

# W. D. Ross on Justice

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## Introduction

W. D. Ross seems to me to be one of the most important ethicists yet. As I will summarize in the next section, his contributions to ethical theory have been enormous and, I believe, insufficiently appreciated. His kind of deontological pluralism seems to me to be theory that rivals need to displace. In this paper, I will move quickly over familiar points about Ross, for the most part, and concentrate on his ideas about the prima facie duty of justice. While giving Ross credit for what seems insightful in his ideas about justice, I will also point to some difficulties.

## Ross's contributions to ethical theory

Ross's three most important contributions to ethical theory are his intuitionist moral epistemology, his deontological pluralism, and his distinction between 'prima facie' (often now called pro tanto) duties and 'final' or 'all-things-considered' duty.

Ross was hardly the first to espouse an intuitionist moral epistemology. Between the 1870s and the 1930s, not only Ross but also Henry Sidgwick, G.E. Moore, J.M.E. McTaggart, H.A. Prichard, Hastings Rashdall, E.F. Carritt, C.D. Broad, and A. C. Ewing were intuitionists in moral epistemology. They were hardly the first. In 1600s and 1700s, Ralph Cudworth, Henry More, Bishop Butler, Samuel Clarke, Richard Price, Thomas Reid held intuitionist views.

There has recently been a rival in intuitionism as a moral epistemology. Thomas Nagel, Judith Thompson, Tim Scanlon, Frances Kamm, and very many others obviously *employ* this moral epistemology. And Robert Audi, George Beeler, Jonathan Dancy, David McNaughton, Roger Crisp, Robert Shaver, Russ Shafer-Landau, Michael Huemer, David Enoch, and Philip Stratton-Lake, among others, *defend and develop* it.

But I am not an expert on the history of metaethics and want to sidestep purely historical questions about it. Nor am I going here to assess intuitionism as a moral epistemology. Instead, I am going to employ it, much in the same way Ross did.

Ross was hardly the first deontological pluralist. And he himself says that he was persuaded of many of his main ideas by H.A. Prichard. Nevertheless, ch. 2 of *The Right and the Good* is the "go-to" source for deontological pluralism.

Are the list of prima facie duties that Ross gives us there fully adequate? I cannot see that they are. Prima facie duties of agent-relative special concern for family and friends is strangely absent from his list of prima facie duties on p. 21 of his *The Right and the Good*. The attempt to fold duties of agent-relative special concern for family, friends, and so on under duties of gratitude and fidelity might place children's duty towards their parents under gratitude and friends' duties towards one another under an implicit promise of loyalty. But siblings' duties towards one another cannot plausibly be fully accounted for under gratitude and promise-keeping, as has often been noted.

I will briefly mention three other (perhaps less obvious) shortcomings in Ross's list of prima facie duties.

First, while Ross implicitly makes a doing/allowing distinction in that he takes his duty of non-maleficence to be generally stronger than his duty of beneficence, he does not make a distinction between foreseen but unintended harm and intended harm. But I think many discussions—including those advanced by Charles Fried, Thomas Nagel, Judith Thompson, and

Frances Kamm—have persuaded many of us that intending harm for the sake of a greater good is, all else equal, morally worse than causing harm that is foreseen as a by-product but not intended.

Second, as Bernard Williams highlighted in *Ethics and the Limits of Philosophy*, Ross's duty of beneficence is so relentless that it "makes work for idle hands," i.e., tells us to be out doing good whenever we are not occupied with fulfilling our other prima facie duties. Ross asserts we have a moral duty of self-improvement in terms of our virtue and knowledge. A duty of self-improvement in terms of virtue is hardly going to release us from spending our free time on doing good for others. Thus, Ross's account seems to imply that the only justification for spending our free time on something other than doing good for others is that we are pursuing knowledge. (For an especially good discussion, see Hurka and Schubert, "Permissions to Do Less than the Best: A Moving Band," *Oxford Studies in Normative Ethics* 2, 2012.)

Third, Ross holds that deontological pluralism can get by with duties at its foundation without need of mentioning rights. Of course, many of your rights can be restated as duties that everyone else has towards you. Your right not to be attacked is the correlate of everyone else's duty not to attack you. Your right not to be robbed is the correlate of everyone else's duty not to rob you. Your right not to be lied to is the correlate of everyone else's duty not to lie to you. And perhaps your freedoms can be explained as absences of duties on you. But explaining so-called power rights in terms of duties seems to me impossible, as I will now explain.

