

JUSTICE, CONFLICT, AND UNIVERSALITY*

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The position developed here is an elaboration of the idea that, since justice functions to go beyond claims that have led to deadlock, it involves universality. The major task in this elaboration will be to specify the sense of universality involved. Difficulties will be pointed out with attempts to specify the relevant sense of universality through appeal to community consensus over norms. An alternative to such a 'communitarian' basis for justice is provided by appealing to a theory of the interests of groups. In this way, the elusive character of community consensus can't vitiate the reliability and critical edge of notions of justice.

1. SOCIAL HOMOGENEITY AND PURE UNIVERSALITY

One way to locate the problem to be addressed here is by reference to a common assumption of currently contending schools. The assumption in question is that of both liberalism and communitarianism. Each takes the relevant social units for discussing justice to be homogeneous in a way that allows justice to have sufficient universality. In liberal thought, different social groups are not so different that it is impossible for them to have a common standard of justice. Thus

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different groups are "objects" of justice in that justice calls for toleration between them, but they are not "subjects" of justice in that each of them is not the basis for a different type of justice. Communitarian thought, in its turn, emphasizes that a community can't be so divided as to lack a common set of values on which a standard of justice could be based. This internal communal homogeneity could, though, exist alongside striking external differences between communities, leading perhaps to multiple standard of justice. After identifying the drawbacks of the common assumption of homogeneity, and of the accompanying notions of universality,¹ the problem becomes that of staking out a position beyond it, and hence beyond these contending schools.

Another way of identifying the problem to be discussed here refers explicitly to the contrasting categories of universality and particularity. Justice, most would agree, builds bridges between individuals, between groups, between nations. It reaches out beyond any particular interest to draw in some potentially conflicting interest. In drawing these particularities together, the just resolution acts like a universal. But paired with this universality is still a third particularity. For justice is done from a standpoint that does the drawing together. It is the standpoint taken up by some individual, some group, some nation. It doesn't escape into pure universality. The problem then arises as to how justice can be sufficiently universal so as to draw different tendencies together if it is never more than justice from a particular standpoint.

This is all forbiddingly abstract. To bring the discussion closer to earth, it is necessary to fill a gaping hole in the above views. To fill this hole we begin by asking what's going on in typical cases where calling for justice or doing justice becomes relevant. Universal and particular come on scene, not as themselves, but as part on conflict and compromise. Doing justice amounts to moving beyond the particularity of actual or potential confrontation toward the universality of a compromise that inevitably carries traces of some quite particular standpoint. The problem then does not emerge simply from the dialectic of schools or

1. On the connection between universality and community, see Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry* (Notre Dame, IN: University of Notre Dame Press, 1990), 59-60.

from the formal relations of concepts. There is no problem without the tensions of actual conflict that, in the luckiest of cases, work themselves out in the process of compromise. Our reliance on compromise will be seen as a regression by those who emphasize social homogeneity and pure universality. It is however, only a regression to something more manageable and real.

2. JUSTICE AND CONFLICT

Doing justice is not tidy, mathematical business. It is the messy process of adjusting conflicting claims.² The conflicts here don't typically arise just from ignorance of overarching principles or even out of malicious disregard of them. To be sure, such principles could, through their prior acceptance, prevent a conflict from arising in the first place. But the difficulty is that it is usually not obvious why all parties to the conflict should be expected to agree to those principles. People are led to make conflicting claims from their different positions, rather than from ignorance or malice. Once they are made, the search for a just resolution begins, a resolution that will limit the potential damage of intensifying the conflict.

One side of the messiness of doing justice arises from the novelty of many of the conflicts that call for resolution. They are unanticipated by settled rules of justice and thus call for fresh reasoning. Such a fresh look will be open to an injection from current political forces. A related side of the messiness of doing justice arises from the fact that the conflicts involve people or groups fighting for their interests. Resolving such conflicts becomes, willy nilly, a political intervention. For, it will reflect or initiate a strand of politics in the arena of struggle. Thus justice is doubly political in so far as it calls for shaping new reasoning under political influence and for intervening directly into conflicts of interests.

2. According to Ernest Barker, justice "balances, and thus reconciles (and thus, in the issue, 'joins'), the different claims". This is a fundamental theme of his *Principles of Social and Political Theory* (London: Oxford University Press, 1951), 102, 150, 170.

Of course, this view is at odds with the idea that the messiness of doing justice is an accident stemming from human limitations. The substance behind the alleged accident is still represented by Justitia carrying scales that work according to settled rules, without her giving thought to why they work by those rules. And it is represented also by the blindfold that preserves her neutrality, keeping justice from being a political intervention. This icon, though, serves more to legitimate justice than limn it.

For the moment, put the political overtones of our agonistic view of justice aside so we can concentrate simply on conflict and resolution themselves. Resolving the conflicts in the least destructive ways seems critical for getting on with social living.

A resolution that deepens tensions might be inevitable when the conflict was a symptom that the social fabric was ripping apart anyway. A deepening of tensions can, though, be avoided in most cases. In general, deepening tensions results from the difficulty of finding a resolution that doesn't in a direct way favor one side while not promising at least indirect benefits to the other. The resolution fails to achieve the needed distance from one of the parties and seems too distance from the other. There is, in short, a failure to get beyond particularity to universality.

Universality here, as in other cases, implies something common that applies to both sides. But there is more to the universality of justice than that. First, the common thing is applied by an authority, which may be one of a variety of kinds. It could stem from an agreement by elders of both sides, a report from an extended process of dialogue between representatives of the sides, or a decision of a court of law. The authority vested with doing justice has a stake in seeing that the social bond is perpetuated rather than ruptured.³ Given this goal, the authority seeks to resolve conflicts without getting too close or too far from either side. So, second, the common thing must be such that it protects the

3. Karl Marx and Frederick Engels, *The German Ideology*, editor C. J. Arthur (New York: International Publishers, 1970), p. 53. Here the conflict between the claims of individuals and the maintenance of the general interest is seen to exist even prior to classes and the state.

social bond by mediating the differences of the sides. The common thing is in fact the principle by which the limits on the sacrifices of the loser and the limits on the gains of the winner are set. Such a principle, whether explicit or implicit, sets limits in a way that brings the sides closer together rather than in a way that separated them still further.

