

Enforced Equality—Or Justice?

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I

In the Preface to *The Mirage of Social Justice*, the second volume of his trilogy on *Law, Legislation and Liberty*, F. A. Hayek explained that “circumstances have contributed to delay the publication of the second volume of this work.”¹ The chief circumstance was “dissatisfaction with the original version of the central chapter . . . in which I had tried to show for a large number of instances that what was claimed as demanded by ‘social justice’ could not be justice because the underlying consideration (one could hardly call it a principle) was not capable of general application.” Hayek was dissatisfied because he had now become convinced . . . that “the people who habitually employ the phrase simply do not know themselves what they mean by it, and just use it as an assertion that a claim is justified without giving a reason for it.”²

I propose to challenge this conclusion, arguing that Hayek’s first thoughts were more nearly correct. The expression “social justice” does appear to be employed by a great many people as almost, if not quite, synonymous with the word “equality,” which is then construed as involving neither equality before the law nor equality of opportunity but equality of income or of outcome. But now, in that understanding, what is claimed to be demanded by social justice certainly is not and could not be justice.

Justice is an essentially backward-looking notion, concerned with people getting and being able to keep their several and presumably often different deserts and entitlements—deserts and entitlements we have antecedently acquired by being what we are and have been, and by doing or refraining from doing what we either have done or have refrained from doing. The Procrustean ideal, on the other hand, the ideal of a universal equality of condition necessarily enforced and maintained by an all-intrusive socialist state is, equally essentially, forward-looking. Regardless of what people are or have been, have or have not previously done, their future condition is to be made (ever more if never perhaps perfectly) equal.³

Protagonists of this Procrustean ideal would, if they were both clear-headed and frank, sacrifice the propaganda advantages of presenting it as a kind of justice. Instead, and taking a leaf from the book of the orthopsychiatrists and other self-styled penal progressives, they would mount a bold and radical onslaught on the very notion of justice—denouncing the whole business as antique, gothic, reactionary, and—what is the truth—irreducibly backward-looking.⁴

II

That social justice and the Procrustean ideal are often thus identified can perhaps best be seen by considering the extraordinary tickertape reception accorded to John Rawls's *A Theory of Justice*, for this author, his different and more ambitious title notwithstanding, proclaims from the beginning that "our topic . . . is that of social justice."⁵

In his Critical Notice in the *New York Review of Books*, the lifelong British socialist Stuart Hampshire wrote: "I think that this book is the most substantial and interesting contribution to moral philosophy since the war, at least if one thinks only of works written in English. It is a very persuasive book, being very well argued and carefully composed." It presents, Hampshire continues, "a noble, coherent, highly abstract picture of the fair society, as social democrats see it. . . . This is certainly the model of social justice that has governed the advocacy of R. H. Tawney and Richard Titmuss and that holds the Labour Party together."

Again, and similarly, the author of one of the first volumes in a new International Library of Welfare and Philosophy sees the implications of the present equation, likes them, and construes this as a license to help himself to the premise from which they follow. Having sketched a Rawlsian account of (social) justice as a (qualified) equality, he remarks that one "reason for linking equality and justice is that within the theory of justice one can provide the necessary moral premises for adopting the principle of equal welfare as a prescriptive recommendation."⁶ (Why should we resist the temptation to quote Bertrand Russell, who once remarked that the Method of Postulation had all the well-known advantages of theft as compared with honest toil?)

Hayek himself appears to have been blinded by charity to the significance of this welcome, for, with his usual irenic generosity, he refrains from settling accounts with *A Theory of Justice*, "because the differences between us seemed more verbal than substantial."⁷ Yet it would be easy to extend indefinitely the list of quotations from British socialist sources showing some sort of near if not always perfect equation between the establishment of a general equality of welfare and a meeting of the demands of (social) justice. Such persons also take "equality" to be virtually synonymous with "equity": An equitable distribution for them, therefore, just is an equal distribution.

