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David Schmitz
Excerpt
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PART 1

WHAT IS JUSTICE?

1

The Neighborhood of Justice

THESIS: Theorists disagree. It is not their fault. Theorizing does not lead to consensus.

PRELIMINARY SURVEY

When I survey the terrain of justice, here is what I see. What we call justice is a constellation of somewhat related elements. I see a degree of integration and unity, but the integrity of justice is limited, more like the integrity of a neighborhood than of a building. A good neighborhood is functional, a place where people can live well. Yet, good neighborhoods are not *designed* in the comprehensive way that good buildings are. (Indeed, designed communities feel fake, like movie sets, with histories too obviously tracing back to the dated plan of a single mind.)

Is there a defining property of the neighborhood of justice, in virtue of which the word applies? Yes, Part 1 explains, but the property is general and formal; how it translates into more substantive principles depends on context. Parts 2 through 5 reflect on four substantive elements: desert, reciprocity, equality, and need. Part 6 pays homage to John Rawls and Robert Nozick, who “arguably framed the landscape of academic political philosophy in the last decades of the twentieth century.”¹ My theorizing is inspired by (although perhaps only vaguely resembles) theirs.

¹ Fried 2005, 221.

THEORIZING

If justice is a neighborhood, then a *theory* of justice is a map of that neighborhood. The best theory will be incomplete, like a map whose author declines to speculate about unexplored avenues, knowing there is a truth of the matter yet leaving those parts of the map blank. A theory evolves toward representing the neighborhood more completely, in the hands of future residents who have more information and different purposes, even as the neighborhood itself changes.

I have become a pluralist, but there are many pluralisms. I focus not on concentric “spheres” of local, national, and international justice nor on how different cultures foster different intuitions, but on the variety of contexts we experience every day, calling in turn for principles of desert, reciprocity, equality, and need. I try to some extent to knit these four elements together, showing how they make room for each other and define each other’s limits, but not at a cost of twisting them to make them appear to fit together better than they really do. Would a more elegant theory reduce the multiplicity of elements to one?

Would a monist theory be more useful? Would it even be simpler? The periodic table would in one sense 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. So, 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 science – to assume we must.

ONLY THAT WHICH HAS NO HISTORY
 IS DEFINABLE²

Socrates famously wanted definitions, not merely an example or two, but in practice the way we actually learn is by example. Thus, I wonder: Does philosophical training lead us to exaggerate the importance of

² Nietzsche 1969, 80.

definitions? We do not need to know how to define ‘dog’ to know what a dog is. Why would justice be different?³

The project of analyzing ‘dog’ has not captured philosophical imaginations as analyzing justice has. But suppose only one of us will get tenure, and somehow the verdict turns on whether we classify jackals as dogs. The meaning of ‘dog’ suddenly becomes controversial. Those who fail to see it our way start to look unreasonable. Two lessons: First, we define and refine a concept’s edges only when the need arises. Second, the needs spurring us to define the edges of justice tend to be conflicting. So, emotions tend to run high, exacerbated by the fact that rules of justice tell us not only what to expect from each other, but what to count as an *affront*. If injustice is an affront, not merely a disappointment, then theorizing about injustice will be hard. Strangely, if Joe’s theory fails to condemn things we consider an affront, that in itself is a bit of an affront.

DISAGREEMENT

Reasonable people disagree about what is just. Why? This itself is an item over which reasonable people disagree. Our analyses of justice (like our analyses of knowledge, free will, meaning, and so on) all have counterexamples. 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. A truism in philosophy of science: For any set of data, an infinite number of theories will fit the facts. So, even if we agree on particular cases, we still, in all likelihood, disagree on how to pull those judgments together to form a theory. Theorizing per se does not produce consensus (although social pressure does).

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? My answer: Theories are not arguments, sound or otherwise. They are maps. Maps, even good

³ For a superb concise discussion, see Gaus 2000, chap. 1. Gaus quotes Wittgenstein (§66) as follows:

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, look!

maps, are not compelling. No map represents the *only* reasonable way of seeing the terrain. (Or at least, this is how I see it.)

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 the 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 theories 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.

