

2

The Virtues of Justice¹

David Schmidtz and John Thrasher

THINKING ABOUT JUSTICE

We do not need to know how to define ‘dog’ to know what a dog is. Why would justice be different?² Socrates famously wanted definitions, not mere examples, but in practice we often learn by example. Does philosophical training lead us to exaggerate the importance of definitions?

As Nietzsche once remarked, ‘only that which has no history is definable.’³ And justice has a history. As concepts with a history are wont to do, justice resists specification with necessary and sufficient conditions. However, on almost any analysis, just relationships are those in which the parties involved get their due, and just persons are disposed to act so that partners get their due.⁴ There was a time when justice was seen by philosophers as a virtue of persons—a feature of a person’s character. Think of this as an internal harmony in which each part of a person’s soul gets its due, as per Plato. Justice

¹ Schmidtz wishes to thank the Property and Environment Research Center at Bozeman, Montana for providing a hospitable and productive research environment during the summer of 2012, when we were finishing this paper. We also thank Kevin Timpe for his warm encouragement and very helpful feedback.

² For a superb concise discussion, see Gerald Gaus (2000). Gaus quotes Wittgenstein (1964), 31–2:

Consider for example the proceedings that we call ‘games.’ I mean board-games, card-games, Olympic games, and so on. What is common to them all? Don’t say; there *must* be something common, or that they would not be called ‘games’—but *look and see* whether there is anything common to all. For if you look at them you will not see something that is common to *all*, but similarities, relationships. And a whole series of them at that. To repeat: don’t think, but look!

³ Nietzsche (1989), 2nd Essay §13, 80.

⁴ Likewise, on almost any analysis, justice is something we have reason to endorse. In other words, learning that our children would grow up to be just, or would live in a just society, should occasion joy, not despair. We think people being disposed to give each other their due (and able to *count* on each other being so disposed) is part of the glue that holds relationships together and enables people to live in such a way that their community is better off with them than without.

also can be, has been, and to this day is, seen as a feature of the relationships, institutions, and terms of engagement through which people constitute themselves as communities. Think of this as a kind of harmony too, in which citizens share a tolerably similar understanding of what free and equal citizens are due.

The above remarks emphasize the underlying consistency of our thinking about justice. Admittedly, however, many an honest reader of Plato's *Republic* feels an uneasy skepticism about whether harmony among parts of the polis is simply a 'writ large' form of harmony among parts of the soul, rather than a separate topic. Once we see them as separate topics, it is natural to wonder whether they are even related.

Yet, there is a relation, for we are social beings. When we live in communities, our psychology makes it essential to our internal harmony that we engage our community in a particular way: honestly and sympathetically; constructively and creatively; humbly, for we can be wrong, yet bravely, for whole communities can be wrong too. Finally, as David Hume and Adam Smith understood, we must judge *impartially*, because we cannot be part of a healthy network of reciprocal sympathy until we become skilled at seeing things from perspectives of our would-be partners. We need terms of engagement that enable us to flourish together when we *do not even agree on what the terms of engagement ought to be*.

In short, to be harmonious souls, we need to be co-authors of a harmonious community. Thus, while the virtues of a person are logically distinct from virtues of a harmonious community, the connections are robust in two directions. First, the harmonious soul of a social being wants to be a contributing part of a harmonious community. Second, a harmonious community essentially is one that teaches (and otherwise induces) citizens to become harmonious souls. *This* harmony bears on justice in the modern sense. That is, a virtuous community does not take for granted the virtue of its citizens. It treats good character as the endogenous variable that it is, shaped by the community in which characters grow. A harmonious community teaches a citizen to see good reason (when there is good reason) to obey the rules, and to be disposed to obey rules even in cases where obeying rules does less good (for self or others) than breaking them.

This essay considers (and endorses) three complementary conceptions of justice as virtue. To the two senses of justice just mentioned—justice as a virtue of the soul and of the polis—we add a third that bridges these two. Virtue can be a kind of outreach rather than a kind of internal harmony, because we are talking about essentially social beings. The harmony that is this virtue's object is harmony *with* a community. Thus, a person who is just in this sense is disposed to respect (play within the rules of) institutions that command respect by virtue of *actually working*—that is, actually succeeding in encouraging and enabling people to live in harmony, to peacefully flourish in

mutually advantageous ways. A just person in this sense is disposed to respect just institutions even when such respect is not personally advantageous, indeed (as Hume saw) when such respect is not even good for the community in the particular case.