For example: A leading Labour Member of Parliament, Mrs. Barbara Castle once made a very characteristic statement in a debate on a Queen's Speech: "Our

complaint against the Government, and in particular the Prime Minister, is that brick by brick they have set out to create an unjust society.”⁸ (The Prime Minister thus arraigned was, of course, Edward Heath.) A Fabian Society review of the two subsequent Labour administrations is full of more of the same. Nick Bosanquet and Peter Townsend proclaim in their Editorial Preface to *Labor and Equality*,⁹ a Preface reprinted on the back cover, “that the Labour Party can and should light a flame in a world of injustice and inequality.” Contributor after contributor to this volume speaks of “socialist canons of equality and social justice” and of “a more socially just and equal society.”¹⁰ One author goes so far as to assert—without attempting to explain either what this might mean or why we should accept it as true—that, in particular, “racial equality requires a society which is equal in all respects.”¹¹ Perhaps the strongest evidence that we are dealing with an equation is provided by David Piachaud’s harshly confident denunciation: “The Conservative government”—this time that of Margaret Thatcher—“is renouncing the search for social justice.”¹² For Piachaud’s point must surely be, what is perfectly true, that instructed Conservatives reject the Procrustean enforcement of equality; rather than, what would be a well-nigh Hitlerian Big Lie, that we all despise and disown old-fashioned, without prefix or suffix, justice.

III

In Section I, I said what I proposed to do. In Section II, I tried to show, against Hayek, that many people do give a fairly definite meaning to the expression “social justice.” Now it is time to start to fulfill the undertaking to show that what is claimed as “demanded by ‘social justice’” certainly is not and could not be justice.

The greatest difficulty in this task is to find any strong and direct opposing argument to confront. For there seems until only yesterday to have been no general disagreement about the concept of justice, though plenty about what in particular justice requires. In Book I of *The Republic*, for instance, before going on to develop his own hopefully persuasive redefinition, Plato scripts Polemarchus to offer what any contemporary would surely have accepted as a correctly descriptive account of the meaning of the Greek word translated “justice”. It is, Polemarchus suggests, “rendering to everyone their due.”¹³ Their due, of course, will be their several and presumably often different deserts and entitlements—moral deserts and moral entitlements if we are talking about morals; legal and legal if we are talking about the positive law.

The same theme is taken up and repeated by the Roman lawyers. Thus in that grand epitome, the *Institutes* of Justinian, we can read that the mark of the just man is “*constans et perpetua jus suum cuique tribuere*”—a constant and perpetual will to assign to each his own. More recent treatises have often cited a fuller Latin sentence, adding two further clauses before that crucial and traditional “to

each his own." This runs: "*Honeste vivere, neminem laedere, suum cuique tribuere*"—"To live honestly, to injure no one, to assign to each his own."

This fundamental agreement about the concept of justice—about the correct descriptive definition of the word "justice"—has not extended to embrace a similar happy agreement either about what people's several deserts and entitlements actually are or about what are the proper bases of desert and entitlement. It is thus possible, putting the same point in another terminology, to share the same concept but nevertheless to have different and conflicting conceptions of justice. But surely any conception that either rejects the notions of desert and entitlement or holds that those of everyone are in all respects, and without regard to any differences between individuals, equal, cannot be a conception of *justice*.

But, if this is obvious, why do so many nowadays identify the Procrustean production of equality of outcome with the pursuit of justice? There are, I suggest, three main reasons. First, justice does indeed demand one sort of equality, although that sort is not this sort. Second, these people never address themselves to questions about the meaning of the word "justice." Instead they are content merely to parrot a cant expression, the use of which shows them to be (in the United States) acceptably "liberal" and (in the United Kingdom) "not at all right-wing." Third, they want to secure the hooray word "justice" as the attractive brand label for their favored policies, in much the same way that Soviet Germany prefers to call itself, and be called, the German Democratic Republic.

The first of these three reasons can be disposed of in very short order. Certainly any rules of justice, like any rules at all, must, to be rules, be applied in the same way, and hence equally, to all those to whom they are applicable. But this is a very different thing from saying that, to be just, you have to treat everyone in the same way, in all respects without exception. Nor is there any doubt but that justice requires equality before the law, in the sense that all offenders must be treated in the same way with no one privileged because of color, relationship to the dictator, or anything else of a similar nature. But any system of what purported to be criminal justice that refused to treat offenders in any way differently from nonoffenders would—as Kant might have said—contradict itself as a system of criminal justice.