Take the case of the Nazis marching in Skokie, Illinois, in the late 1970s. The Nazis claimed a right to march with swastikas and Skokie, with its large Jewish population, claimed a right not to be threatened by marchers bearing symbols that harked back to Auschwitz.⁴ However, the claimed right to march with threatening symbols needs more to back it up than the mere interests the Nazis have in demonstrating, whatever those interests might be. At a bare minimum, this claimed right needs, if it is to become universal in the sense called for by justice, to be made applicable by some authority to both sides in the dispute. Jews as well as Nazis could, then, march with threatened is to be sustained, this right not to be faced with marchers bearing threatening symbols is to be extended to the Nazis as well. Without at least this minimal parity, the resolution would fail to distance itself sufficiently from one of the sides.

It might seem though that any time the claim one party is upheld and that of the other is rejected there is an objectionable one-sidedness. This calls for a distinction between two senses of one-sidedness. Doing justice is one-sided in the 'weak sense' every time the claim of one party in a conflict is denied and that of the other is upheld. But this need not involve the kind of failure of universality that is called for by justice. Such a failure involves one-sidedness in a 'strong sense', which focuses on the social effects of a resolution. Doing justice is one-sided in the strong sense whenever the social bond that has been severed by upholding one side and rejecting the other in a conflict is not reestablished because it is not possible to affirm with any credibility that the claim upheld is also to be both a respected and a useful right for the side whose

4. *Village of Skokie v. National Socialist Party of America*, 373 N. E. 2d 21 (Ill. 1978). The Supreme Court of Illinois upheld the right of the Nazis to march with swastikas, denying that swastikas are fighting words and claiming that, being forewarned of the demonstration, citizens could choose to be elsewhere, avoiding thereby being either offended or provoked to violence.

claim is rejected. The extension of the right to the loser would be purely formal when such a credible affirmations is not possible. In that case the right would not be an equal right, and its extension to the loser would be artificial. In such a case the effort at getting universality, and hence justice, would have failed due to strong one-sidedness.⁵

Assuming the Nazis win the right to march with threatening symbols, would the same right be useful to the Jews of Skokie? What symbols would the Jews choose to threaten Nazis with? The asymmetry between the oppressed and their former oppressor together with their epigones like US Nazi leader Frank Collin is crucial here. The asymmetry may be too great to allow one to say that the affirmation of the right to march with swastikas establishes sufficient distance from the Nazi side. In that case, upholding the right of the Nazis would be strongly one-sided. Though, the Jews in Skokie didn't have to look at the swastikas, and were not then a captive audience, the threat to Jews intended by the Nazi demonstration remained, even if the Jews chose not to be present. If indeed the asymmetry between them were so great that it would be artificial to claim that an equal right had been upheld by the court in upholding the right of the Nazis to march, then one could expect the authority of the court to lose legitimacy with the oppressed. For the oppressed the decision would lack universality.

3. THE SOCIAL GOAL OF JUSTICE

The urgency to transcend conflicting claims and the willingness in general to accept the resolution of a conflict come from the need to perpetuate the social bond. There is a social bond where individuals willingly share burdens, treat others as having claims on them that limit

5. Consider the seeming justice of upholding the right to property, as claimed by the rich, by extending it to the poor. Suppose, though, there is no good-faith effort, by those doing justice, to protect the poor from common burglars, usurers, environmental classism, and a regressive sales tax. The right to property for the poor is then artificial, and it doesn't become an equal right as between rich and poor. In these circumstances, denying the poor a right to take from the rich by upholding the right to property as claimed by the rich damages the social bond without an effort to repair it. The resolution is strongly one-sided, and thus the universality called for by justice fails.

their self-interest, and grant the bindingness of widely shared norms. An end to the social bond would turn interactions into a drab instrumental relation. The need to avoid such a change and to perpetuate the social bond is a teleological element that gives significance to doing justice and that is a standard for feasible resolutions of conflicts. This goal of perpetuating the social bond can be called 'the social goal' of justice.

Without a social bond to start with, those making conflicting claims would be unwilling to accept the possibility that their claims would be rejected. Thus it is essential that we think of justice as having as an indispensable background, rather than as creating, the social bond. Since in El Salvador the social bond between the peasants and the oligarchy had been attenuated, the oligarchy viewed even modest efforts at land reform in the early 1980s as assaults on their class rather than as efforts to do justice.⁶

Where the social bond exists and can thus be the teleological element in justice, the question arises as to whether it imports a substantive conception of the good into the resolution of conflicts. Would the conception of the good of ardent democrats, as distinct from that of upholders of an aristocratic point of view, determine the outcome of doing justice wherever the social bond happens to exist in a democratic society? The answer will depend on whether the social bond to be reproduced is a neutral link rather than one that necessarily takes on the character of the society it not only exists within but also is indispensable for. A strong case can be made against the position of neutrality. What the social bond implies will be different in different kinds of society. The sharing of burdens, the respect for others, and the binding norms - all needed for a social bond - will imply different behaviors in different societies. The commitment to perpetuating the social bond would, then, be a commitment to these behaviors as goods to be cherished. Thus perpetuating the social bond makes justice dependent on substantive goods.