We begin by asking what it would be like to make progress in theorizing about the nature of justice as a virtue.

DIVERSITY

Commenting on Thomas Scanlon's *What We Owe Each Other*, David Gauthier observes that 'what we owe to others' is not the first question. Before asking that, we could ask why we should assume we owe *anything* to others.⁵ The question is neither skeptical nor sinister. It is simply a paradigm of the sort of question that philosophers learn not to take for granted. It is the sort of question that ought to have an answer, and being able to answer it would be illuminating.

The idea that justice is something we have reason to endorse might be thought to beg the question in favor of consequentialism by presuming that the good is prior to the right. Not so. First, people have different conceptions of justice. When people have different conceptions, then theorizing about justice will be a search for reasons to view justice in one way rather than another. This is so regardless of whether the good is prior to the right.

Second, the generic idea—that justice has to do with what people are due—has content that does not reduce to how the concept relates to human flourishing. (For example, it seems built into the concept that punishment is not an innocent person's due.) But the fact remains that there are many ways of fleshing out the generic idea. Sorting out rival conceptions sometimes requires going beyond considerations internal to the generic concept. When everything built into the generic concept has been brought to bear on the task of sorting out rival conceptions, without resolution, then that leaves us with no reason not to appeal to considerations transparently external to justice. Such considerations sometimes reveal that not all ways of conceiving our due are equally good.

Moreover, the thought that some external considerations are worth caring about implies nothing about whether external considerations are more fundamental than, or morally prior to, principles of justice. They are merely external, and that is the point. Because they are external, they can serve as non-question-begging avenues for continuing inquiry when there is nothing more to say by way of giving internal reasons for favoring one conception

⁵ Gauthier (2003).

over another. If our intention is to be talking about justice as something we are better off with than without, and if justice conceived in a particular way would make us worse off, that tells us that justice conceived in that particular way is not what we are after.

Again, however, none of that implies that ‘better off’ and ‘worse off’ are foundational ideas. If justice is itself foundational, it may have no deeper foundation. In that case, we can ask what justice is a foundation *for*. We can evaluate the soundness of a house’s foundation without presuming there is something more foundational than the foundation. We ask what can be built on it: what kind of house, what kind of life. We do all this without forgetting for a moment that foundations are not everything.⁶

Disagreement

Reasonable people disagree about what is just. Why? This itself is an item over which reasonable people disagree. Analyses of justice all seem to have counter-examples. We have looked so hard for so long. Why have we not found what we are looking for?

In part, the problem lies in the nature of theorizing itself. We have learned from philosophy of science that for any set of data, an infinite number of theories will fit the facts. Theorizing *per se* does not produce consensus. To be sure, social pressure produces consensus. But consensus is not what we are after.

Why not? Either an argument is sound, or not. So why isn’t a theory compelling to all of us, if sound, or none of us, if not? As noted, our account of justice is not even trying to give necessary and sufficient conditions. A theory in our sense is more like a map that represents some particular territory without purporting to show everything. Maps are practical. We want a particular map because we want to go somewhere and arrive safely. If we are traveling by car, we will want a road map. If we are traveling by foot, we may need another kind of map, perhaps a topographic map. The two maps will differ markedly even if they are mapping the same territory and even if they each are doing so successfully on their own terms.⁷

⁶ As to whether justice actually is foundational, there is a thicket of questions here that may have answers, but not quick answers. It is possible for something to be foundational—that is, conversation-stopping—in one context but not another. It is possible for something to be foundational at one level of inquiry but not in another. So, ‘blue’ might be a conversation-stopping answer to ‘what color is the sky?’ but not to ‘why is the sky blue?’ ‘Because it’s just’ can be a conversation-stopping answer to ‘why should I give my employee the wage she earned?’ but not to ‘what makes you so sure that justice requires us to equate wages with earnings?’ See Schmidtz (2006).

⁷ A good cartographer is cautious about extrapolating. So too with the best maps of the terrain of justice, perhaps especially the best ones. They will be like a map whose author declines to speculate about unexplored avenues, knowing there is a truth of the matter yet leaving those

We would be astounded if two cartography students separately assigned to map the same terrain came up with identical maps. We would doubt they were working independently. Theorists working independently likewise construct different theories. Not seeing how the terrain underdetermines choices they make about how to map it, they assume their theory cannot be true unless rival theories are false, and seek to identify ways in which rival accounts distort the terrain. Naturally, they find some, and such demonstration seems decisive to them, but not to rivals, who barely pay attention, preoccupied as they are with demonstrations of their own.

