

Justicized Consequentialism: Prioritizing the Right or the Good?

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One of the standard objections to classical utilitarianism is that it permits harmdoing that we find intuitively unacceptable. It appears to mandate, for example, the framing of an innocent person for murder if her suffering is outweighed by the satiation of the population's craving for retribution. It is usually argued that utilitarianism produces these counter-intuitive conclusions because it is, at best, only indirectly concerned with the way in which total welfare is distributed between individuals. As a result it treats the target population as if it were one individual aiming to maximize her welfare. That is, utilitarianism fails to differentiate between sacrificing some individuals in order to maximize welfare for a population and a particular individual choosing to make a sacrifice in order to maximize her personal welfare. In sum utilitarianism is accused of permitting counter-intuitive conclusions and of failing to take seriously the separateness between persons.¹ Henceforward, these two closely related charges will be referred to as the objection from justice.

In response a number of philosophers have argued that traditional act-utilitarianism is only vulnerable to the objection from justice because it adheres to a theory of the good which ignores non-welfarist sources of intrinsic value such as justice.² According to that proposal intrinsic value is produced both by welfare

¹ For the classic statement of the latter challenge see John Rawls, *A Theory of Justice*, revised edition (Cambridge Mass.: Harvard University Press, 1999/1971), pp. 19–26.

² See Amartya Sen, "Rights and Agency," *Philosophy and Public Affairs*, Vol. 11, No. 1, (1982); David Sosa, "Consequences of Consequentialism," *Mind*, Vol. 102, No. 405 (1993); John Broome, *Weighing Goods: Equality, Uncertainty and Time* (Oxford: Blackwell Publishers, 1995); Fred Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," *Philosophy and Phenomenological Research*, Vol. LV, No. (3) (1995); Fred Feldman, "Justice, Desert and the Repugnant Conclusion," *Utilitas*, Vol. 7, No. 2 (1995) and Douglas W. Portmore, "Can an Act-Consequentialist Theory Be Agent Relative?" *American Philosophical Quarterly*, Vol. 38, No. 4 (2001).

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and by the distribution of welfare according to justice. The idea of attributing intrinsic value to justice, and desert in particular, is by no means a new one. Franz Brentano, G.E. Moore and W.D. Ross all argued that hedonic receipt and the extent to which hedonic receipt matches deservingness partly determines the total intrinsic value in the world.³ An important upshot of pluralizing intrinsic value in this way is that justice is not valued simply because it tends to encourage welfare maximizing behavior. Equally, justice is not an independent and prior constraint on the pursuit of the good, but rather itself a good which may add to or subtract from the total good. According to the advocate of that variant of act-utilitarianism the morally right course of action is the one that maximizes welfare and justice value for the world. To see how this might block the justice objection consider W.D. Ross's example of the benefactor who must choose between giving 1001 units of value to the bad man or 1000 units of value to the good man.⁴ Consequentialism based solely on a subjective theory of value would recommend – contrary to our intuitions – that the benefactor give all the units to the bad man. By contrast a consequentialist theory that also takes into account the objective value arising from the amount of justice in the result would recommend that she give the units to the good man. The amount of good arising from distributing according to moral desert outweighs the amount of good arising from the disparity in satisfaction between the two individuals. Thus, justified consequentialism promises to reconcile our commonsense moral intuitions with the appealing idea that we ought to bring about the best available state of affairs.

In this article it will be argued that justified consequentialism can only block the objection from justice by presupposing deontological constraints. More precisely, the proposal can avoid the introduction of deontological restrictions, but only at the expense of providing an extremely modest response to the objection from justice. In addition it is argued that any theory of the good that assigns non-instrumental value to justice is, in effect, appealing to deontological considerations. The value of justice, or so it is argued, cannot be explained non-deontically. If correct then the assignment of value to justice at most provides a way of representing deontological considerations.

Fred Feldman's desert-adjusted act utilitarianism represents the most fully developed account of justified consequentialism.⁵ It has also garnered the most attention in the literature. For that reason his axiological framework will form the

³ See Franz Brentano, *The Origin of Our Knowledge of Right and Wrong* trans. Roderick M. Chisholm and Elizabeth H. Schneewind (Abingdon: Routledge, 2009/1889), p. 100; G.E. Moore, *Principia Ethica*, revised edition. (Cambridge: Cambridge University Press, 1993/1903), pp. 263–264; W.D. Ross, *The Right and the Good*, Phillip Stratton-Lake ed. (Oxford: Oxford University Press, 2002/1930), pp. 57–58, 72, 138. For a more recent defense of that view see Thomas Hurka, “The Common Structure of Virtue and Desert,” *Ethics*, Vol. 112, No. 1 (2001) and Shelly Kagan, *The Geometry of Desert* (Oxford: Oxford University Press, 2012), pp. 628–634.