Although we disagree over theoretical matters, there is less discord over how we should treat each other day to day. I may believe, at least theoretically, that justice requires us to tear down existing institutions and rebuild society according to a grand vision. You may feel the same, except your grand vision is nothing like mine. Yet, when we leave the office, we deal with the world as it is. I find my car in the parking lot. You find yours. We drive off without incident. If we are to live in peace, we need a high 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 to agree: We agree on what is correct, or on who has jurisdiction – 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. So too with freedom of speech. Isn’t it odd that our greatest successes in learning how to live together stem not from agreeing on what is correct but from agreeing to let people decide for themselves?

2

The Basic Concept

THESIS: Justice concerns what people are due. This much is uncontested, simply a matter of how we normally use the word. Exactly what people are due, though, cannot be settled entirely by conceptual analysis.

WHAT WE KNOW ABOUT THE BASIC CONCEPT

What is justice? It is a philosopher’s question, and a philosopher might start by noting that when we ask what is justice, the term ‘justice’ is not a meaningless sound. We argue about justice, yet the very fact that we argue presupposes a level of mutual understanding. Because we share a language, we know we are not arguing about what is an eggplant, or what is the weather forecast, or what is the capital of Argentina. When we argue about justice, there may be much we do not know, but we know that justice has something to do with treating like cases alike.

We also know that treating like cases alike is not the whole of justice. Suppose a medieval king decrees that persons convicted of shoplifting shall have their left hand amputated. We protest. Such punishment is unjust! The king replies, “I don’t play favorites. I treat like cases alike, so what’s the problem?” Even if the king is telling the truth, this does not settle the matter. Amputating every thief’s left hand is treating all alike, but evenhandedness (so to speak) is not enough. Impartiality is not enough. The idea of treating like cases alike is relevant, but there is more to justice than this.

Compare this to a second case. The king now decrees: Those found *innocent* of shoplifting shall have their left hand amputated. Again, we

protest. Again, the king replies, “I treat like cases alike, so what’s the problem?” What do we say now? In the first case, the king’s conception of justice was barbaric. In the second, the king does not *have* a conception – not even a barbaric one. We know this because, if the king softens his stance and says from now on the innocent will merely be fined, not maimed, the punishment is no longer barbaric, but that does not fix the problem. The problem is, the king fails to grasp the concept. To argue about justice is to argue about what people are due.⁴ Simply grasping the meanings of words tells us that punishment, even mild punishment, is not what innocent people are due.

While treating like cases alike does not rule out evenhandedly punishing the innocent, giving people their due does. When we ask “What is justice?” we make a decent start when we say, “Whatever else we may debate, justice is about what people are due.” There is a limit to how far we can get by analyzing language, but we can get (and we just did get) somewhere.

We also know we can distinguish the basic *concept* from particular *conceptions* of what people are due. Thus, to John Rawls,

it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common. Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.⁵

For present purposes, we do not need this much baggage. We need not take a stand on whether arbitrariness is always bad. (When we assign the right to vote in a given election, we arbitrarily distinguish between citizens celebrating their eighteenth birthday and citizens who are one day younger.) We also can leave open whether “competing claims to advantages of social life” are what need balancing. The basic concept is this: Normal conversation about doing justice to X is conversation about giving X its due. This shared concept is what enables us to propose different conceptions, then argue about their relative merits.

⁴ I am not denying that we can do justice to animals, opportunities, and ourselves. Likewise, the Grand Canyon in some sense deserves its reputation. My focus here is on the connection between doing justice to X and giving X its due, not on what can substitute for the variable X.

⁵ Rawls 1971, 5. See also Hart 1961, 155–9.

The idea that we can disagree about what justice requires presupposes that we agree that justice does, after all, *require*.

WHAT THE BASIC CONCEPT LEAVES OPEN

We know something about justice, then. The basic concept is not empty, since only so many things can count as a person's due. As noted, punishment cannot be an innocent person's due. Yet, if the concept is not empty, neither is it substantial enough to answer every question. For example, if Joe works harder than Jane, should Joe be paid more? What if Jane needs the money more than Joe does? Should Jane be paid more? The basic concept does not say. We cannot specify Jane's due simply by defining the term 'due.' How do we know when facts about how hard Joe works matter more than facts about how badly Jane needs the money?

Suppose, for argument's sake, that if Jane and Joe are equal in relevant respects, their employer ought to pay them equally. Now change the case slightly: Jane and Joe remain equal but have different employers. Must Joe's employer pay the same as Jane's? If Jane earns twenty-thousand dollars as a cook while Joe, a comparably good cook, earns thirty-thousand dollars at the restaurant next door, is that unjust? Do issues of justice arise when Jane and Joe are paid differently by the *same* employer, but not when their salaries are set independently by *different* employers? Why?