Again, equal consideration should not be mistaken to imply that everyone has an equally legitimate claim to equal shares of everything—although today, it seems, it often is. For what equal consideration has traditionally meant, and should continue to mean, is that everyone is equally entitled to his day in court. But what the court will then decide is bound to be, in different cases, different and maybe, as between one litigant and another, very unequal indeed.

The third of the three reasons will eventually be disposed of with similar dispatch; for, once the full traditional meaning of the word "justice" has been reestablished, it will become immediately obvious that the Procrustean who misrepresents himself as pursuing justice incurs costs that are bound to prove

altogether unacceptable. So the next job is to attempt to enforce the contention that that meaning is what it is, bringing out some of the most relevant implications. Perhaps the most effective way of tackling this job is to confront the challenge of *A Theory of Justice*.

IV

Before beginning to engage that philosophical enemy more closely, let us treat ourselves to one wide-ranging comment. Just as Plato in *The Republic* developed a uniting and justifying ideology for the absolute rulers of his supposedly ideal state, so Rawls too has, in his own somnambulistic and pedestrian way, done the same thing for that New Class which sees its own most unequally powerful and most unequally prosperous future in the enforcement, through the ever expanding welfare-state machine, of equality for all others.

Now to detail. Readers of the Sherlock Holmes stories will remember the remarkable thing about Watson's hearing the dog barking in the middle of the night. That remarkable thing was that Watson did not hear it, because no dog barked. The similarly remarkable thing about the definition of "justice" that Rawls provides is that he provides none. Nor does he offer any reasons for rejecting all traditional accounts. Indeed this may well be the first work pretending to be a treatise on justice that is not, even in over 600 pages, able to find room to quote any of those previously mentioned variations on the theme of *suum cuique tribuere*. Instead this extraordinarily unlinguistic former chairman of Harvard's Department of Philosophy takes credit for an assumption that "allows us to leave questions of meaning and definition aside and to get on with the task of developing a substantive theory of justice."¹⁴

As everyone interested in such matters has known for some time, Rawls sets about this chosen task by reviving the notion of a Social Contract. What we have to do now is to bring out the nature and significance of certain assumptions built into either the content or the context of that hypothetical and not historical contract. Rawls himself, as well as most of his critics, have failed to appreciate either that these assumptions are being made and/or how crucial they are to the entire enterprise.

(a) First, there is the assumption that all present and potential property really belongs to the collective and is therefore available for distribution or redistribution, subject to no legitimate prior claims, at the absolute discretion of that collective. This is a pretty big and fundamentally socialist assumption. Yet it is wholly typical of the unselfcritical parochialism of Rawls that, since he never even notices that he is making it, he finds no room to essay any justification.

Indeed he goes so far as to state that "justice as fairness"—his own brand-label for his system—is neutral as between a private, pluralistic economic order and total, state-monopoly socialism.¹⁵ Yet he still assumes that all the wealth either

already produced or in the future to be produced within the to-them-unknown national frontiers of the hypothetical contracting parties is, as has been said, available for collective distribution, free of all prior claims to individual ownership. Most remarkably, yet it seems never elsewhere remarked, this collectively owned wealth must be taken to include all those services that are the actions of individuals.

(b) Consistent with this original, totally socialist assumption, Rawls also takes it absolutely for granted throughout that any particular rights or resources enjoyed by any individual either are or ought to be allocated collectively. Consider, for instance, two statements: first, that "the justice of a social scheme depends on how fundamental rights and duties are *assigned*";¹⁶ and, second, that "the chief primary goods *at the disposition of society* . . . liberty and opportunity, *income and wealth* . . . are to be distributed equally. . . ." ¹⁷—unless, he will later add, an unequal distribution is positively advantageous (and not merely not disadvantageous) to the least advantaged (not individual but) group. Rawls is thus, from the very beginning and throughout, making the same enormous socialist assumption as is made in the blurb of Michael Harrington's *The Twilight of American Capitalism*: "A notable study which analyzes reasons why sharp inequalities in the sharing of *the nation's wealth* are inevitable outcomes of American capitalism"¹⁸