⁴ See Ross, op. cit., p. 35.

⁵ Feldman's proposal has been defended and further developed by Neil Feit and Stephen Kershnar, “Explaining the Geometry of Desert,” *Public Affairs Quarterly*, Vol. 18, No. 4 (2004); Richard Arneson, “Desert and Equality,” in Nils Holtug and Kasper Lippert-Rasmussen eds., *Egalitarianism: New Essays on the Nature and Value of Equality* (Oxford: Oxford University Press, 2007), pp. 282–283 and Bradford Skow, “How to Adjust Utility for Desert,” *Australasian Journal of Philosophy*, Vol. 90, No. 2 (2012).

main focus of this article. Nevertheless, all versions of justicized consequentialism are susceptible to the criticisms that are developed here against Feldman's proposal. It should be noted from the outset that the existing challenges to Feldman's proposal in the literature are not life-threatening because in each case the critic specifies how the axiology may be revised to avoid the very criticism they identify.⁶ By contrast the challenges presented here cannot be avoided by tinkering with the axiology. Finally, it is assumed that rule-utilitarianism is not susceptible to the standard counter-examples to act-utilitarianism. However, the purpose of this article is to examine whether act-utilitarianism can be adapted to avoid the objection from justice.⁷

1 Feldman's Desert-Adjusted Utilitarianism

We begin with a brief sketch of the most robust formulation of Feldman's version of justicized consequentialism. According to Feldman's proposal an action is morally right if it leads to at least as much intrinsic good as the outcome of each alternative action. Welfare and desert represent independent sources of intrinsic value which combine to determine the net intrinsic goodness in the world. More precisely, the intrinsic value arising from the receipt of welfare is a function of the welfare received as well as the degree to which it fits the welfare level that the individual deserves. Feldman himself argues that desert adjusts the intrinsic value emanating from welfare. In other words, the intrinsic value of welfare is conditional upon desert.⁸ However, that way of putting things suggests that a person's pleasure receipt is less intrinsically good if it is undeserved and that a person's pain receipt is less intrinsically bad if it is deserved.⁹ For that reason it is more plausible to say that both welfare and desert adjust the intrinsic value in the world.

Feldman has been criticized on the grounds that he vacillates between two competing ways of understanding the contribution of desert to intrinsic value – the

⁶ See Peter Vallentyne, "Taking Justice Too Seriously," *Utilitas*, 7(2) (1995); Erik Carlson, "Consequentialism, Distribution and Desert," *Utilitas*, Vol. 9, No. 3 (1997); Owen McLeod, "Adjusting Utility for Justice: A Re-examination of the Connection between Desert and Intrinsic Value," in Kris McDaniel, Jason R. Raibley, Richard Feldman, and Michael J. Zimmerman, eds., *The Good, the Right, Life and Death: Essays in Honor of Fred Feldman* (Burlington, Vt.: Ashgate, 2006); and Gustaf Arrhenius, "Desert as Fit: An Axiomatic Analysis," in Kris McDaniel et al., eds., *The Good, the Right, Life and Death: Essays in Honor of Fred Feldman* (Burlington, Vt.: Ashgate, 2006).

⁷ On the contrast between rule-utilitarianism and justicized act-utilitarianism see Brad Hooker, "Feldman, Rule-Consequentialism, and Desert," in Kris McDaniel, et al., eds., *The Good, the Right, Life and Death: Essays in Honor of Fred Feldman* (Burlington, Vt.: Ashgate, 2006) and Brad Hooker, "Ideal Code, Real World: A Rule-Consequentialist Theory of Morality," (Oxford: Oxford University Press, 2003), pp. 104–107.

⁸ Feldman, "Adjusting Utility for Justice," p. 573.