Intractable though these theoretical disagreements may seem, there also (theorists seem to agree) seems to be less disagreement over how we should treat each other day to day. Why? Part of that is due to the tendency of harmonious, healthy souls not to suffer from an urge to fix what is not broken. To be sure, some people believe that justice requires us to tear down existing institutions and rebuild society so that it conforms to justice as they conceive it. Others may feel the same, differing only in the particulars of their vision of what has to be torn down and what has to replace it. When we stop theorizing and leave the seminar room, though, we deal with the world as it is. I find my car in the parking lot. You find yours. We drive off without incident. The fact, mundane yet striking, is that we do not need daily discussion of how cars ought to be distributed, and the very fact that no discussion is needed is constitutive of successfully specified terms of engagement. If we are to live in harmony, we need a level of consensus on a long and mostly inarticulate list of ‘dos’ and ‘don’ts’ that constitute the ordinary sense of injustice with which we navigate in our social world. The consensus we need to achieve concerns *how* (not why) to treat each other, and we need to achieve consensus where we do achieve it: in practice.

In effect, there are two ways for people to agree: we can agree on what is correct, or on who gets to decide. Freedom of religion took the latter form; we learned to be liberals in matters of religion, reaching consensus not on what to believe but on who gets to decide. No conception of the one true religion is allowed to be imposed on everyone else, no matter how certain people feel about the truth of the matter. Freedom of speech is the same. The point of respecting freedom of speech isn’t to impose a conception of the truth, or even a conception of ‘diversity.’ The point is to *stop presuming to decide as a society*. Isn’t it odd that our greatest successes in learning how to live together stem not

parts of the map blank. Imagine the proverbial blind people groping around the body of the elephant. Since the beast is not everywhere the same, reports from the tail are bound to be unlike reports from the trunk. The reports may all be correct, too, so long as the reporters are wise enough to resist the temptation to over-generalize from their own experience, and humble enough to resist the temptation to think something must be wrong with anyone who has a different perspective.

from agreeing on what is correct but from agreeing to let people decide for themselves?

Justice, whatever else it is, has to do with people getting their due. In part because justice is about people getting their due when they do not even agree on what to count as their due, justice is about who gets to decide what people are due. It is about defining jurisdictions that respect persons who may want and need to share the *road*, but who may neither want nor need to share a *destination*. Thus, the ubiquitous fact of disagreement, and the imperative to come to terms, peaceful terms, with people who may have very different theories about how things ought to be, give people a reason to seek a conception of justice that is in this sense *liberal*—a conception that aims not to dictate our destination so much as to manage traffic, including commercial traffic, so that we may avoid harmful collisions and also so that we may find our own way toward local opportunities for mutually advantageous cooperative ventures. The goal is to limit piracy and parasitism (including parasitism wrapped in the rhetoric of justice), thereby facilitating trust, and thereby promoting gradual, reliable, peaceful progress.

To the extent that jurisdictions express mutual respect, they express impartiality as well. No one has to accept being relegated to a category of persons whose destination in life is dictated by someone else. Just jurisdictions embody terms of engagement that everyone can live with.⁸ Perhaps some people are unreasonable; perhaps not. Part of being just is acknowledging that, so long as they are not acting in such a way that we truly would be better off without them, it is not our place to pronounce on their reasonableness. Suppose we want something from them. Suppose we want what they can give us so badly that we are tempted to deem them unreasonable if they do not give it to us. Still, even in that case, justice is not about convincing ourselves that they are unreasonable. It is about finding a way to offer them what they want in return, such that each of us can truly say our partners are better off with us than without us.

FROM CHARACTER TO COMPACT

Plato and Aristotle saw justice as a virtue of persons, as did the Stoics. So did David Hume. The difference between these ancients and Hume is that, for Hume, although justice is a personal virtue, it is also an ‘artificial’ one. Natural justice is relatively invariant because the circumstances of justice are preloaded

⁸ Part of the tragedy here is that we cannot take ‘everyone’ literally. To be honest, we have to mean something like ‘everyone but criminals.’ Or more precisely, albeit recursively, ‘everyone disposed to find and live by terms of engagement that everyone (similarly disposed) can live by.’

