarily arrive without the intervention of third parties. This is an example of freedom of contract—part of Humean justice.

³² . In the political process it seems appropriate to put the word beneficence in quotation marks because it is difficult to see true beneficence when the support for deviations from justice comes from groups which have a financial interest in them. Others might refer to the measure as an instance of distributive "justice." Following Hume, I do not use the term justice in this way.

To the extent that they construe these actions at a high level they will find that issues of justice arise in their minds. Why should people be forced to buy higher priced steel when, in general, we allow people to buy and sell at whatever prices the market will sustain? Other individuals, besides steel workers, suffer from the effects of more able competitors—why are they not protected? Would it be a good thing to protect the prices of all buyers or sellers who are in “need?” As one generalizes this issue the more unappealing this *type* of intervention becomes. Public opposition will be easier to generate. On the other hand, if the case is construed in low-level terms, the minds of citizens will be focused on the particular sorrows and difficulties of the steel workers. In this situation, gathering public support or, at least forestalling public opposition, will be easier.

It is certainly possible that psychologically-sophisticated rent-seekers might deliberately seek to have the public issue construed in concrete terms. Suppose, however, they are not so sophisticated. It is likely anyway that the issue will be posed in low-level terms. This is because the specifics of their situation are what the special interests know. In addition, they are interested in the prevention or relief of economic distress concentrated among their members and not more abstract issues. They will make their case in concrete and particular terms.

Research conducted by those working in the area of CLT has shown, at least in a preliminary way, that when experimental participants are primed with abstract thinking, specifically, abstract words in a preliminary word-search task, they become more oriented toward future benefits and their level of impatience decreases. Those who were primed with concrete words tended to be more present-oriented.³³ If these effects generalize, it would not be surprising to find that the low-level construals of their problems advanced by rent-seekers would tend to make citizens focus on the here-and-now beneficence aspects and not on the more abstract or longer-term justice issues.

³³ . See Trope et al., *supra* note 22, at 93; S.A. Malkoc et al., Impatience is in the Mindset: Carryover Effects of Processing Abstractness in Sequential Tasks (2006) (unpublished manuscript, on file with the University of North Carolina, Chapel Hill).

2008] *JUSTICE VERSUS BENEVOLENCE* 897
B. JUDICIAL DECISION-MAKING³⁴

We suppose that judges make their reputation, by and large, by adhering to the precedents set by other judges. Nevertheless, it may well be the case that judges differ in their beneficence propensities. Some judges may be tempted more than others to depart from justice in deciding a particular case. These judges perhaps construe the issues more concretely; that is, more in terms of the particular circumstances in a discrete case. Low-level construal is their personal predilection. For example, such a judge may feel greater temptation to depart from the general rules that enforce contracts against individuals in breach or impose liability on negligent parties because the particularly sympathetic circumstances of the party who is responsible in each case. The judge will pay a certain price in terms of loss of reputation but he feels it is worth it. If he decides according to his beneficence preference, he will create a precedent that moves the line of acceptable excuses slightly. This will make it more likely that another judge with a marginally lesser propensity to beneficence will find a basis (in that first decision) for moving the line still farther. While each judge imposes a negative externality on the system, he is partially protected in reputation by the previous decision and so the system moves toward a weakening of the rules of justice. In rationalizing such decisions the relatively-beneficent judge lowers the level of problem-construal reflecting at least in a rough way his personal predilection. In the circumstances outlined above, the system of precedent can lower the level of construal in the law.³⁵

CONCLUSIONS

All actions can be characterized in more than one way. This is especially important in those cases where motivations and consequences are multifaceted. David Hume

³⁴ . This is a summary of the analysis in Mario J. Rizzo & Douglas Glen Whitman, *The Camel's Nose is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 568-70 (2003).

³⁵ . On the other hand, levels of construal might rise through the mechanism of precedent as they have in First Amendment free-speech cases. See Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 403-04 (1989) (reviewing HARRY KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988)).

understood that the psychology of moral action is a critical aspect of individual and social behavior.

In this Article I have shown that individuals may characterize the same action as a lack of beneficence or as the application of justice depending on how it is construed. A single act of beneficence is a concrete virtue with immediate positive affect or positive psychological feedback. Justice is more abstract. Individuals may view a single act of justice disapprovingly, even though the institution of justice is necessary for the maintenance of society and social cooperation. For my purposes, the contribution of modern Construal Level Theory shows that there is predictability in the way actions or events are construed. The smaller the psychological distance between an action or event and the decision-maker or observer the more likely the decision-maker will construe it at a lower level of abstraction. Lower-level construal, I conjecture, is more likely to lead to the approval of acts of beneficence relative to acts of justice. This introduces a negative externality into the system of moral, legal and even political decision-making. Too much beneficence relative to justice, from the point of view of the social optimum, will be produced. This need not be where the process stops, however, if individuals in the private or public capacity adopt rules and procedures to make higher level construals of moral, legal, or political actions more likely, thus rebalancing the system in favor of acts of justice.