⁹ On this point see Arrhenius, op. cit., pp. 5–6 and Hurka, op. cit., pp. 10–11. Elsewhere Feldman defends the view that the intrinsic value of pleasure is unconditional. See Fred Feldman, "On the Intrinsic Value of Pleasures," *Ethics*, Vol. 107, No. 3 (1997). Not surprisingly, therefore, he now explicitly accepts the view that desert and utility represent two independent sources of intrinsic value. See Fred Feldman, "Return to Twin Peaks: On the Intrinsic Moral Significance of Equality," in Serena Olsaretti ed. *Desert and Justice* (Oxford: Oxford University Press, 2003), p. 148.

height of the desert level and the degree of fit between the desert level and receipt.¹⁰ Most agree that the fit interpretation better captures the concerns of justice and so the discussion below is framed in terms of that interpretation. Nevertheless, both interpretations are vulnerable to the criticisms that will be raised against Feldman's theory.¹¹

For the sake of clarity let us follow Feldman in assuming that welfare is measured in terms of pleasure and pain and that justice is best captured by desert. As we will see justicized consequentialism is susceptible to the criticisms that are presented even if justice value is interpreted in terms of an alternative element of justice (such as needs, rights and equality) or a plurality of such elements. Besides, Feldman defends a remarkably broad understanding of the concept of desert. In a departure from the received wisdom he does not restrict the possible bases of desert to those factors for which the agent was responsible. Thus, for example, a person deserves a minimum level of happiness simply in virtue of being human. Similarly, a person deserves their inheritance simply in virtue of their legal entitlement.¹²

As Feldman notes, welfare receipt is good or bad for the world because it is good or bad for the person. By contrast, the intrinsic value resulting from deserving treatment is merely good for the world.¹³ Nevertheless, requiring desert is good for the world because of something about the individual, namely the basis of their claim to deserving treatment (for example, a person deserves a reward in virtue of their valuable contribution). What that means is that the intrinsic value of desert is sensitive to the morally relevant features of each individual. With this in mind we may distinguish Feldman's proposal from the standard indirect utilitarian way of capturing the value of desert. Distributing goods and bads according to desert may, in virtue of incentive effects, be instrumental to the realization of maximal welfare. For Feldman, distribution according to desert generates intrinsic value for the world even in those cases where it does not encourage welfare maximizing behavior.

On the face of it Feldman's desert-adjusted axiology appears to provide an adequate response to the objection from justice. Consider for example W.D. Ross's example of two possible worlds one composed of a million sad saints and a million happy sinners and the other composed of a million happy saints and a million sad sinners.¹⁴ The upshot of classical utilitarianism is that both worlds are equally good even though many would be inclined towards the view that the latter world is better. In keeping with our intuitions, the upshot of Feldman's proposal appears to be that the latter world is indeed intrinsically better.

¹⁰ See Ingmar Persson, "Ambiguities in Feldman's Desert-adjusted Values," *Utilitas* Vol. 9, No. 3 (1997).

¹¹ Note that Carlson, op. cit., Arrhenius, op. cit., and Skow, op. cit. outline how the axiology may be consistently formulated based on the fit interpretation.

¹² Fred Feldman, "Desert: Reconsideration of Some Received Wisdom," *Mind*, Vol. 104, No. 413 (1995).

¹³ See Feldman, "Justice, Desert and the Repugnant Conclusion," pp. 194–195.

¹⁴ Ross, op. cit., p. 138.

2 Three Counter-Examples

Feldman claims that assigning desert consequential value ensures that persons are not merely regarded as welfare carriers. According to the proposal, total value for the world depends, in part, on what each person has done or the qualities they possess. This represents an intriguing attempt to respond to the charge that act-utilitarianism is distributionally insensitive. As we will see the problem with the proposal is that it manipulates the value of justice so as to guarantee the distinction between persons – that is to say, the intrinsic value of justice is adjusted so that it lexically dominates the intrinsic value of welfare. In effect this amounts to taking account of deontological constraints by assigning sufficient value to them. From a purely heuristic point of view this ‘weighing goods approach’ may make of a lot of sense. However, it does not entail that the good defines the right. In order to see this consider how the proposed axiology handles the following counter-examples to utilitarianism.