into our psychology in the form of moral emotions. They are also ‘artificial’ because in each particular society, the natural emotions of resentment and guilt will generate and reinforce rules of justice. Because circumstances vary, the particular rules of the road developed to instantiate frameworks for mutually advantageous cooperation will not be universal. Rules of justice vary in an analogous way. Hume writes:

All birds of the same species, in every age and country, build their nests alike: In this we see the force of instinct. Men, in different times and places, frame their houses differently: Here we perceive the influence of reason and custom . . . all houses have a roof and walls, windows and chimneys; though diversified in their shape, figure, and materials. The purpose of the latter, directed to the conveniences of human life, discover not more plainly their origin from reason and reflection, than do those of the former, which point to a like end.⁹

Outside of what Hume calls the ‘circumstances of justice’ (that is, circumstances of moderate scarcity and limited altruism), justice would be ‘an idle ceremonial, and could never have place in the catalogue of virtues.’¹⁰ Justice allows a society to do better than it might do otherwise. He writes, ‘the necessity of justice to the support of society is the sole foundation of that virtue.’¹¹ We benefit from the disposition to follow the rules of justice because of the goods that rules of justice help us to secure when mutually observed. If justice conceived in a certain way failed to conduce to peaceful cooperation even on balance, justice so conceived would lose its point. It would be like a hammer for which there is no need—a dead weight.

As Julia Annas notes, the Humean distinction between artificial and natural virtues makes less sense in the ancient context than in ours.¹² Virtue, for the ancients, was a necessary condition for living a happy and successful life. Any virtue including justice has to be natural in Hume’s sense because all virtues conduce to living well *without fail*, not merely on balance.

This understanding of justice is implausible to a modern ear. To moderns, justice can require sacrifice. Imagine Pete learns that he has inadvertently committed a crime. Being a just person, he turns himself in to the authorities. The virtue of justice, in this case, leads Pete to give up on what a modern would think of as flourishing. How can we say then that justice is a natural virtue, necessary (and on some views sufficient) for flourishing when acting justly can be so costly?¹³ One ancient approach was to tie flourishing to objective characteristics of the soul. Pete might in weak moments suspect he is throwing his life away, but on some ancient conceptions that cannot be so, or at least not in a way that matters, so long as his soul is what it should be.

⁹ Hume (1988), 97, III.2.44–5.

¹⁰ Hume (1988), 83, III.1.3.

¹¹ Hume (1988), 98, III.2.48.

¹² Annas (1993), 298.

¹³ More radical moderns like Nietzsche and, following him, Walter Kauffmann have questioned whether justice makes sense at all. See Kauffmann (1973).

Perhaps he is being torn apart on a rack, but so long as his soul retains its integrity, life is going about as well as it possibly could.

One ancient view of happiness that rejects this treatment of flourishing as objective success (rather than as a state of feeling a certain way about one's success) is the Epicurean account of happiness as a felt experience: the subjective state of *ataraxia* or tranquility. To live blessedly, according to the Epicureans, is to be untroubled by the fear of death or other troubles that prevent a person from enjoying life. On this Epicurean account of happiness, practical rationality can conflict with justice.¹⁴ For an Epicurean, reconciling demands of justice with the rational search for happiness is a task not to be dispatched by waving a hand at a definition of happiness that may or may not be what real people want out of life. To reconcile the virtue of justice with rationality is to show that a disposition to act justly will conduce to happiness—maybe not in every instance—but overall. The point of establishing a regime of justice is to secure the tranquility that obtains when peaceful cooperation is the norm. The personal virtue of justice is a disposition to follow the rules of justice interpreted as a compact the mutual observance of which is mutually beneficial.

For the Stoics, as Julia Annas puts it, justice 'is simply correct moral reasoning, thought of as being prescriptive.'¹⁵ But, Annas wonders, if justice is concerned with public issues, how can we understand reasoning about justice simply as private moral reasoning?¹⁶ How do we publicly adjudicate between conflicting views of justice? Hobbes and Locke saw that not everyone could be a judge; escaping the state of nature requires traditions and institutions of impartial judgment that, among other things, settle who has the right to make the call.

A contractarian approach is based on an empirical assumption that persons are separate decision makers as a matter of descriptive fact. Contractarians treat this descriptive fact as bearing on whether a given institution, as a matter of fact, has what it takes to help society to be stable as a cooperative venture. Some contractarians combine this descriptive assumption with a normative assumption that a society's legitimacy depends on whether it treats separate persons as not merely instruments, but as partners. Accordingly, such a society works to constitute itself as a mutually advantageous cooperative venture. Thus, contractarian reasoning is not simply private moral reasoning but is reasoning meant to be shared and reasoning about common concerns. In at least some crucial contexts, reasoning about justice *must* be public reasoning.