You have power rights to promise, accept or reject others' promises to you, make contracts with people, and (if single) get married. There are other power rights as well. Admittedly, the exercise of power rights has effects on duties. For example, if you promise you will meet me for lunch tomorrow and I accept the promise, then you have created a duty for yourself to meet me for lunch tomorrow. (You have also created a right for me that you meet me for lunch tomorrow.) The duty you thereby create to meet me for lunch tomorrow depends on your having exercised your prior right to create this duty. The right cannot be reduced to or explained in terms of the duty, since the right is the basis of the possibility of conferring the duty. Deontological pluralism needs to posit at least power rights as well as duties.

Therefore, Ross does not provide a fully satisfactory version of deontological pluralism. Nevertheless, many of the elements he identifies must be included in a satisfactory version. We might say he leaves some important things out, rather than leading us off in the wrong direction. And if a moral theory must accord with our most confident moral convictions if this theory is to be justified to us, then a revised version of deontological pluralism will be difficult to supersede. For a revised version of deontological pluralism will generate verdicts about what to do that seem intuitively correct. No single-principle moral theory will do a better job generating intuitively correct verdicts. And no single-principle moral theory will be justified to us unless it does as good a job of agreeing with our various moral convictions as deontological pluralism does. To defeat deontological pluralism, a single-principle moral theory must not only do as good a job of agreeing with our various moral convictions as deontological pluralism does but also provide a deeply attractive unifying foundation for our various moral ideas (see my *Ideal Code, Real World*, pp. 9–22). Whether there is some single-principle moral theory that can do this is as yet unresolved.

Connected to Ross's deontological pluralism is Ross's distinction between prima facie duties and all-things-considered duties. We have a duty not to harm others and a duty not to lie, but what about cases where someone will be harmed if we do not lie? Ross would say that what we know is invariant is that if an act would harm an innocent person, this fact about the act

always counts morally against it, and if an act would be a lie, this fact about the act always counts morally against it. What we do not know until we hear more about the amount of harm at stake in a particular case, the subject matter of the lie in the case, and perhaps other matters is whether in this case the duty not to harm defeats the duty not to lie or vice versa. Ross would say similar things about the conflicts between other prima facie duties.

One could try to be a deontological pluralist without making a distinction between prima facie and all-things-considered duty. In order to construct such a deontological pluralism, one might try to rank the duties in an ordering of strict priority. For example, the duty not to harm others might be thought to trump the duty to benefit others. Indeed, the duty of non-maleficence is *generally* stronger than the duty of beneficence (*FE*, p. 75). Thus, you are not allowed to break my finger in order to prevent someone else from getting a broken arm.

Nevertheless, there can be cases in which the harm to others would be relatively small and the benefit to others would be so great that, intuitively, the duty of beneficence here outweighs the duty of non-maleficence. For example, suppose that your breaking my finger is somehow necessary for you to prevent multitudes of other innocent people from being subjected to radioactive poisoning. This sort of example is easy to multiply using conflicts between other duties. *Strict* priority orderings seem implausible (Nagel, “The Fragmentation of Value,” in *Mortal Questions*, 1979, p. 131).

Instead of trying to maintain strict priority orderings, could we fine-tune the pluralist elements so as to eliminate conflict between them entirely? For example, since an unqualified duty not to harm others can come into practical conflict with an unqualified duty not to lie, a way to prevent such conflict might be to qualify one duty or both of them. A suggestion might be that the duty not to lie is restricted to situations in which one’s interlocutor has a right to be told the truth, and the duty not to harm might get qualified so as pertain to harms intended as an end or a means to an end but *not* to harms that are unintended but foreseen.

However, someone good at devising counter-examples might then cite a case where refusing to lie to someone who has a right to the truth will somehow result in an unintended but foreseen harm that is so terrible that the duty not to lie is here outweighed. Examples where duties are outweighed rather than restricted or qualified are plentiful. And the phenomenon of “moral residue” testifies to one duty’s being *outweighed* by a second duty instead of the first duty’s being *restricted so as to avoid conflict* with the second (Ross, *R&G*, p. 28).

As I indicated, I think that Ross’s combination of deontological pluralism with his distinction between prima facie duties and all-things-considered duties constituted one of the most important steps forward in ethical theory. And, more than eighty years later, the combination still constitutes the theory to beat in normative ethics, even if Ross’s list of prima facie duties needs a bit of revision and supplementation.