2.1 The Sheriff I

A heinous murder has been committed in a small town. The townspeople want justice. The sheriff knows that Tim is innocent, but most people believe he is guilty. Act utilitarianism will recommend that the Sheriff arrange for Tim to be punished if his suffering will be outweighed by the satisfaction of the townspeople’s craving for retribution. This case highlights the same basic challenge that is posed by all the standard counter-examples to act utilitarianism. Namely, that it permits harmdoing that we deem intuitively unacceptable. Consider the following numerical illustration of the case. Note that although the numbers in the table are purely illustrative they are all entirely consistent with the proposed axiology.

From Table 1, we can see that if Tim is punished, then the intrinsic disvalue resulting from his considerable suffering is outweighed by the intrinsic value resulting from the townspeople’s combined pleasure. If the Sheriff demonstrates Tim’s innocence, then the value created by his pleasure from continuing his life uninterrupted is outweighed by the disvalue created by the townspeople’s disappointment that the real culprit has not been caught and punished. Based on a comparison of the total intrinsic value produced by the two alternative courses of action the act utilitarian appears to be committed to the unpalatable conclusion that it is morally permissible to punish an innocent person.

Now consider how justice-adjusted utilitarianism might block that counter-intuitive conclusion (see values in brackets). If Tim is punished then the lack of fit between the pleasure he receives and the pleasure he deserves magnifies disvalue

Table 1

<i>Actions</i>	<i>Intrinsic Value: Tim</i>	<i>Intrinsic Value: Townspeople</i>	<i>Total Intrinsic Value</i>
Punish Tim	−800 (−1600) [−900]	810 (700) [800]	10 (−900) [−100]
Not punish Tim	30 (100) [40]	−700 (−800) [−710]	−670 (−700) [−679]

for the world. Let us assume that the townspeople's pleasure is neither deserved nor undeserved (that is, they deserve 0 units of pleasure) and so the resulting intrinsic value is lowered due to the resulting lack of fit. If Tim is not punished then intrinsic value is increased because there is, let us assume, a reasonable fit between his existing receipt level and his desert level. Finally, the disvalue from the townspeople's disappointment is reduced because it is neither deserved nor undeserved. As a result of these modifications we observe that the justice-adjusted axiology recommends the action that accords with our intuitions.

The problem with the proposed solution to the justice objection is that the formal structure of the axiology only requires that the intrinsic value for the world is adjusted upwards or downwards by desert. As a result the axiology does not necessarily block the standard counter-examples to utilitarianism. To see this observe the further way of adjusting total intrinsic value for desert presented in Table I (see square brackets). What this shows is that the axiology, by itself, does not rule out unacceptable harmdoing. It would only block the conclusions like *Sheriff I* if the intrinsic value of desert was deliberately set in order to achieve that aim. However, that strategy would effectively amount to introducing a prior constraint (such as an absolute prohibition on punishing the innocent) on the pursuit of the best consequences.

2.2 Sheriff II

Perhaps the clearest illustration of the general problem is that adjustment for justice may actually produce the counter-intuitive result. Consider the following variation on *Sheriff I*. Let us assume that unrefined utilitarianism produces the intuitively correct result (that is, greater total welfare is produced if Tim is not punished). Let us further assume that the townspeople are suffering from the effects of a severe economic depression that has left most of them destitute for a number of years. As a result there is a significant gap between the minimum pleasure that they deserve (as we will see Feldman defends that type of desert-basis in his response to the population puzzle introduced shortly) and the misery they have been suffering (note that in the original example we assumed that the townspeople deserve no units of pleasure or pain). Let us also assume that punishing Tim will bring the townspeople significantly closer to the pleasure level they deserve. Similarly, the disappointment they will endure if Tim is not punished will significantly widen the gap between their receipt level and the deserved minimum. The resulting adjustment in justice value may, not implausibly, lead us to the conclusion that punishing Tim will produce greater total intrinsic value for the world (see the quantitative example in

Table 2

<i>Actions</i>	<i>Intrinsic Value: Tim</i>	<i>Intrinsic Value: Townspeople</i>	<i>Total Intrinsic Value</i>
Punish Tim	-800 (-830)	790 (840)	-10 (10)
Not punish Tim	30 (30)	-20 (-100)	10 (-70)

Table 2). In that case the counter-intuitive conclusion is actually a product of justice maximization rather than welfare maximization.