SEEKING A REFEREE

These questions suggest a problem. So long as rival conceptions are minimally credible (for example, so long as they do not endorse punishing the innocent), the basic concept will not have enough content to settle which is best. Neither can we settle anything by appealing to one of the rivals. Put it this way: If opposing players are disputing a rule, we cannot settle the dispute by consulting a player. We need a referee. We need to go beyond the kind of weight players have. We need a different kind of authority.

For example, we can choose a conception according to what sort of life that conception (institutionalizing, endorsing, acting on it) would help us lead.⁶ This idea is not a conception of justice, and does not

⁶ Williams (1985, 115) says this about conceptions of morality.

presuppose one, which means we can appeal to it without prejudice.⁷ It can be a referee precisely because, on the field of justice, it is not one of the players.

The idea of being able to live well lacks the kind of *gravity* we associate with principles of justice. But since the idea is not a principle of justice, this is as it should be. After all, it is the players who inspire us, not the referees.

AMBIGUITY

We can flesh out the idea of living well in different, not necessarily compatible ways. Is the idea to meet basic needs, promote welfare in general, provide better opportunities, or foster excellence? In practice, and in the long run, such ends may all be promoted by the same policies. Even when the various standards are incompatible, though, they still matter. Asking whether a policy fosters excellence is not a mistake. Asking whether a policy empowers the least advantaged is not a mistake. Admitting that various things matter without always pointing in the same direction is not a mistake. If relevant standards sometimes point in different directions, that is life. Complexity and ambiguity are not theoretical artifacts.

JUSTICE: WHAT IS IT FOR?

Granting that the idea of living well is complex and ambiguous, the role justice plays in enabling us to live well may yet be (relatively!) simple and well defined. Suppose we do not see justice as a panacea; that is, suppose we accept that everyone getting their due does not guarantee that everyone is living well. Justice gives us something, not everything. What more specifically, then, is the point of justice? Here is a suggestion.

A *negative externality*, sometimes called a spillover cost, is the part of an action's cost that has an impact on bystanders.⁸ Economists talk of internalizing externalities: that is, minimizing the extent to which innocent

⁷ Rawls says, "We cannot, in general, assess a conception of justice by its distributive role alone, however useful this role may be in identifying the concept of justice. We must take into account its wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable" (1971, 6).

⁸ *Positive* externalities are benefits that spill over to enrich the lives of "innocent bystanders." The following discussion pertains more to negative externalities.

people are forced to bear the costs of other people's choices. If embracing a certain principle resolves a conflict, this is not enough to show that the principle is a principle of justice. However, if practicing a principle leads us to take responsibility for the consequences of our actions, then not only is it apt for resolving conflict; it also functions like a principle of justice, for it requires paying some attention to what people around us are due. Henry Shue says, "If whoever makes a mess receives the benefits and does not pay the costs, not only does he have no incentive to avoid making as many messes as he likes, but he is also unfair to whoever does pay the costs."⁹ Externalities undermine harmony among parts of a polis, as per Plato. Our neighbors do not want to put up with drunk drivers, for example, and should not have to. To be just is to avoid, as best we can, leaving our neighbors to pay for our negligent choices.

I am not proposing an imperative to internalize externalities as a conception of, or even a principle of, justice. Instead, I am saying our reasons for wanting to limit the proliferation of negative externalities do not rest on any particular view of justice. Such reasons do not *derive* from a conception of justice but instead *support* any conception that leads people to internalize. Any theory of justice that would lead us away from internalizing negative externalities has an uphill climb toward plausibility. Internalizing negative externalities is only one aspect of what we need to live well, but it may be justice's characteristic way of helping us to live well. Justice is a framework for decreasing the cost of living together; the framework's larger point is to free us to focus less on self-defense and more on mutual advantage, and on opportunities to make the world a better place: that is, to generate positive rather than negative externalities.

This may not be the essence of justice. However, if what we call justice serves that purpose, then we have reason to respect what we call justice, and to be glad we have as much of it as we do.

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 kind of life the house's occupants will be able to live, while realizing that foundations are not everything. Foundations facilitate the good life, but cannot guarantee it.

Later parts of this book do not rely overtly on this way of testing competing conceptions. This is partly because I wrote later parts first, partly

⁹ Shue 2002, 395.