### **Ross on Justice**

One of the areas where Ross’s list of prima facie duties needs revision and supplementation concerns justice. He wrote,

Some [duties] rest on the fact or possibility of a distribution of pleasure or happiness (or of the means thereto) which is not in accordance with the merit of the persons concerned; in such cases there arises a duty to upset or prevent such a distribution. These are the duties of justice. (*R&G*, p. 21)

The duty of justice is particularly complicated, and the word is used to cover things which are really very different—things such as the payment of debts, the reparation of injuries done by oneself to another, and the bringing about of a distribution of happiness between other people in proportion to merit. I use the word to denote only the last of these three. ... The bringing of this about is a duty which we owe to all men alike, though it may be reinforced by special responsibilities that we have undertaken to particular men. (*R&G*, pp. 26–7)

In this second passage, Ross acknowledged that the word “justice” is used to cover payment of debts created by previous acts of the agent, in particular promises the agent has made. In the passage, Ross also acknowledged the part of justice that has to do with making reparation to those whom the agent has wronged. With respect to both paying debts and making reparation, let us note, the duties are owed to people with a particular connection to the agent. The agent has promised to do a service or provide a good to someone in particular, and so the duty is *agent-relative*, in the sense that *my* duty is to keep the promises I made, to be loyal to my friends, not to harm others myself, while *yours* is to keep your promises, to be loyal to your friends, not to harm people yourself, and so on). These agent-relative components of justice are elements that Ross wants to list under duties that rest on actions the agent has done, such as promises the agent has made to a particular person or wrongs the agent has perpetrated on a particular person.

Are the only agent-relative elements of justice the agent-relative elements that Ross has identified? Suppose that I could devote my free time to helping a stranger or to helping my sister, and each of them would benefit about the same amount from my help. If I help the stranger rather than my sister, my sister might correctly complain that I am treating her unjustly, because I am ignoring the fact that, as between the two potential beneficiaries of my choice in the current situation, one has a close personal connection to me and thus a special claim on my attention and energy, while the other has no special connection to me and thus no special claim on my attention and energy.

Admittedly, special connections between siblings can of course be strengthened by explicit or implicit promises. These connections can also be strengthened by duties of reparation for wrongs done to one another and by duties of gratitude for services provided to one another. But there are special connections between siblings that underpin agent-relative duties of loyalty to one another *even in the absence of any explicit or implicit promises between them, the absence of any wrongs for which reparation is owed, and the absence of any unfulfilled duties of gratitude*. Since there are such agent-relative duties of loyalty that do not rest on duties of promise keeping, reparation, or gratitude, and these duties of loyalty can be relevant to justice, an account of justice should accommodate them.

Can Ross accommodate duties of loyalty by folding them into his account of *merit*? Couldn't Ross say that my sister *merits* my attention in a way that a stranger doesn't, unless of course the stranger would benefit much more from my help than she would? I think there is scope for a very broadly Rossian account to do this. But Ross himself didn't do it. He restricted merit to virtue, rather than to standing in special connections to the agent.

Instead, Ross construed the duty of justice as agent-neutral. He indicates at the end of the second quotation immediately above that bringing about the distribution of happiness in proportion to merit is something each owes to all others without regard to any agent-relative connections, just as the duty of beneficence in itself has no agent-relative component (apart from

Ross's insistence that the agent's duty to promote pleasure disregards the agent's own pleasure). Indeed, Ross wanted to subsume the duty to promote justice under the duty of beneficence. Ross took the non-moral goods to be pleasure and knowledge and the moral goods to be virtue and justice. All of these goods can be promoted under banner of beneficence.

Does each owe to all others, without regard to any agent-relative connections, a duty to promote the distribution of happiness in proportion to merit, by which Ross meant virtue? Whether the duty to do good is one we *owe to all others or not*, it is a duty. And it is difficult to deny that the good is comprised of, among other things, aggregate well-being and the extent to which benefits go to those who deserve them. Ross gave us a thought experiment with immense appeal:

If we compare two imaginary states of the universe, alike in total amounts of virtue and vice and of pleasure and pain present in the two, but in one of which the virtuous were all happy and the vicious miserable, while in the other the virtuous were miserable and the vicious happy, very few people would hesitate to say that the first was a much better state of the universe than the second. (*R&G*, p. 138; see also *FE*, pp. 73–4)

This passage seems to me very difficult to resist, especially if the account is amended so that it refers to the distribution of *positive well-being* in proportion to virtue, without tying positive well-being to happiness (see my "The Elements of Well-Being," *Journal of Practical Ethics*, 2015).