That possibility represents a serious problem for justice-adjusted utilitarianism as it demonstrates that the axiology may actually produce the very result it was designed to prevent. At this point some may argue that the whole proposal should be abandoned on the grounds that a solution that has the potential to make things worse is simply not a solution. In response it may be argued that there is good reason to place less weight on the desert-claims of the townspeople. Indeed that qualitative restriction accords with the intuition that doing harm is worse than allowing harm. However, it would remain the case that the values of the competing desert-claims would need to be adjusted in order to block the counter-example. As before that amounts to conceding that there is an absolute constraint against punishing the innocent.

2.3 Repugnant Conclusion

Feldman himself notes a further scenario in which the intrinsic value of desert must be set at a certain level in order to avoid a counter-intuitive conclusion.¹⁵ Specifically he argues that the desert-adjusted axiology provides a satisfactory response to the infamous repugnant conclusion outlined by Derek Parfit.¹⁶ Parfit points out that, provided a population is large enough, a world in which each person's life is barely worth living will be better than a less populous world in which each person's quality of life is better. Totalism recommends the very populous world even though our intuitions suggest that the less populous world is a much better option. Although averagism appears to be an obvious solution to this problem it is itself consistent with a number of counterintuitive outcomes. For example, in a population comprised of extremely happy people the addition of a very happy person would make the world worse. Adding a really happy person to the world, without affecting the well-being of the people already living there, surely makes the world better.

Feldman contends that totalism avoids the repugnant conclusion if aggregate intrinsic value in the world is taken to be a function of welfare and justice. He argues that each person deserves a minimum level of welfare and that receiving much less than that level represents a grave injustice. Consider the case of a person who receives markedly less welfare than the minimum each person deserves. The meager welfare she does receive adds intrinsic value to the world, but it is outweighed by the negative intrinsic value generated by the fact that the welfare she receives falls short of the welfare level she deserves. This amendment to totalism promises to evade the repugnant conclusion because it entails that the addition of a person who would lead a life barely worth living would not add intrinsic value to the world.¹⁷

¹⁵ See Feldman, "Justice, Desert and the Repugnant Conclusion".

¹⁶ Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), chap. 17.

¹⁷ Feldman, *ibid.*, pp. 201–203. Compare with Gustaf Arrhenius, "Feldman's Desert-Adjusted Utilitarianism and Population Ethics," *Utilitas* 15(2) (2003).

However, the amendment only succeeds if we accept the idea that there is a threshold point beyond which the lack of fit between desert and receipt results in sufficient disvalue to outweigh the value generated by welfare receipt.¹⁸ For the sake of argument let us simply grant that under-receipt can produce negative total intrinsic value for the world.¹⁹ The problem that remains is that the repugnant conclusion is only blocked if the threshold is set high enough to rule out the addition of lives that are barely worth living. In that case each individual's prior claim to at least a moderately good life places a qualitative restriction on the outcomes that may be produced by the axiology. That is tantamount to saying that there is absolute constraint against letting people lead a life that is barely worth living.

3 Lexical Priority

In all three of these cases the value of justice must be manipulated to ensure that the intuitively just action perseveres. In effect, therefore, the proposed response to the objection from justice presupposes a prior constraint on the distribution of the good. The range of results that may be produced by the axiology can be limited by the inclusion of independently justified qualitative restrictions. Bernard Skow, for example, presents a plausible set of qualitative restrictions as well as a non-arbitrary method for combining the intrinsic value of welfare and desert.²⁰ The problem is that those restrictions do not preclude the standard counter-examples. Put differently, it is difficult to see how restrictions that do block the justice objection can be justified on grounds other than the fact that they block the justice objection. It is perhaps because of that concern that Feldman notes that:

In some cases [justice-adjusted utilitarianism] will imply that a serious injustice is required in order to assure the best outcome, and so (sadly) ought to be committed. The theory does not imply that justice must always be maximized; it implies that justice-adjusted intrinsic value must always be maximized.²¹

However, it is not clear that a theory which allows for the possibility of serious injustices is one that provides an adequate response to the objection from justice. Moreover, it would seem to imply that the axiology would not necessarily block the repugnant conclusion even though he characterizes that possibility as an example of 'rampant injustice'.²² Perhaps what he means to say is that there are some cases in which following the dictates of justice would run counter to our intuitions (for example, not torturing one person in order to extract information that will save a

¹⁸ Feldman, "Justice, Desert and the Repugnant Conclusion," p. 198.

¹⁹ Although see Vallentyne, *op. cit.*

²⁰ See Skow, *op. cit.*

²¹ Feldman, "Adjusting Utility for Justice," pp. 582–583.