This social goal is not recognized by strongly deontological views of justice. These views see no incompatibility between doing justice

6. Raymond Bonner, *Weakness and Deceit: U. S. Policy and El Salvador* (New York: Times Books, 1984), 188-189, 313-319.

and destroying the community irreparably. They assert that justice must be done whatever the consequences. John Sayles' remarkable movie, *Matewan*, is a Kantian tragedy in which the justice of getting the mine owner's gun thugs out of town is entwined with the realistic foreboding that getting them out will destroy the town and with it the organizing drive by the miners' union. Strongly deontological views of justice fail though to provide a motivation for doing justice beyond pathological commitment to principle.

The transcendence achieved by doing justice is limited by the social goal. Resolutions of conflict that are one-sided in the strong sense mentioned above not only uphold the right of one side over that of the other but also fail to repair the damage this does to the social bond. To avoid this strong one-sidedness calls for an affirmation that the right upheld is also a right of the side whose claim is not upheld. This affirmation must not express a mere formal equality, but must also imply that in the circumstances the transcendent right will be useful to the losing side. If this affirmation is to be true, it may be necessary to initiate a process of social change so that the transcendent right will indeed be useful to those whose claim was not upheld. Thus reestablishing the social bond, as called for by the social goal, does not imply social stasis. The social goal will often require that social change be part of the process of doing justice.

Perhaps, though, the social bond shouldn't be reestablished in societies thought of as unjust. Wouldn't doing so only perpetuate their injustice? This situation presents no particular problem for the idea that a social goal is behind doing justice. For, if the society is indeed unjust, what will pass for doing justice in it will fail to avoid strong one-sidedness. The rights upheld by its so-called system of justice will not become equal rights and hence the social bond, if there was one, won't be reestablished. The system of justice will, then, lack legitimacy. The conditions will be prepared for those denied equal rights to attempt to change the society in the direction of a genuine justice. Thus the social bond will be reestablished by justice only once the society has been changed to become a just one.

4. PERSPECTIVAL UNIVERSALITY

More needs to be said about the standpoint from which justice is done. We have said only that doing justice is called for by conflicts of claims and that the reason it is called for is the social goal -the perpetuation of the social bond. A resolution is universal to the extent that it does transcend each side.

What needs to be added is that the social bond qualifies the universality of this transcendence. For, doing justice is an effort to resolve conflict in order to perpetuate the social bond. The society that shapes the social bond will in turn give the transcendence in conflict resolution its special character. We can say the society provides the perspective from which justice is done. Doing justice in a particular case reflects the point of view of a society characterized by a social bond of a given kind.

What has been said so far shouldn't be taken to imply that doing justice is nothing more than the resolution of isolated conflicts. Rather, the resolution of one conflict bears on that of others, since the social bond will not be promoted when the resolutions of conflicts fail to cohere. Without coherent resolutions to conflicts, or at least some way of papering over incoherence by distinguishing cases, expectations become confused and individuals lose the trust needed for social intercourse.⁷ With coherence, though, past resolutions begin to lay a basis for formulating principles of justice that achieve a higher level of universality than what be involved if cases were taken in isolation. The great temptation is to confuse this higher degree of universality with an escape from any particular standpoint, to confuse universality with absoluteness.

Seeing justice in terms of perspectival universality is a feature of an old tradition that carries on today under the label 'communitarianism'. On the positive side, those in this tradition connect the motive for doing justice with acceptance of a certain social order. Justice is typically done from the motive of perpetuating the bond within a social order. There need be no appeal to ghostly motives, such as a pure respect for

7. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 219-224.

self-given law, the desire to implement arrangements worked out behind a veil of ignorance, solidarity with humans anywhere within the galaxy, or the urge to seek truth in a medium of uncoerced discourse. Instead of resting on such motives, which few humans feel even on occasion, the communitarian starts from where most of us are most of the time, that is, from our being bonded with others in a social order. Being thus bonded, we will accept -whether it be enthusiastically, merely implicitly, or only grudgingly- the social order into which such bonding fits. In the absence of an immediately available alternative to the social order we in fact accept, we have a motive to do justice in cases of those conflicts which if left to fester would erode that order. That motive is the perpetuation of the social bond of that order.

Hume developed this positive communitarian theme when he argues for his claim that justice owes the approval humanity gives it solely to its tendency to preserve the order of society. He observes that "where the society is ready to perish from extrem necessity", such as a famine, the harm is already done that justice was intended to remedy, namely, to prevent the society from coming apart. Injustice cannot, at that point, increase this harm; so persons are left to themselves to survive, without justice regulating their interaction.

The notion of society here could be interpreted in either a broad way to include humanity or a narrow way to include only the agent's "own country". But Hume makes clear that attempts to do good for humanity come to naught "for want of a duly limited object". The perspective of justice is, then, society in the narrower sense. There will, though, be differences between societies in the narrower sense of subdivisions of humanity, differences important enough to affect justice.

Consider, for example, the contrast Hume draws between a society in which "birth is respected" and one in which "riches are the chief idol". The former favors military virtue and hence monarchy as its form of government; the later favors industry and hence a republican government. Hume concludes that each form of government will promote the usefulness of the characteristic custom of its society. The monarchical form, through the military, promotes respect for birth; the republican form, through industry, promotes the quest for riches. Hume does not go on

to draw the conclusion, though it seems inevitable, that since the sole foundation of justice is the support of society, justice in these different societies will be different, otherwise one form of justice would be required to support conflicting goals.⁸

5. FREEDOM AND EQUALITY

On the negative side, those in the communitarian tradition reject the idea of an emergence of nonperspectival from perspectival universalism. Such an emergence might seem plausible if in the process of doing justice from a particular perspective a breakpoint is reached. At this breakpoint that perspective itself is tested. The significant thing is that the perspective has to be tested by adopting a moral stance with no tie to a particular social group. Such a nonperspectival moral stance would in some fashion be presupposed in the overall interactive process of doing justice from a particular perspective. It would then be argued that without presupposing a nonperspectival moral stance for testing any perspective the enterprise of doing justice is not a moral but only a political enterprise. It would be nothing more -as though everyone should see this as a fatal flaw- than choosing the best means for maintenance of the society.