John Rawls, on the first page of *A Theory of Justice*, was articulating the most common modern understanding of justice when he wrote, 'justice is the

¹⁴ See Thrasher (2013).

¹⁵ Annas (1993), 303.

¹⁶ Annas (1993), 303–5.

first virtue of social institutions, as truth is of systems of thought.¹⁷ No matter what other virtues a social structure may possess, it should be rejected if it is unjust. On this view, the virtue of justice is a constraint on an acceptable system of social rules.¹⁸

This conception of justice has roots in the Stoic conception of natural law and in the Judeo-Christian conception of cosmic moral law. The idea was later developed by a host of modern thinkers, maturing in the work of Immanuel Kant. Its ancient roots notwithstanding, there is something especially modern about this conception, for it represents a framework for cooperation for arms-length relationships. Consider that modern society, unlike the small city-states of the Greeks or the commercial republics of the Italians and Dutch, is largely a society of strangers. For our market society to function smoothly and peacefully we need a set of stable public rules that creates background conditions for ongoing cooperation between strangers. The rules of justice must be apt for managing traffic and sustaining cooperation among strangers, including even those who disagree on matters as fundamental as religion.

A fundamental question, on this social conception of justice, is a question that the virtuous must ask themselves: do you want your community to be better off with you than without you? Are you capable of living in a way that would pass that test? Justice on this conception takes on a distinctly cooperative but also distinctly eudaimonistic aspect.

FROM BENEFICENCE TO ‘MERE’ JUSTICE

We considered how justice can be seen as an attribute of character or of relationships. We acknowledged the attractions of each perspective. There is also a difference between justice understood as a positive rather than negative virtue. Like Hume, Adam Smith sees the virtue of justice as securing key conditions of peace and cooperation.

Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit. He fulfils, however, all the rules of what is peculiarly called justice, and does every thing which his equals can with propriety force him to do, or which they can punish him for not doing. *We may often fulfill all the rules of justice by sitting still and doing nothing.*¹⁹

¹⁷ Rawls (1999), 3.

¹⁸ On this point, see Larmore (1996), 19–40.

¹⁹ Smith (2009), 82, II.ii.I.9. Emphasis added.

Jill can do ‘mere’ justice simply by minding her business and leaving others alone. (But suppose our neighbors are cooperating to produce a public good. In that case, can we do justice by doing nothing, or does justice in such cases require us to do our ‘fair’ share?) Obviously, ‘mere’ justice is not everything.²⁰ To act justly is merely to avoid warranting punishment. Smith contrasts justice (in several ways) with another virtue often confused with justice: beneficence.

Though the mere want of beneficence seems to merit no punishment from equals, the greater exertions of that virtue appear to deserve the highest reward. By being productive of the greatest good, they are the natural and approved objects of the liveliest gratitude. Though the breach of justice, on the contrary, exposes to punishment, the observance of the rules of that virtue seems scarce to deserve any reward. There is, no doubt, a propriety in the practice of justice, and it merits, upon that account, all the approbation which is due to propriety. But as it does no real positive good, it is entitled to very little gratitude.²¹

Beneficence, unlike justice, is ‘free, it cannot be extorted by force, the mere want of it exposes to no punishment; because the mere want of beneficence tends to do no real positive evil.’²² Fiercely though we may resent a person’s indifference, mere lack of beneficence does not imply that the rest of us would be better off without that person. True injustice is more worrisome. An unjust person is indeed someone whom the rest of us are, at least in general, better off without. That makes justice an indispensable foundation of normal relations between free and equal citizens despite being (on this conception) merely a negative virtue. A mutual understanding and expectation of justice so conceived will—first of all—define jurisdictions, rules of the road, or spheres of autonomy. However, there is no reason and no empirical tendency for this shared understanding to remain *merely* negative. People want to stand for something, and they want to achieve something, both individually and collectively. They judge their framework for mutual cooperation by whether it helps them stay out of each other’s way but not only by that. They also care about whether that framework for cooperation does, after all, lead to cooperation and to a lifting of the ceiling of human possibility.