### **Virtue, Rights, and Fairness**

Even where social practices and institutions are designed to promote and reward virtue, these social practices and institutions might be designed badly and so have the reverse effect. Other social practices and institutions are designed to ignore virtue and achieve other ends. In either case, social practices and institutions might *require*, indirectly *incentivize*, or merely *permit* injustice. How might practices or institutions require, incentivize, or permit injustice? In a Rossian spirit, we might try to answer that these practices or institutions could require, incentivize, or permit divergence between benefit and virtue.

Many social practices and institutions focus on other things than virtue. To take a simple example, let us consider a 100-yr dash. Suppose that I have been self-obsessed and devious over the years and you have been altruistic and honest. We compete in a 100-yr dash. Sadly, you trip and I get to the finish line first. If the rules of the race are followed, I am awarded the prize. But you are more virtuous. Here, following the rules of the practice results in a divergence between benefit and virtue.

Is it unjust that the prize goes to me rather than you? Well, the prize was to be awarded to the first across the finish line without cheating, and I didn't cheat. It would be unjust to change the rules *after the race* so that the award was given for kindness and honesty over the years rather than for the swiftest performance in the race. If the rules had been changed before the race, would there have even been a race, given that the rule that benefits go to the virtuous would have already awarded the prize to you? The lesson to draw from this example is that what is just often consists in following the rules of an established practice or institution, even if following the rules results in a divergence between benefit and virtue.

Ross could have reacted to the example of the 100-yr dash by saying that, when we voluntarily engage in a competitive sport or game, we (implicitly if not explicitly) promise to

follow the rules of that sport or game. The rules of the 100-yrds dash require various things of the competitors, such as they not start before the whistle, not make physical contact with the other runners during the race, etc. And the rules stipulate that the first across the finish-line is the winner. By voluntarily competing in, or officiating at, the race, people implicitly if not explicitly promise to accept that the first to cross the finish-line is the winner. Justice requires that people keep their promises even when doing so will decrease rather than increase the extent to which the more virtuous benefit more.

Since practices and institutions can be acceptable to justice even if, in particular cases, applying their rules results in divergence between benefit and virtue, consider the idea that practices and institutions are just as long as their operation *in general* and *on the whole* results in a correspondence between benefit and virtue—even if, in many individual cases, their operation yields greater benefits to the less virtuous. Many practices are configured for the sake of efficiency, being easy to remember, and for other non-moral advantages. For example, if you list names in alphabetical order, you have provided a list in which, no matter how long the list is, someone can very quickly check to see if a name is included, and you have made no suggestion as to which names are more important than others. There is no reason to assume that this practice will in general and on the whole result in greater benefits for the more virtuous. The same seems to me true of very many other useful and acceptable practices whose purposes are other than to recognise and reward virtue.

Might it nevertheless be the case that *a system of social practices* working together could produce a better match between well-being and virtue *on the whole* than any other system we are able to identify? Let us accept that there is some system of social practices that is better at rewarding virtue than any rival system. However, if systems of social practices are assessed *only* in terms of how much they reward virtue, the spectre of obsessive moralism looms. The extent to which virtue is rewarded—in Ross’s terms, the degree of justice—is hardly the only thing that matters. A way of making this point vivid is to rework Ross’s thought experiment:

Compare two imaginary states of the universe. In one, there is far greater aggregate well-being but a bit less of a match between well-being and virtue. In the other, there is far less aggregate well-being but a bit better match between well-being and virtue.

Why might there be greater aggregate well-being where the match between well-being and virtue is a bit less? If the match is better between well-being and virtue, the likely cause is that people are trying relentlessly to bring about this match. But too great a concern for bringing about a match between well-being and virtue would be oppressive, leaving far too little room for the pursuit of other aims, such as efficiency. Moreover, it would be a terrible loss to leave no room for non-judgemental joy taken in undeserved benefits.

So far, I have admitted that justice is *partly* a matter of reward of virtue. I have also contended that often justice requires following the rules of an established practice or institution whose rules are focused on things other than matters of virtue, and that the consequences of following the rules of the practice or institutions can be a divergence between well-being and virtue. I added that, even if systems of social practices and institutions can be assessed in terms of how effectively they are at rewarding virtue, this is not the only dimension along which they should be assessed. My example suggested that another dimension along which they should be assessed is aggregate well-being.