Should there be, for example, reliance on the moral stance that those engaged in a just resolution of a conflict are free and equal as moral persons? If so, any perspective which rejects this stance would fail the test for being adequate for doing justice. This appeal to freedom and equality in the process of doing justice has deep roots in contract, as opposed to communitarian, views of justice.⁹ Without presupposing freedom and equality, any resolution would be criticized by contractarians as instrumental.

8. David Hume, *An Enquiry Concerning the Principles of Morals*, in *Enquiries*, editor L.A. Selby-Bigge (Oxford: Clarendon Press, 1972), 186, 225 nl, 249.

9. Just as in Locke's state of nature humans are free and equal, so too in Rawls' original position, humans are free and rational beings concerned with furthering their own interests in a situation of equality. «By acting from these principles [adopted in the original position] persons express their nature as free and equal rational beings...» John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 252.

As free, participants in doing justice would not be limited to preserving the social bond, since having to preserve it would be a restriction on moral reflection. The freedom of a moral person allows for questioning any tradition, any authority, any propriety. And as equal, the weight of their voice in the discussion would not be diminished even if they reject the social bond, since this would make acceptance of the social bond a condition of their qualifying as moral equals. Nations disqualify foreigners, ethnic minorities, and religious minorities from full participation in citizenship. But such discrimination is incompatible with the moral equality allegedly presupposed by doing justice. Freedom and equality would then certainly open the discussion up; there would be no binding rules of "political correctness".

The communitarian thinker will, though, want to know just why doing justice imports these nonperspectival requirements of freedom and equality into the discussion. They are, after all, quite rigorous standards, so rigorous that it is hard to imagine any being other than a detached and alienated spirit insisting on them.

But there is an easier way for the communitarian to attack the introduction of these nonperspectival requirements. In different social groups there are different standards of freedom and equality. Freedom and equality turn out themselves to be perspectival. In U.S. society the standard of freedom involved in the process of doing justice is compatible with important exclusions. For example, jury selection in criminal cases doesn't proceed on the basis that acceptable jurors can think that a classist and racist state has no right to punish. In appointments to U.S. judgeships, moreover, there has been a tendency to select those who do not see class as a suspect classification when it comes to determining whether there has been equal protection of the laws.¹⁰ None of this need be taken to mean that in doing justice people lack freedom and equality. Instead, it reminds us that the standards of freedom and equality are fashioned by the society from whose perspective justice is being done. If there is an objection to such standards, then it is also an objection to the society in which they are standards. But such an objection would not lead away from all societies. It would point the direction to a different

10. *San Antonio Independent School District v. Rodriguez* (1973).

society, one with different standards of freedom and equality.

The urge still remains to say there is a noncontextual conception of freedom and equality that can serve as the test. This urge arises wherever communities cultivate the drive to have their own justice accepted by recalcitrant subgroups or distinct communities. Liberalism is often identified with an aversion to putting its concepts of freedom and equality in context. In fact, liberal theorist with the greatest influence always integrate a contextual element into their thought. Isaiah Berlin recognizes a "shifting, but always recognizable frontier" of freedom. Within these frontiers, people should be inviolable, and a "normal human being" would not overstep these frontiers without revulsion. The frontiers are "developed through history" and are "weighed against the claims of many other values".¹¹ With the recognition of the frontiers of liberty as shifting and value dependent, liberty can no longer lay the basis for a nonperspectival justice.

An even more concrete contextualization occurs when a specific social order is made the focus of discussion. It is democratic society of modern Western history that is picked out by Rawls, in his work after *A Theory of Justice*, as the context for discussions of freedom and justice. Rawls would insist though that he stays clear of assuming any comprehensive substantive good when he picks out democratic society. He thinks this insistence makes sense since, in a democratic society, there will be respect and freedom for those striving for different comprehensive substantive goods. Kantian autonomy or Millian individuality are not, then, assumed as goods. What Rawls assumes are only the mutual respect and freedom necessary if democratic procedures are to be workable. This freedom defines the frontier against intrusion, making it depend on the demands of democratic procedures. This freedom is not, then, the noncontextual autonomy Kant makes central to his views. In addition, the mutual respect called for by democratic interaction is the appropriate sense of equality needed by Rawls in his pursuit of a 'political' rather than a purely moral sense of justice.¹²

11. Isaiah Berlin. «Two Concepts of Liberty», in his *Four Essays on Liberty* (New York: Oxford University Press, 1969).

12. On the contrast between a comprehensive substantive moral view and a

What has been said so far about the perspectival universality of justice is not then something that liberals like Berlin and Rawls find abhorrent. Each contains a communitarian moment in his thought.

6. HOMOGENEITY AND COMMUNITY

Building on communities is risky. They are made to carry a lot of weight in the argument for a social-based perspectivalism. In this argument, they provide the perspectives from which justice is done. The risk involved comes from the fact that there are all sorts of communities. Not all of them will provide a foundation for political morality in general or even justice in particular. Part of the problem comes from the widely lamented atomization of individuals that eventually destroys community. The problem also arises from the sharp divisions between reasonably well-defined groups that fracture what we are led to believe are communities. (The focus here will be on nation-sized communities, rather than on communities in the sense of traditions, which may only involve a small segment of a nation and may cross numerous national boundaries).¹³

We'll start with atomization. For John Dewey, the market and industrialization had ruptured the social bond as it had existed in small communities. As a result community had become a project, rather than be a place ready for occupancy. Human relationships formed only a Great Society, an atomized aggregate resulting from the destruction of smaller communities. Dewey could only anticipate a Great Community that would replace the inchoate public of the Great Society.¹⁴

He took note of the tendency toward democracy present everywhere, thinking that this tendency could be guided toward the realization of a more ideal democracy, which would then be the Great Community. But, he notes, this realization would not come about simply by more democracy. There would have to be a qualitative improvement in the political conception of justice, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 13.