²⁰ On some accounts, mere justice may not count as a virtue at all, contra Smith. There is a strong tradition of virtue ethics requiring that ‘a virtue expresses a positive aim at some overall good way of developing, and so a commitment to goodness’ (Annas 2011, 102). Or perhaps Smith would agree with Annas that happening by chance to act as a virtuous person would, is, of course, not to be virtuous; however, if in doing nothing a person is expressing a certain steadfastness, characteristically resisting any impulse to jump in and ‘do something’ simply because ‘something has to be done,’ might indeed be expressing a positive aim of being a person who honors a person’s right and responsibility to stand or fall with his or her own merit, at least in cases where the crisis is not a life-threatening challenge so much as a life-defining learning experience.

²¹ Smith (2009), 81, II.ii.I.9.

²² Smith (2009), 78, II.ii.I.3.

Justice as a framework for cooperation makes possible grand achievements within human society. It makes possible a kind of ambition on behalf of humanity that Francis Bacon spoke of, finding a ready audience in his onetime secretary Thomas Hobbes.²³ David Hume and Adam Smith would worry about what a dangerous thing such noble ambition could be. Adam Smith described men drawn to the idea that there is one true conception of justice as ‘men of system.’ The man of system, obsessed with his vision of an ideal world, forgets that the social world is made up of people who have lives and dreams of their own, not to mention incompatible theories about how the world ought to be. The man of system

is apt to be very wise in his own conceit; and is often so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. He goes on to establish it completely and in all its parts, without any regard either to the great interests, or to the strong prejudices which may oppose it. He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it.²⁴

The man of system, intoxicated by an ideal, sees the end of establishing justice as so important that any means is justified. Indeed, even the imperative to make sure the end genuinely is *justice* gets lost. Thus, the ‘man of system’ often produces results that have nothing to do with justice. Or so we read in the pages of Smith. The sentiment emerging from Grotius and Locke, through the Scottish Enlightenment and reaching its apex in John Stuart Mill, is that disagreement about the true nature of positive justice is something to be embraced, even cherished, not resented. A society that speaks with one voice is not free, and probably has a warped view of justice to boot. Even at best, it lacks resources for self-correction, and in that way is like a gene pool that, lacking in diversity, will not survive changes in its ecological niche.

Smith contrasts the overconfident man of system with the ‘man of true public spirit’ who, ‘. . . when he cannot establish the right, he will not disdain to ameliorate the wrong; but like Solon, when he cannot establish the best system of laws, he will endeavour to establish the best that the people can bear.’²⁵ Undoing or ameliorating wrongs in piecemeal fashion may not necessarily do more good than imposing a vision of perfection in the teeth of dissent, but that will be the robust historical tendency.

²³ Bacon (2010). ²⁴ Smith (2009), 233–4, VI.ii.2.17.

²⁵ Smith (2009), 233, VI.ii.2.16.

The function of ‘mere’ justice—negative justice—is to define a sphere within which there is such a thing as minding one’s own business. Negative justice defines jurisdictions. It settles who makes the call, not what the call ought to be, in the same way that a rational traffic management system does not try to do too much. It does not try to pick a driver’s destination; it merely settles who has the right of way.

FROM MERE JUSTICE TO COOPERATION

The negative conception of justice that we find in Smith contrasts with most contemporary conceptions. For instance, T. M. Scanlon conceives of justice as a kind of agreement between free and equal persons.

The contractualist ideal of acting in accord with principles that others (similarly motivated) could not reasonably reject is meant to characterize the relation with others the value and appeal of which underlies our reasons to do what morality requires. This relation, much less personal than friendship, might be called a relation of mutual recognition.²⁶

On this view, seeing ourselves in a ‘relation of mutual recognition,’ motivates us to act in accord with principles that others could not reasonably reject. Mutual recognition is a relationship that creates strong duties of treatment. For those standing in a relationship of mutual recognition, the requirements of morality are ‘not just formal imperatives; they are aspects of a positive value of a way of living together.’²⁷ The positive value of mutual recognition creates an element of attraction in the contractualist system. Agents not only refrain from harming others in ways that justice prohibits; they also see others as deserving positive treatment because of their status in the mutual recognition relationship. A just person on this view has an obligation not only to avoid harming fellow citizens but to make sure they are tolerably well off.

It is no surprise that Scanlon compares mutual recognition to a weak form of friendship.²⁸ Being a friend creates duties beyond what we owe to strangers. This is also true in the relation of mutual recognition. Both friendship and mutual recognition generate duties that are internal to the relationship. Duties on this understanding are not impositions; they are basic to our understanding of ourselves and others as fellow participants in a practice.