²² Feldman, "Justice, Desert and the Repugnant Conclusion," p. 203.

million). I take this to mean that there is a threshold level where achieving the best results overrides our concerns about justice. However, it remains the case that justice is a constraint below the threshold level.²³ The fact that Feldman must preset the value of justice to ensure that justice is preserved below the threshold level suggests that he cannot avoid the conclusion that justice constitutes a prior and independent constraint. In other words, the intrinsic value of justice must be set at level that accords with our prior intuitions about the appropriate trade-off point between preserving justice and obtaining the best results overall. If correct then the assignment of value to justice merely provides a way of heuristically representing the deontological constraint.

In order to avoid this challenge it may be argued that all versions of justicized consequentialism acknowledge the boundaries between persons simply by including justice value in the aggregative calculation. In the case of desert, for example, it may be argued that the proposed theory adequately recognizes each person's separate identity merely by assigning nonzero value to what they have done or the qualities they possess. Clearly this will not suffice for Feldman's overall purposes as he also wishes to block the standard counter-examples to utilitarianism. Moreover, some may argue that a theory that recognizes the value of justice but does not preclude the possibility of intuitively unacceptable sacrifices (such as punishing an innocent person in order to satiate the retributive urges of the populace), does not in fact take adequate account of separateness. Although it might suffice for those who contend that the moral significance of the separateness between persons has been overstated.²⁴

Feldman appears to be caught between two unpalatable alternatives. A strong response to the objection from justice avoids the standard counter-examples to utilitarianism, but only at the expense of introducing deontological constraints. A weak response to the objection from justice avoids the introduction of deontological constraints, but does not provide a response to the standard counter-examples (and it remains debatable whether it is sufficiently sensitive to the separateness between persons). The first horn of the dilemma is perhaps best illustrated by Feldman's response to the repugnant conclusion. That is, the disvalue of under-receipt is set so as to ensure that justice prevails. The second horn of the dilemma is perhaps best illustrated by Feldman's response to sheriff-type cases. That is, the disvalue created by the injustice may not be sufficient to prevent it from being consistent with bringing about the best results overall. It is assumed that the same dilemma confronts all versions of justicized consequentialism, irrespective of how they interpret justice.

It has been argued that, despite appearances, the strong response is not strictly speaking a consequentialist theory because it is deliberately designed so as to safeguard an absolute constraint. In other words, it is difficult to see what justification could be presented for assigning trump value to justice other than the fact that it guarantees that injustice is impermissible. David Sosa, aware of the

²³ For further clarification of the moderate deontological view see Shelly Kagan, *Normative Ethics* (Boulder, Co.: Westview, 1998), pp. 79–84.

²⁴ See, for example, Parfit, *op. cit.*, pp. 329–345.

pitfalls of the strong response, argues for the weak claim that justicized consequentialism can block the justice objection.²⁵ But we should consider in what sense that represents an improvement on unrefined act-utilitarianism. Firstly, we should take into account the utterly trivial point that unrefined act-utilitarianism also can produce results that accord with our intuitions. Secondly, we should take note of the fact that justicized act-utilitarianism does not represent a Pareto-style improvement on the original version. As we have seen in *Sheriff II* it may actually produce the counter-intuitive conclusion. At most, therefore, advocates of the weak response must see it as an improvement in the sense that it is more likely, empirically speaking, to produce results that accord with common-sense morality. Act-utilitarians already appeal to plausible empirical assumptions (such as diminishing marginal utility) in order to show that unacceptable sacrifices would rarely be consistent with the utilitarian calculus. It may be further argued, therefore, that an axiology that includes the intrinsic value of justice (along with a set of plausible qualitative restrictions) is even less likely to produce counter-intuitive conclusions.

Finally it might be argued that advocates of justicized consequentialism can avoid the charge presented here by noting, firstly, that there are multiple sources of justice value and secondly, that the standard counter-examples to act utilitarianism will be blocked once all are factored into the axiology. Note, that Feldman's account of justice is already, in effect, pluralistic because he interprets desert so as to take into account a plethora of justice claim (need-claims, merit-claims, entitlement-claims and so on). However, a pluralized version of justicized consequentialism does not block the objection presented here. That is, the various sources of justice value must be weighted so as to ensure that there is an absolute constraint against committing an injustice. It may, however, bolster the weak response to the objection from justice as it seems plausible to say that the more justice elements that are included in the axiology the more likely it is that the justice objection will be blocked.