(c) A third major assumption, which both determines that the terms of the hypothetical contract must be Procrustean and thus disqualifies the result as *A Theory of Justice*, actually is argued for elsewhere. Typically, however, Rawls never notices either that or how this assumption both removes all possible grounds for individual self-respect—something he says he values greatly¹⁹—and lays his own theory open to what he himself rightly insists is the great objection to any utilitarianism—that "it does not take seriously the distinction between persons."²⁰

This third assumption decisively eliminates from consideration all possible grounds for individual differences in desert and entitlement. It ensures that the only deserts or entitlements any individual could have must be universal human deserts or entitlements—the deserts appertaining to original sin, perhaps, or the rights claimed by the American Declaration of Independence.

So what is this crucial third assumption? To appreciate its nature and full significance, we have to approach it slowly and rather indirectly. Remember that the hypothetical contractors in the Rawls system are supposed to negotiate behind "the veil of ignorance."²¹ And what they have collectively to choose are "the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions."²²

In these days, and after the captivating frankness of his confession that "we want to define the original position so that we can get the desired solution," it should come as no surprise that these Rawlsian contractors cannot but "acknowledge as the first principle of justice one requiring an equal distribu-

tion." Indeed, Rawls adds, "this principle is so obvious that we would expect it to occur to anyone immediately."²³

To bring out the nature of the enormous third assumption by which this conclusion becomes "so obvious" to Rawls, we must recognize the stated main purpose of proceeding behind "the veil of ignorance." It has been usual for commentators to discuss this comprehensive blinkering as having been stipulated to secure impartiality. This, as Richard Hare reminded us in his critical notice,²⁴ makes the whole business no more than a dramatization of the colorless Humean appeal to the ideally impartial spectator.

Now, certainly, Rawls does mention this as one purpose: "We should insure further that particular inclinations and aspirations, and person's conceptions of their good, do not affect the principles adopted."²⁵ But the stated primary aim is altogether different, and altogether preposterous: "Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in the quest for political and economic advantage, we are led to these principles. *They express the result of leaving aside those aspects of the social world that seem arbitrary from the moral point of view.*"²⁶

In the end it emerges that Rawls will have to include under the rubric, things "that seem arbitrary from the moral point of view," everything that distinguishes one individual from another; everything, that is, that any individual has done or another has not done, as well as everything that one individual is and another is not. For only by such wholesale discounting of all the differentiating characteristics of every individual as, allegedly, "morally irrelevant" can he maintain the supposedly quite obvious "first principle of justice, one requiring equal distribution." Without that discounting he would be laying himself open to pressure from those who do indeed "take seriously the distinction between persons." For we want to respect some of the different and hence often (horrid thought!) unequal claims urged by and on behalf of different people; claims grounded in differences between what those different people severally have done, or are.

Rawls never spells out in full how much he would have us include under the descriptions "the accidents of natural endowment and the contingencies of social circumstance . . . those aspects of the social world that seem arbitrary from the moral point of view." Had he done so, he could scarcely have failed to realize the absurdity of offering his "justice as fairness" *either* as a conception of justice; *or* as a reform alternative to all versions of utilitarianism that fail "to take seriously the distinction between persons"; *or* as a system within which we must and can place a very high value on individual self-respect.

What Rawls does is present some unsound argument for the crucial conclusion that these accidents and contingencies are indeed "arbitrary from a moral point of view." He starts from the observation that natural endowments are not themselves deserved. From this innocuous truth he draws two invalid references:

first, that what these endowments make possible cannot, therefore, be itself a proper basis of desert; second, because they are not deserved, therefore they must be, in some scandalous way, undeserved.

This second invalid inference is taken to establish the "principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for."²⁷ Such compensation is provided by the Difference Principle. This, Rawls tells us, "represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favoured by nature, whoever they are, may gain from their good fortune *only* on terms that improve the situation of those who have lost out."²⁸

As Rawls sees it, "The natural distribution of abilities and talents," and also presumably of disabilities and ineptitudes, is the outcome of a "natural lottery." And, furthermore, "Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances."²⁹

Two further objections against this common and apparently seductive line of argument have to be raised, however briefly.