Scanlon’s view is a well-developed version of the idea that duties of justice arise from the nature of the relationship between free and equal persons in a democratic society. By virtue of our recognizing each other as free and equal,

²⁶ Scanlon (1998), 162.

²⁷ Scanlon (1998), 162.

²⁸ See also Cohen (2009).

we owe certain duties of justice to one another.²⁹ This conception of justice requires positive treatment—a particular destination.

David Gauthier argues that Scanlon's positive account of justice conceives of persons as 'moral debtors.'³⁰ To Gauthier, understanding justice as 'what we owe to one another' misunderstands justice from the outset.³¹ Gauthier sees justice as identifying constraints on individual prudence necessary to create and stabilize the conditions of cooperation. In this way, Gauthier is closer to Hume and Smith than to Scanlon. Gerald Gaus likewise argues for a 'restricted view' of the authority of justice.³² Gaus's view is also a negative conception 'constituted by the idea that to respect others as free and equal moral persons is to refrain from claiming moral authority over them,' including the authority to require that they serve as means to each others' ends.³³ In this sense, Gauthier and Gaus agree with Smith that while it is proper to enforce rules of justice, enforcing positive virtues of beneficence and charity would be an unwarranted exercise of power—incompatible with treating fellow citizens as free and equal.

Gauthier further agrees with Smith that rather than beginning from 'what we owe to each other,' we might better focus on what we have to offer each other.³⁴ Justice is, on this conception, a cooperative virtue. It concerns what we need to do to properly respect what each of us has to offer—including the talents, deserved or not, that each of us brings to the table. (Note that dealing with fellow citizens in the real world—dealing with them respectfully, treating them as *persons*—is about taking what they bring to the table at face value, treating their talents as their talents. To instead regard a particular constellation of talents as communal property, the undeserved product of an arbitrary confluence of genetics and culture, is to regard that constellation of talent as residing in something other than a person.)³⁵ In a way, this would not be a radical departure from the letter of Scanlon's theory, but it would shift the emphasis. On this view, contractualist justice would still be about reasons that others could not reasonably reject, but it would be far more sensitive to the empirical fact of reasonable people actually rejecting each other's reasons. Actually respecting the fact of diversity (roughly, letting people be unless their overt behavior is so disruptive that we would be better off without them)

²⁹ Rawls's analogous position explicitly is about justice rather than morality as such.

³⁰ Gauthier (2003). ³¹ Gauthier (2003), 168. ³² Gaus (2011), 15–20.

³³ Gaus (2011), 19. One tension in the Smithian tradition concerns whether this homage to the separateness of persons goes so far as to include ends that must be achieved if people are to be capable of normal functioning as free and equal citizens. Smith himself endorsed mandatory publicly funded schooling and other elements of what today we might think of as a minimal welfare state. Smith would not deny that such ends are of surpassing value; his question would be whether those ends are well-served by reconceiving them as rights rather than values. Ultimately, this was a question of policy, not of justice.

³⁴ Gauthier (2003), 168. ³⁵ See Part 6 of Schmidtz (2006).

enables us to live together, and live more peacefully and prosperously, than we otherwise could by living apart.³⁶

As Smith puts it, society, ‘cannot subsist among those who are at all times ready to hurt and injure one another.’³⁷ We cannot cooperate and have our needs met if we are huddled in bunkers or pointing guns at each other. Regular and effective law secures gains, though, freeing individuals to focus on improving their situation through reciprocal cooperation, without having to worry about their gains being stolen.

Justice as a cooperative positive virtue has roots in justice as a person-respecting negative virtue. Insofar as it limits negative externalities of public life, ‘mere’ justice reduces the cost of living together, making it safer for people to trust each other and thereby setting the stage for a cornucopia of positive externalities that go with cooperation. Justice as a cooperative virtue is about creating circumstances that inspire us to make our partners better off with us than they would have been without us. Schmidtz writes, ‘When people reciprocate, they teach people around them to cooperate. In the process, they not only respect justice, but foster it. Specifically, they foster a form of justice that enables people to live together in mutually respectful peace.’³⁸