13. Milton Fisk, «Community and Morality», *Review of Politics* 55, #3 (1993):...

14. John Dewey, *The Public and its Problems* (Athens, Ohio: Swallow Press, 1988), 134-151.

kind of democracy presently existing, which suffered from the atomization of interests in a market society. So Dewey was pointing toward a community that didn't exist and furthermore wasn't the natural outcome of the democratic tendency that did exist. He looked forward to it as a social thinker rather than as a member of a movement motivated by the Great Community as its shared ideal. It was a project drawn to his own specifications. The Great Community could not, then, claim to be an existing foundation, such as communitarianism requires, for a radical view of justice.

On to the problem created by social divisions! Contemporary communitarians are not as willing as Dewey to claim that there is only an inchoate public. They would claim that there are social bonds strong enough to make up communities rather than aggregates of individuals. Despite the atomization caused by markets, there is other-regarding behavior and many are willing to spend time for what they think of as the good of the community. Such behavior might be attributed either to self-interest, to the need for recognition, or to an innate feeling of solidarity. The communitarians would argue that the important thing is not the origin of such behavior, but that it exists.

Where there is other-regarding behavior, there is what communitarians call civic virtue. This is a propensity for sociability, one that builds social bonds and reinforces them institutionally. The state does not make displays of civic virtue unnecessary but instead, at least in the case of the democratic state, rests on civic virtue. Civic virtue is necessary if the state is not to become totalitarian. A moral culture, whether in a society with a democratic state or not, will have its roots, at a level deeper than the state, in the sociability of the people. For the communitarian, justice can in its turn be centered in this sociability, as a real rather than just an ideal foundation.

This type of view has many variants, running from the conservative to the neoconservative to the liberal and over to the social democratic.¹⁵ Most variants share the belief that there are nation-wide societies, each

15. For a survey of the different positions see Robert Booth Fowler, *The Dance with Community: The Contemporary Debate in American Political Thought* (Lawrence, KS: Kansas University Press, 1991), chapters 5, 6.

with a consensus in regard to a system of norms. With such a consensus these societies can be considered communities. The system of norms arms such a society with a moral culture that allows for the orderly resolution of conflicts, which we are calling doing justice.

Can there be such a consensus and what might its nature be in a society with deep divisions along class, race, gender, or ethnic lines? Rousseau raised just such a question concerning the compatibility of factions with the 'general will'.¹⁶ The matter should be decided in precisely the way he did. He insisted that (a) a moral culture exists only when its adherents could freely adopt it in view of what is in their best interest, and (b) when there are social positions making for systematic conflict among them a people will not be able to freely adopt a common moral code. Given that in any society we can think of today there are social positions that generate such conflict, the kind of moral culture needed for justice on the communitarian view does not exist.¹⁷

John Rawls has adopted an ingenious way of avoiding this problem. If it is successful, the communitarian can still claim that, despite social heterogeneity, there is room for the moral homogeneity needed as a basis for justice. As already noted, Rawls appeals in recent writing to a democratic tradition as a basis for justice. As Rawls was surely aware, there were important gaps in this tradition in view of the reluctance of powerful groups to sacrifice their advantages by accepting the democratic process. Whites, for example, were for years willing to exclude African-Americans from the scope of democratic institutions. This involved the absence of political liberties, police repression with impunity, and the open denial of equal economic opportunity. Those who derived benefits from white supremacy in social, economic, and political terms saw these benefits as goods worth sacrificing a truly democratic culture for. Supremacy for whites and equality for African-Americans were conflicting goals that made it impossible for both groups to share a democratic culture.¹⁸

16. Rousseau, *The Social Contract*, Book 2, Chapter 3.

17. For a perceptive survey of systematic conflict between class positions, see Ralph Miliband, *Divided Societies: Class Struggle in Contemporary Capitalism* (Oxford: Clarendon Press, 1989), chapters 3, 5, 6.

18. However, the division between groups are not, for Rawls, so deep that they

In this impasse, the way out suggested by Rawls is for both sides to experiment with democracy for enough time for them to recognize just how great its advantages are. At such a time they will be willing to modify their incompatible goals sufficiently so they can continue to enjoy the benefits of democracy.¹⁹ Social heterogeneity would then allow for the moral homogeneity needed by the communitarian. His suggestion, though, is fraught with difficulties. Even if those in a privileged position were to enter into the experiment, there is no guarantee that they would find democracy better than their privileges. After all, when a sizeable group is subordinated, the benefits in terms of everything from cheap labor to a political monopoly are enormous, at least for the most powerful in the subordinating group.

What makes their privileged position vulnerable is not mulling over the advantages of democracy but rather the possibility of a movement of the subordinated group for greater equality. The militance of the African-American movement of the 1960s in the U.S. caught the attention of white liberals, thereby creating a coalition across racial lines that could not be ignored by white politicians. Playing the power card did, then, bring about an extension of democracy, based though on a truce rather than a fundamental change of goals.

The truce involved gains in civil rights for African-Americans but within the context of white controlled institutions and of simmering white resentment at having to give up anything. There was an extension

must ultimately refuse to agree to a conception of democratic fair play. The will, once having seen the advantages of such fair play in practice, go on to modify their comprehensive substantive goods so as to avoid run ins. This does not mean that their comprehensive views will become identical, but only that they will become sufficiently homogeneous to provide a common moral basis for justice. Thus what he calls a 'reasonable pluralism' is not just a limit on groups that will be tolerated. It is something most groups can become part of. For, they will see, in terms of their own values, the advantages of modifying certain among those values so that they can then adopt fair conditions of cooperation in respect to other groups. See Rawls, *Political Liberalism*, lecture 2, section 1; lecture 4, section 6.