1. First, the lottery analogy is applicable only where there are antecedently existing participants hoping to increase their resources by some (for them) lucky spin of the wheel or fall of the die. Something else has to be either part of me or a legitimate property of mine if I am to be in a position to make acquisitions, whether these are deserved or undeserved or—as Aristotle might have said—not-deserved. Again, I have to have some independent existence as an individual and to possess at least some properties that are, for better or for worse, essentially mine if I am either to be fairly or unfairly allocated anything or to have any basis for individual self-respect—as opposed, perhaps, to some sort of 1844 Marxist collectivist self-respect as a species being.

2. Second, Rawls never explicitly entertains the possibility of undeserved or not-deserved entitlements. Yet he is no more able than anyone else to avoid admitting or affirming the moral legitimacy of some such claims. Is he not, after all, himself acknowledging what surely must be not-deserved or undeserved entitlements both (a) when he assumes that all the wealth produced or to be produced in that to-them-unknown territory is a collective asset, which his contractors have the right to distribute among themselves at their absolute discretion, and (b) when they, and he, "acknowledge as the first principle of justice one requiring equal distribution"?³⁰

V

Suppose that someone now objects, as some have objected, that Rawls has a different conception of justice, that his is not "an entitlement theory." Certainly

he has a different conception, so different that what Rawls calls justice is not justice at all. A conception of justice, to be such, must be a conception of what people's several deserts and entitlements are, and/or of what are the proper and legitimating bases of desert and entitlement. But Rawls, as we have seen, has no room for notions either of desert or of not-deserved entitlement, while he categorically denies the moral relevance of any of those various characteristics in respect of which one individual differs from another, and upon which all differences of desert or of not-deserved entitlement cannot but be grounded.

Plato's Socrates wisely concludes Book I of *The Republic* by remarking, sadly, that "so long as I do not know what justice is, I am hardly likely to know whether or not it is a virtue, or whether it makes a man happy or unhappy."³¹ We might wish that Rawls had paid some attention to this warning. Instead, as we have seen, he rashly preferred "to leave questions of meaning and definition aside and get on with the task of developing a substantive theory of justice."

Someone here could respond that all the objections deployed above have been merely verbal, not substantive. Yet this would reveal grotesque misunderstanding. The differences between the objector to and the protagonists of "equality and social justice" are a matter merely of words only in the silly sense in which the difference between a verdict of "guilty" and "not guilty" is a difference of a single word. The point is that different words carry different implications; and the differences between such different implications may sometimes be, as in the latter example, a matter of life and death. There are various very solid, though not by the same token respectable, reasons why Rawls—and many others much nastier and more worldly-wise than Rawls—want to present their cherished Procrustean norms as the mandates of (social) justice.

In the first place, of course, there is the enormous propaganda advantage of presenting new and alien ideals in old and well-loved bottles. And what Procrustean does not wish to see himself, and to be seen, as a sort of Shane figure out of a good old-fashioned, traditional Western, a man dedicated to doing the justice "which a man has to do."³²

In the second place, if the Procrustean can get us to accept that his norms are indeed the imperatives of justice, he will have acquired a knock-down answer to an objection that might otherwise be embarrassing: "By what right are you proposing to employ the machinery of the state to impose on everybody, or more often it is everybody else, your own personal ideal?" For everyone is ready to allow that what is prescribed by (moral) justice may properly, though not always prudently, be enforced by (legal) law.

Let us conclude with a third observation, the pressing home of which holds out our only hope of persuading the Procrustean to abandon their false, proud claims to be promoting (social) justice. If justice really did require and warrant an equal distribution, then everyone would be entitled to no more and no less than an equal share (tautology). But now all the Procrustean of my own acquaint-

tance are, on these assumptions, rather conspicuously underdeprived. They are all, to speak less delicately, in possession and enjoyment of considerable amounts both of capital and income, to say nothing of power and position, over and above those equal or nearly equal shares to which alone they are, on their own accounts, justly entitled. In accordance with their own constantly reiterated principles, therefore, such excesses constitute property stolen (by keeping) from others worse off than themselves. This unlovely picture is not the one they want either to see themselves or to show to the rest of us!