CONCLUSION

We noted that justice can be and historically has been seen as a feature of a person’s character, that it also can be seen as a virtue of institutions, but that there is a further virtue of character that has to do with respecting the virtues of institutions. We endorsed all three ideas, but particularly the third one as a way of modernizing the ancient conception of justice as a harmony among parts of the soul. Along the way, we considered how ‘mere’ justice can be seen as a primarily negative virtue in part because it grounds something more positive, namely community. Suppose people are regarded as having a right to say no. Suppose this right is seen as the essence of Kantian dignity, even if not a sufficient condition for full-blown Kantian moral worth. Respecting this right to say no, thereby meeting the minimal conditions of justice, is the foundation of a community in which people can be trusted not to presume to own each other. In such a community, people with fundamentally different

³⁶ Rawls goes beyond this, of course, defining a Pareto frontier and then saying that, for the sake of having a determinate view, we must pick a distribution on that frontier that privileges one class or another. If we are going to pick a class upon which to confer the maximum possible unearned privilege, then the only point that bears even a remote resemblance to justice is the point where the class so privileged is the class that otherwise was least privileged. But the resemblance between this and what we normally think of as justice truly is remote.

³⁷ Smith (2009), 86, II.ii.3.3.

³⁸ Schmidtz (2006), 79.

views will be able to afford the risk and cost of living in close proximity and dealing with each other on terms that will constitute them as a kingdom of ends.

We considered what it would be like to achieve anything like harmony among the parts of a diverse society in which disagreement can run deep—where the disagreement is not about how or why to avoid physical violence so much as about how people should conceive of themselves, of their relationships, and of what they are owed.

Our map of justice is pluralistic, reflecting how thinking has changed without assuming that previous thought must have been wrong. Would a more elegant theory reduce the multiplicity of elements to one? Would a monist theory be more useful? Would it even be simpler?

Not necessarily. The periodic table would in a superficial way be simpler if we posited only four elements—or one, for that matter—but would that make for better science? No. Astronomers once said planets *must* have circular orbits. When they finally accepted the reality of elliptical orbits, which have two focal points, their theories became simpler, more elegant, and more powerful. Simplicity is a theoretical virtue, but when a phenomenon looks complex—when an orbit seems to have two foci, not one—the simplest explanation may be that it looks complex because it is. We *may* find a way of doing everything with a single element, but it would be mere dogma—the opposite of philosophy—to assume we *must*.³⁹

WORKS CITED

- Annas, Julia. 1993. *The Morality of Happiness*. New York: Oxford University Press.
- Annas, Julia. 2011. *Intelligent Virtue*. Oxford: Oxford University Press.
- Bacon, Francis. 2010. *Of Ambition*. Whitefish, MT: Kessinger Publishing.
- Cohen, G. A. 2009. *Why Not Socialism?* Princeton: Princeton University Press.
- Gaus, Gerald. 2000. *Political Concepts And Political Theories*. Boulder, CO: Westview Press.
- Gaus, Gerald. 2011. *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*. Cambridge: Cambridge University Press.
- Gauthier, David. 2003. 'Are We Moral Debtors?' *Philosophy and Phenomenological Research* 66.1: 162–8.
- Hume, David. 1998. *An Enquiry Concerning the Principles of Morals*, ed. Tom Beauchamp. Oxford: Oxford University Press.
- Kauffman, Walter. 1973. *Without Guilt and Justice: From Decidophobia to Autonomy*. New York: Peter Wyden Co.

³⁹ Schmitz (2006), 79.

- Larmore, Charles. 1996. *The Morals of Modernity*. Cambridge: Cambridge University Press, 19–40.
- Nietzsche, Friedrich. 1989. *On the Genealogy of Morals and Ecce Homo*, ed. W. Kaufmann. New York: Vintage Books.
- Rawls, John. 1999. *A Theory of Justice: Revised Edition*. Cambridge: Belknap Press.
- Scanlon, T. M. 1998. *What We Owe to Each Other*. Cambridge: Harvard University Press.
- Schmidtz, David. 2006. *The Elements of Justice*. Cambridge: Cambridge University Press.
- Smith, Adam. 2009. *The Theory of Moral Sentiments*, The Glasgow Edition of the Works and Correspondence of Adam Smith. Indianapolis: Liberty Fund Inc.
- Thrasher, John. 2013. 'Reconciling Justice and Pleasure in Epicurean Contractarianism.' *Ethical Theory and Moral Practice* 16.2: 423–36.
- Wittgenstein, Ludwig. 1964. *Philosophical Investigations*, trans. G. E. M. Anscombe. New York: Macmillan.