19. This is the process emphasized by Rawls in «The Idea of an Overlapping Consensus» (*Political Liberalism*, lecture 4). In «The Priority of the Right and Ideas of the Good» (ibid, lecture 5, section 6), he stresses another tactic. Since civil society isn't fully formed apart from the state, he contends that conflictive divisions in civil society can be avoided by a just state.

of democracy that did not eliminate, but at best narrowed, the gap in democratic culture. For, so long as social inequality was still being promoted by attitudes and institutions there could not be political equality and hence not a full democratic culture.²⁰ In the 1990s this 1960s truce is threatened as African-Americans of most strata recognize that their losses in the 1970s and 1980s were enormous. The heterogeneity in a society with unstable truces makes impossible the moral homogeneity the communitarian appeals to as a basis for doing justice.

7. SOCIAL POSITIONS AND JUSTICE

Either there is no nation-sized community, but only Dewey's Great Society, or the nation-sized communities relevant today lack moral homogeneity, due to social fractures. In either case there appears to be no nation-sized moral culture on which justice could be based. Instead, the only place to look for a set of standards to base justice on seems to be in the individual groupings into which society is fractured. It is in these that there is a basis for normative unity on which justice can be based. There is no class-, race-, gender-, or religion-blind justice since the perspectives from which justice is done will be those of groupings defined in one of these ways. This shift from community to social position allows us to maintain perspectival universalism, but now the perspective is from a social position rather than from a community based on moral homogeneity.

The logic of this new view still sets out from the communitarian assumption that a social unit is a prerequisite for doing justice. This means only that they both share a perspectival universalism. But the new view differs from communitarianism in two respects, one of which has already been discussed whereas the other injects a new element.

The element already discussed has to do with the tendency of many communitarians to play up moral homogeneity where there are in fact deep social divisions. Nation-sized societies are fractured by cross-

20. This parallels the point about women made by Carole Pateman, «Feminism and Democracy», in *Democratic Theory and Practice*, edited by G. Duncan (Cambridge: Cambridge University Press, 1985), 204-217.

crossing divisions that make the unmanipulated common understandings needed for a common moral culture difficult to come by. The longing for community can underestimate the depth of the moral diversity in such societies. Dewey was closer to the mark when he said a nation-sized community is today no more than a project. Can we, though, find unitary moral cultures by pushing on the subgroupings within nation-sized society, such as classes and races? I think not.

The new element is an insistence on social positions rather than moral cultures. The idea is that there can be opposed moral cultures within any grouping we settle on. This opposition will have complex causes but will in one way or another depend on the fact that it is an opposition within a single social position. Women in Operation Rescue have a pro-life, anti-gay, and pro-family moral culture that differentiates them from the women in the National Organization of Women with their pro-choice and pro-equality moral culture. It would, then, be a mistake to think of justice from the woman's perspective as rooted in a unitary women's moral culture. That is why there is a need to shift from moral culture, shared moral meanings, and normative consensus to speak about social positions.

Once this shift is made, it is no longer fruitful to think in communitarian terms. The appeal to community is an appeal to a bond established through a homogeneous culture, shared understandings, and cohering norms. Such an appeal is unfruitful in providing us with a basis for justice. The reason is simply that the moral cultures sought continue to break into multiple cultures as we push from nation-sized groups through various sub-groupings. The appeal to social positions to which we now turn does not depend on there being a unitary moral culture within each grouping.

The shift in primacy from moral cultures to social positions puts a critical tool for assessing moral cultures within our reach. In this way it satisfies the classical liberal demand for reflection on moral cultures. Such a critical tool works in the following way. Through a social theory—an hypothesis about social positions and their links—one attempts to account for the fact that people in a given social position have the moral culture or cultures they do.

A sufficiently comprehensive social theory will also be able to account for the rejection of the explanation it itself offers of any moral culture by those adopting that culture. Thus the social hypothesis is not assumed to be beyond the conflict in moral cultures it is dealing with. Its explanations will be contested and it will, if it is adequate, explain why they are contested.

In addition, a social theory can interpret moral cultures associated with a given social position as either coerced because of a need to cope with desperate circumstances or manipulated by agencies outside that position. Such an interpretation is of special interest here since it amounts to a critique of those moral cultures. It is a critique if it can be assumed that those in the given social position would not adopt any of those moral cultures on their own in the absence of desperate circumstances or manipulation.²¹

What does this general line of thinking imply for justice? As before, doing justice is a matter of transcending conflicting claims. And also as before, this transcendence is guided by a complex set of values. Such a set of values picks out ones that need to be realized to preserve the group. They are then part of a concept of a good society. With the communitarian it was possible to locate such a set of values where there was a moral culture or a shared moral understanding. But some moral cultures or shared moral understandings don't pass critical scrutiny in light of social theory. They show up as the coerced or manipulated cultures of a given social groups. Thus the moral culture of Operations Rescue might fail to pass critical scrutiny as a morality for women on several grounds. Women who adopt that culture do so partly out of desperation. It helps them cope with the arbitrariness, the humiliation, and the threats they endure in the male dominated family as well as elsewhere. They also adopt it partly out of manipulation. Men promote such a moral culture as a way of protecting the privileges that equality for women would deny them. But where else, if not in moral culture, could a critically acceptable conception of the good society come from on the basis of which justice could be done?

21. Raymond Guess, *The Idea of a Critical Theory* (New York: Cambridge University Press, 1971), 79.

The preliminary answer is that the values to be realized if a society is to be good will be based on the interest a social position will give its members. These interests will be ones that can pass the test of critique in the light of social theory. And if there are overlapping groups, it will be left to discussion in the light of social theory to undertake a conciliation of the interests of the various groups. According, then, to the general view taken here of the underlying values, justice will be done where conflicting claims are resolved in a way that advances the critically certified interests of a social position.²²

An implication of this view is that justice itself will become a source of conflicting claims. Justice done from the perspective of one group will be countered by charges of injustice from the perspective of a conflicting group. Yet two such groups are often tightly linked, calling for a single justice between them. But by focussing on the interests arising from each group by itself, the way is barred toward such a single justice. For this reason a step beyond our preliminary answer is needed.