I now want to suggest that there are remarks in Ross that can support the idea that justice can come into our assessment of social practices and institutions in ways that bypass the question of whether the distribution of well-being is proportional to virtue. *The Foundations of Ethics* has a few passages in which Ross seems to place more importance on the observance of rights than he does anywhere in *The Right and the Good*. The most striking of these passages in *The Foundations of Ethics* is this:

In its typical manifestation, the sense of duty is a particularly keen sensitiveness to the rights and interests of other people, coupled with a determination to do what is fair between them.... (p. 304)

Where in Ross's deontological pluralism do rights and fairness sit? Rights to have promises kept are created by promises. Rights against various kinds of harm correspond to the duty of non-maleficence. But there are lots of rights that do not easily fall into those categories. Perhaps liberty rights and power rights are the most obvious examples. If we have to choose where in Ross's list of prima facie duties to put rights that are not created by promises and rights that are not the flip side of the duty of non-maleficence, I think the most natural answer is under the duty of justice. Equally, if we have to choose where in Ross's list of prima facie duties to put concern for fairness, I think the most natural answer is under the duty of justice.

If part of assessing the justice of a set of social practices and institutions consists in ascertaining whether the set generates a distribution of benefits in proportion to virtue, cannot another part of assessing the justice of a set of social practices and institutions consist in ascertaining whether the set respects the rights that people have? If so, then justice involves not only distribution of well-being in proportion to virtue but also (at least) respect for people's rights.

The pressure for distribution of well-being in proportion to virtue might itself be explained as grounded in rights. This explanation might assert that each person has a right to a level of well-being that corresponds to his or her level of virtue. If pressure for distribution of well-being in proportion to virtue can be grounded in such rights, then we are confronted by a rights-based theory of justice. I am not suggesting that Ross would be happy with a rights-based theory of justice, much less that he suggested one. I am suggesting that his arresting remark about the typical manifestation of the sense of duty might lead us in the direction of a rights-based theory of justice.

Ross's comment about a determination to do what is fair *between people* suggests he thinks of fairness as essentially comparative in the sense that fairness or unfairness depends upon a comparison of the treatment of, or evaluation of, different individuals or groups. Indeed, in that spirit, consider this account of fairness:

An individual behaves or evaluates fairly if, only if, and because she not only treats or evaluates entities who are *not* relevantly different as if they're *not* relevantly different but also treats or evaluates entities who *are* relevantly different in accordance with their relevant difference.

We can take a stab at saying what differences between people might be relevant. With Ross in mind, we might say that one way that people are relevantly different is that some are more *virtuous* than others. Another relevant difference might be that some people are ones to whom

we have made *promises* and others are not. Another relevant difference might be that some people have some other *special connection* with us, such as being our benefactor or victim or sibling, and others do not. There will be many situations in which any or all these differences between people will be relevant to deciding how we should treat them.

Consider a situation in which we are deciding which of two people to give some item, and the two people do not differ in any of the ways just mentioned, and yet one of these people would benefit more than the other from getting the item. Is taking into account this difference between them fair? Perhaps one of these people is *needier* than the other and that is why one would benefit more from getting the item than the other would. Many people hold that the difference in the extent to which their needs would be satisfied is a relevant difference.

But, while holding everything already stipulated in place, suppose that neither of the possible beneficiaries of our decision is needy. Each would benefit from being given the item, but each is already above any reasonable threshold of need, and so the benefit obtained would be beyond need. Does fairness count as relevant the fact that, though neither person is needy, one person would benefit more than the other would? One prominent view is that fairness is limited to comparison of people's moral *claims* (Broome, "Fairness," *Proceedings of the Aristotelian Society* 91, 1990, pp. 87–102). It might be held that there are moral claims based on moral desert, promises, special connections, and need, but none based on purely the availability of an unneeded benefit. Mindful of idea that the duty of beneficence is an imperfect duty, I accept that people without special connections to us do not have *rights* to unneeded benefits from us. Yet, I do think that the fact that one person would benefit more than the other would benefit though neither is needy can be a difference relevant to fairness. Differences in utility gains can be relevant to fairness, even if this difference can also pull in the opposite direction from the pull of one or more other differences relevant to fairness.

Notice that I wrote "can be relevant to fairness" rather than "*must* be relevant to fairness." Differences in utility are like differences in moral virtue, in what promises have been made, in special connections, and in need: each of these is often irrelevant to fairness. They are irrelevant when agents are engaging in a permissible social practice and the practice requires or allows criteria to operate that ignore differences in moral virtue, in what promises have been made, in what special connections exist, in need, and in unneeded utility gains. In the example of the 100-yr dash, all these differences were irrelevant to deciding who won the race.