NOTES

1. F. A. Hayek, *The Mirage of Social Justice*, vol. 2 of *Law, Legislation and Liberty* (London: Routledge and Kegan Paul, 1976), p. xi.
2. *Ibid.*, p. xi.
3. Compare my *The Politics of Procrustes* (London: Temple Smith; N.Y.: Prometheus, 1981), *passim*.
4. Dr. Karl Menninger, for many years the doyen of American orthopsychiatry, in *The Crime of Punishment* (New York: Viking, 1968), goes so far as to say: "The very word 'justice' irritates scientists. No surgeon expects to be asked whether an operation for cancer is just or not. No doctor will be reproached on the grounds that the dose of penicillin he has prescribed is less or more than justice would stipulate. Behavioral scientists regard it as equally absurd to invoke the question of justice" (p. 17). For more of the similar, and for some old-fashioned criticism thereof, see my *Crime or Disease?* (London: Macmillan, 1973).
5. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971; Oxford: Clarendon Press, 1972), p. 7.
6. A. Weale, *Equality and Social Policy* (London: Routledge and Kegan Paul, 1978), p. 32.
7. Hayek, *The Mirage of Social Justice*, p. xiii.
8. *Hansard* for 6/XI/72, 845, 55.
9. Nick Bosanquet and Peter Townsend, eds., *Labour and Equality* (London: Heinemann, 1980).
10. *Ibid.*, pp. 131 and 228; and compare pp. 61 and 227.
11. *Ibid.*, p. 151.
12. *Ibid.*, p. 184.
13. Section 331E. It is noteworthy that in *The Open Society and Its Enemies* (London: Routledge and Kegan Paul, 5th ed., 1966), vol. 1, p. 247, Sir Karl Popper remarks that Plato's persuasive redefinition does "not . . . touch the essence of what man generally mean by justice," but instead sums up a conception of "social justice."
14. Rawls, *A Theory of Justice*, p. 579.
15. *Ibid.*, pp. 265 ff.
16. *Ibid.*, p. 6. Italics added.
17. *Ibid.*, p. 62. Italics added.
18. Michael Harrington, *The Twilight of American Capitalism* (New York: Simon and Schuster, Touchstone Books, 1977). Italics added.
19. Rawls, *A Theory of Justice*, p. 440.
20. *Ibid.*, p. 22.
21. *Ibid.*, p. 136.
22. *Ibid.*, p. 13.
23. *Ibid.*, pp. 150-51.
24. Richard Hare, "Critical Study," *Philosophical Quarterly* 23 (April 1973): 144-55; 23 (July 1973): 241-52.
25. Rawls, *A Theory of Justice*, p. 18.
26. *Ibid.*, p. 15. Italics added.
27. *Ibid.*, p. 100.
28. *Ibid.*, p. 101. Italics added.

29. *Ibid.*, p. 74.
30. An even more powerful challenge has been launched by Robert Nozick in his scintillating critique, *Anarchy, State and Utopia* (New York: Basic Books; Oxford: Blackwell, 1974). Suppose that half of the population was born with two eyes and half with none, would the aficionados of "equality and social justice" want to say that it was an imperative of justice that all the two-eyed must be forced to make one of their eyes available for transplanting into the empty sockets of the no-eyed; on the grounds that bodily parts, just like abilities and disabilities, ought to be regarded as a collective asset, available for redistribution at the absolute discretion of the collective? Even if there are Procrustean so ruthlessly consistent that they would take this hard line, would they not still have to say that it was justice precisely because the no-eyed have a necessarily not-deserved entitlement to an eye?
31. Section 354C.
32. Hugh Stretton goes so far as to dedicate *Capitalism, Socialism and the Environment* (Cambridge: Cambridge University Press, 1976) to Four Just Men: "Apart from any influence their writings may have had those four must by now have planned, directed or managed several billion dollars' worth of three or four countries' capital resources, mostly to the purpose of reducing inequalities" (p. vi).