Before taking that step, in the next section, a word more about critical acceptability. There is no intention in appealing to social theory to ascend to a purely neutral level beyond the conflicts within and between groups. Thus the critical acceptability of a moral culture is not a mark of nonperspectival approval. As a caution, then, social theories should be indexed by the agendas they promote. This does not, though, destroy their critical impact. A well documented account of the moral culture surrounding Operation Rescue based on a social hypothesis about the nature and interrelation of gender groups can be persuasive beyond those already committed to whatever agenda that hypothesis is associated with. Further, since finely articulated social theories aren't automatically available to serve every agenda, a developed social theory can get the edge simply for lack of a respectable competitor. The critical potential of a social theory does not, then depend on its independence of the social context. Otherwise it would be hard to say how humans ever did critical thinking.

22. Milton Fisk, *Ethics and Society* (New York: New York University Press, 1980), 218-220.

8. GOVERNABILITY AND UNIVERSALITY

Though nation-sized communities are made impossible by social divisions, states manage to survive such divisions. Perhaps all along we should have been looking to states rather than to communities for justice. We could in that way have avoided the problem we just ran aground on while looking for the basis for justice at the level of social groups like classes and genders. It will turn out, though, that the false start with such groups pays off in getting clear about how justice can be located at the level of the state.

In doing justice, one needs to consider the big picture from somewhere within it. This is simply to reaffirm the view that justice involves universality with a tie to a perspective. But in this final attempt to understand justice, the big picture is to encompass the various subdivisions of society ruled by a state and the perspective becomes that of one of those subdivisions.²³ The perspective is not, then, that of the state itself. The motive for doing justice, where justice is still understood as the resolution of conflicts, shifts from being the cohesion of a community to the governability of a society. Conflicts between the elements of the society could, if allowed to intensify, make the society ungovernable and as a result undermine the society itself.

Governability, then, provides a motive for transcending the narrowness of group interest, making it impossible for any governing body to commit itself to advancing the interests of only one or a few of the groups in the society.²⁴ A balance must be struck between the interests of major conflicting groups that, on the one hand, limits their losses and, on the other hand, limits as well their gains. Exactly what formula for limiting losses and gains is adopted will depend considerably on the circumstances. The strength or weakness of the democratic impulse among a people, of the different conflicting groups, of the economy in the given period, and of the legitimacy of the ruling body will all be factors in determining how much gains and losses should be limited to

23. For an extension of this view to international justice, see Milton Fisk, *The State and Justice* (New York: Cambridge University Press, 1989), chapter 17.

24. Milton Fisk, *The State and Justice*, part 2.

insure governability.

This picture isn't complete without emphasizing the role of group perspective. There are a variety of ways losses and gains could be limited. None of these ways corresponds precisely with the interests of any group in the society. For the point is to limit the interests of each group so all groups can be governed together. However, each group will want to limit its interests as little as is absolutely required by governability. Here is where the group perspective of state justice shows up. All we need to do is ask what group or groups will be the positions defining the perspective of state justice. The perspective-defining groups will be the powerful social groups. They will have more resources with which to influence the doing of justice in the direction of their interest. In addition, a governing group standing above the society is more disposed to favor them since without their full support its ability to rule can be seriously undermined. It then makes sense for a governing group not to try to fashion the limits on losses and benefits as a neutral in the conflicts between social groups but in a manner that calls for the least sacrifices by powerful groups.

State justice is not, then, a carbon copy of the justice of powerful groups governed by the state. Still, by calling for the least sacrifices from the powerful groups, state justice is done from the perspective from those groups.²⁵ How is state justice related to the justice of the powerful groups? The governing group modifies the justice based on the interests of powerful social group in such a way that governability is insured. This will mean that the group justice of powerful social groups gets modified to take into account the interests of less powerful groups.

It was group justice that was elaborated in the last section. It is being replaced here by state justice, which is neither more universal nor more absolute than group justice. It is not more universal since both can transcend conflicts occurring across the society. It is not more absolute

25. A pattern of justice then becomes part of the set of ideas and practices that enables a dominant group or groups to become hegemonic in the sense intended by Antonio Gramsci, *Selections from the Prison Notebooks*, edited by Q. Hoare and G. Nowell Smith (New York: International Publishers, 1971), 257-264.

since both involve a group perspective. They differ in that the governability of a divided society replaces the realization of group interests as the motive of justice.

The current escalation in the price of health care in the U.S. illustrates key features of this picture of state justice. Some limit needs to be put on the gains of the health providers and health-related manufacturers. Otherwise, the government will be held accountable for allowing this sector to enrich itself far beyond the ability of the rest of the population to keep up. Similarly, some limit needs to be put on the losses sustained by those who have to pay the bill for health care. Inflation in the cost of health care is in part responsible for a high level of unemployment and for the large number of working people without health insurance. State legitimacy would be called into question without a state effort to alleviate this situation.

The health industry, though, wants to set these limits without sacrificing its chance to continue to increase its share of the gross domestic product, which in 50 years jumped from 4% to 14%. The majority of the population has, however, shown its preference in numerous polls for a system in which physician fees and hospital rates would be negotiated by health commissions and in which the health insurance industry would be replaced by a single payer.