4 What's so Good About Justice?

So far it has been argued that aggregative theories that assign intrinsic value to justice only block the standard counter-examples to utilitarianism at the expense of introducing deontological constraints. At best, therefore, the proposal represents a weak response to the objection from justice in the sense that it acknowledges the separateness between persons – although that is also open to debate – and is more likely to remain in tune with our commonsense judgments.

Let us accept, for the sake of argument, that the weak response represents a satisfactory way of handling the objection from justice. The question that remains is whether we can make sense of the non-instrumental value of justice without referring to deontic considerations. If we cannot, then the proposed theory is not in fact consequentialist all the way down. It should be stressed that the point being

²⁵ See Sosa, op. cit.

made here is not that justice cannot be represented in value terms. Rather the point is that the value of justice cannot be justified non-deontically. It should be further noted that the concern is not that justice derives its value from another good. It is assumed without further argument that justice can be construed as a final good. Nor is the concern that justice is an extrinsic good rather than an intrinsic good – that is, takes its value from a source other than itself, and that, therefore, its value depends on the circumstances.²⁶ Consequentialism may be based on final goods that are intrinsic or extrinsic. Moreover, the challenge under consideration centers on the good-making properties of justice, rather than the location of those properties. More precisely, the claim is that the properties that make the fulfillment of justice non-instrumentally good are essentially deontic.

Justice at its most elemental entails claims that individuals have on others in virtue of some characteristic they possess – being human, doing well, being the recipient of a promise, suffering innocent harm and so on.²⁷ There is, however, considerable disagreement over which claims best describe justice (need-claims, desert-claims, rights-claims, and so on) as well as the relative strength of each type of claim. In addition claims entail not only an ‘ought to have’ on the part of the subject but also an ‘ought to give’ on the part of others. However, claims need not entail a requirement on the part of others to provide that to which the individual has a claim. That is, they provide reasons for fulfilling the claim, but not necessarily conclusive reasons. Nevertheless, justice has value for the world only because it entails the fulfillment of the subject’s prior claim by those who ought to fulfill the claim. This point is perhaps best illustrated by those cases in which an individual receives fitting treatment purely by chance – for example, a hard working employee who wins some money in a lottery. Such cases do not generate value for the world, at least not in virtue of justice. Rather justice value follows only in those instances where the agent who ought to fulfill the claim actually does so.²⁸ Put differently, the production of justice value requires more than a match between the welfare level deserved and the welfare level received. If the good-making properties of justice were non-deontic it would not matter how the match is achieved. But clearly it does matter how it is achieved.

The upshot of this line of argument is that justicized consequentialism presupposes reasons for action that precede the reasons for action ultimately prescribed by the pursuit of the best consequences overall. Feldman argues that desert by itself does not entail moral obligation. Rather moral obligation follows when all other instances of intrinsic value have been taken into account.²⁹ It is not disputed that a person’s desert is not a conclusive reason for giving her what she deserves. Nevertheless, it does qualify as a *prima facie* reason for requiring.

²⁶ See Christine Korsgaard, “Two Distinctions in Goodness,” *Philosophical Review*, Vol. 92, No. 2 (1983).

²⁷ See also Feldman “Desert: Reconsideration of Some Received Wisdom,” p. 63 and “Justice, Desert and the Repugnant Conclusion,” pp. 196–197.

²⁸ A similar line of argument is presented by E.F. Carritt in *The Theory of Morals: An Introduction to Ethical Philosophy* (London: Oxford University Press, 1928), pp. 72–73.

²⁹ Feldman, “Adjusting Utility for Justice,” pp. 573–574.

Moreover, Feldman must make the same assumption in order to explain the intrinsic value of desert. The reason the requital of desert (and other justice claims) is valuable for the world is because the relevant agent has done what he or she ought to have done. Therefore, justice is a consideration that requires us to examine what ought to be the case prior to ascertaining how good it would be for the world if it were the case. Indeed what ought to be explains precisely why requital would be good for the world. Nevertheless, it is a consideration that may, as a result of moral deliberation, be overridden by other justice-claims or welfare-promotion. Moreover, the justice claim retains moral force even when it has been overridden. On balance there may be no strict requirement to fulfill the claim, but even then there remains the recognition that there is a claim that was not fulfilled. In such cases, therefore, it is often appropriate for the agent to feel or even express regret towards the person whose justice-claim was not fulfilled. In effect justicized consequentialism entails the combination of two distinct kinds of moral consideration – deontic considerations and telic considerations. If that is a correct, then it is not a purely consequentialist theory.