In the U.S. context, this favored change will not take place now, since the justice that will be done from the perspective of corporate power. This power is better organized, closer to the governing group, and has greater resources than the inchoate majority favoring more radical change. At present this corporate perspective excludes a government takeover of any major industry and also excludes an effective mechanism of controls on fees and rates. At the level of the media, this perspective of corporate power is eloquently expressed at regular intervals in *The New York Times* editorials.²⁶

But the state's doing justice from the perspective of corporate power does not mean that it does exactly that power wants. It is after all the state and not corporate power that is laying down the pattern of justice

26. See e.g. the editorials of *The New York Times* 5-26-92, 6-22-92, 7-22-92, 9-26-92, 3-7-93.

in health care from the corporate perspective. The perspective of corporate power is, then, no longer taken with the sole motive of realizing corporate self-interest but with the motive of preserving governability. Thus there will be an effort to extend coverage to many of the uninsured and there will be an effort, of dubious effectiveness, to have voluntary compliance on the part of the health-care industry with price restraint. Despite the weakness of such a measure, it will become state justice in the health-care field, barring an unanticipated groundswell of consumer protest which would strengthen it. Through it conflicts is temporarily defused and something more than narrow group interest is thereby achieved.

9. OBJECTIONS

In closing three objections call for comment. First, it will be objected that state justice is not the only kind. This must be admitted by introducing what can be called radical justice. But even this new species avoids the difficulties that have led us to state justice only by resorting to reference to the state. Radical justice is different from state justice in two ways. On the one hand, its perspective is that of a group or groups that at the moment happen not to be those with the greatest power. It is a perspective that, like state justice, takes into account the interests of what are currently the dominant groups. It takes them into account since it is a perspective that would promote the legitimacy of a state run not for the currently powerful but for the underdog groups.

Second, it will be objected that state justice is not merely a compromise worked out to preserve legitimacy. It is a matter of principle rather than compromise, and the principles involved can be found to be operative in the legal tradition of a democratic society like the U.S.²⁷ The response to this made by Critical Legal Studies is adequate for our purposes as well. It is difficult to encase the history of legal conflict resolution in a consistent tradition of principle.²⁸ Legitimacy manages

27. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), chapter 6.

28. Andrew Altman, «Legal Realism, Critical Legal Studies, and Dworkin»,

to be preserved over long periods through compromises that, if principles are present at all, involve changing and conflicting principles. These compromises are outcomes of debates that turn on the relative power of the groups participating and on the assumed goal of governability.

Third, it will be objected that as between the various justices-state justice and different forms of radical justice- there is a true justice, which will be that of dominated groups.²⁹ The reason is that only the interests behind the radical justice of dominated groups can be openly acknowledged without reducing the long-term chances of satisfying them. In other cases, the interests behind justice have to be obscured by ideology. State justice done from the perspective of the most powerful groups is, then, false since to admit openly its tilt toward the interests of those powerful groups would stiffen the resistance of relatively powerless groups. Thus if the interests of the powerful are to be promoted by state justice, its tilt to the powerful must be obscured with ideology about the common interest.

This is an initially attractive suggestion. But it comes to grief over the fact that in a divided society none of the sides -powerless or powerful- can reveal the true interests behind the kind of justice they wish to promote. There is a perfect symmetry here. The powerless, if they reveal their interest in overcoming their powerlessness, will only intensify the opposition to them of the powerful. The powerful will charge the powerless with declaring class war and will attack the powerless under the banner of the common good.

Can the radical justice of the powerless still be defended against a state justice based on the perspective of the powerful? Suppose the

Philosophy and Public Affairs 15, 3 (1986): 205-236.

29. See the critique of the perspectival universality of justice in the discussion-review of Fisk's *The State and Justice* by Justin Schwartz, «Revolution and Justice», *Against the Current* 42 (1993): 37-41. The criterion of publicity used in this critique can be traced to Kant's «To Perpetual Peace: A Philosophical Sketch» in Immanuel Kant, *Perpetual Peace and Other Essays*, translated by T. Humphery (Indianápolis: Hackett, 1983), appendix 2, 135. Here Kant lays out a transcendental formula of public right: «All action that effects the rights of other men are wrong if their maxim is not consistent with publicity». This formula is subject to the difficulty pointed out below.

radical justice of the powerless calls for a society in which there is no power differentiation. Then in such an egalitarian society, the interests of those who promote the justice of this society can be proclaimed without threat to those interests. There is, though, no corresponding paradise for the powerful, since without the powerless to oppose them they are no longer the powerful. Here we seem to have reached asymmetry of the sort needed to justify the radical justice of the powerless.

Those who see power inequality as compatible with justice will, however, object in strongest terms. Any effort to do away with power inequalities for the sake of egalitarian radical justice will, from their perspective, involve an unacceptable use of coercion in order to divest the powerful of their power. Admittedly after using coercion, a situation will exist in which people can express their interest in equal power without opposition. But what is at issue is precisely the present and not the future. Can a radical justice opposed to power inequalities be given validity within our present divided society simply by the fact that it points to a future society in which equal power can be affirmed publically as a social good? The answer be that its so pointing has no tendency to validate it. For, this radical justice can reach the goal it points to only by means objectionable to competing types of justice. Only if those competing types of justice were ruled invalid in advance could such a goal lend absolute validity to the radical justice in question.

Having dealt with these objections, we are in a position to claim that state justice, at least in state societies, must be central in treatments of justice. The impulse that leads to doing justice is one of finding a universal standpoint from which to reconcile particular forces in conflict. We have traced several steps in the attempt to find just what such a universal standpoint could be. We were led from communities of at least the size of nations proved incapable of yielding norms generally acceptable within them due to the social divisions present in them. Social groupings within such nations might have been a structural basis for justice, but this left us with as many standards of justice as groupings. And yet due to the close interaction between such groups a single standard of justice is needed for dealing with conflicts between

them. Rather than retreat to community to get such a single standard, we moved on to the state as the organizer of groups in conflict. Without presupposing social homogeneity, the state can claim to stand outside particular conflicts and adjudicate them on the basis ultimately of norms designed to promote governability. State justice is often at odds with radical justice, which shares with state justice a parallel structure but emerges from oppositional rather than dominant groups. While radical justice can offer a critical view of state justice, it cannot defend itself as ultimate.