The defender of justicized consequentialism may argue that the intrinsic value of desert represents an instance of Moore's principle of organic unities – namely, the idea that the value of a whole need not amount to the sum of the value that its parts would have on their own.³⁰ The actions or features that are the object of the desert-basis may be intrinsically good (for example, virtue), the receipt may be intrinsically good (for example, pleasure) and the combination of these two goods in the same person may be intrinsically good.³¹ On the face of it that suggests that the goodness of justice need not be understood in terms of any reason for action that a person has. However, even when justice is understood in terms of the theory of organic unities its value is not merely the product of the pairing of desert and welfare. As we have seen, justice value requires both that the receipt is fitting and that it is provided by those who ought to provide it. The purely accidental pairing of a justice claim with its fitting treatment or, the provisioning of that treatment by someone who has no reason to do so, does not elicit justice value for the world. In both those instances it remains the case that a wrong has been committed if the relevant agent does not fulfill the claim.

All this is too quick, however, as there are cases in which it appears that a state of affairs such as unrequited desert is bad even though it does not entail an injustice. That is, circumstances in which there is some kind of claim, but no one ought to act to ensure that it is fulfilled (for example, a person who has suffered brute bad luck deserves some good luck or the claim that saints deserve to be happy). In such cases it seems that no one owes anything to the individual because no one is responsible for fulfilling the claim or no one is in a position to do so. Put differently, non-requital in such cases does not entail a wrongdoing. This appears to show that the non-requital can be bad for the world even in the absence of any prior normative

³⁰ Moore, *op. cit.*, pp. 78–80.

³¹ See, for example, Hurka, 2001, pp. 10–11.

reasons to requite. Based on examples such as this Derek Parfit has argued that we may distinguish between teleological and deontological accounts of justice – the former assesses states of affairs, while the latter assesses actions.³²

In response it may be argued that we ought to provide even when we are not causally responsible. That is to say, the fact that a person can requite entails that they ought to requite (for example, we should assist a person who is in need due to pure bad luck). If that is correct, then only those cases in which the claim cannot be fulfilled represent examples of non-derivative justice value. Alternatively it may be argued that in all cases in which nothing is owed by someone the state of affairs is neither just nor unjust.³³ In other words, the good-making properties of justice are simply absent in those cases where no one can have a reason for action. If correct, then such cases have no bearing on the value of justice and so it remains the case that justice value is based upon deontic properties.

For the sake of argument let us grant for the moment that such cases represent genuine examples of non-derivative justice value. Notice, however, that that concession will not be of much use to the justicized consequentialist seeking to block the objection from justice. That is because the standard counter-examples to utilitarianism represent clear-cut examples of where the state of affairs is avoidable. That is, individuals are in a position where they can fulfill the justice claim (by, for example, not punishing the innocent). In such cases the value of justice is unavoidably based upon deontic considerations.

5 Conclusion

A growing number of philosophers have argued that assigning non-instrumental value to justice provides a way of reconciling our intuitions about justice with the appealing idea that we ought to maximize good and minimize evil. In response it has been argued that the advocates of justicized consequentialism are caught between two unpalatable argumentative positions. If they argue that the proposed axiology does block the objection from justice, then they presuppose the prior and independent significance of justice. If they argue that the proposed axiology merely can block the objection from justice, then they are offering an extremely modest response to that objection. In addition it has been argued that all theories that assign non-instrumental value to justice are actually appealing to deontic considerations. That is because the good-making properties of justice are essentially deontic. If that line of argument stands up to scrutiny, then it implies that justicized consequentialism is not consequentialist all the way down. That is to say, it would entail that the assignment of non-instrumental value to justice merely serves as a way of representing deontological considerations which may or may not outweigh the non-instrumental value arising from the promotion of welfare.

³² Derek Parfit, "Equality or Priority?" in Andrew Mason ed. *Ideals of Equality* (Oxford: Blackwell, 1998).

³³ See, for example, Rawls, op. cit., pp. 87 & 254.