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EDWARD CRAIG



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the publication of express rules, seen as emanations of the human will. The idea that such rules should apply equally to all members of the society only emerges, however, in societies of the 'legal order', as exemplified by the liberal societies of post-feudal Europe. Such societies are composed of different groups with different interests, no one of which is dominant, so that the law is seen as a cohesive force, binding all groups equally.

Another manifestation of what may be called historical jurisprudence concentrates on the identification of recurring patterns in the technical development of law, irrespective of their social context. Such studies emphasize similarities between the legal techniques of the laws of different societies, in such matters as the relations between procedure and substantive law, for example, the effect of use of laymen, such as civil juries, on the nature of the law, or the relations between written law, in which the text is fixed but subject to recurring techniques of interpretation, and unwritten law, in which the rules are not finally formulated but elucidated on a case by case basis by authoritative judges or jurists.

See also: EVOLUTION AND ETHICS; EVOLUTIONARY THEORY AND SOCIAL SCIENCE; LAW, PHILOSOPHY OF

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PETER STEIN

JUSTICE

The idea of justice lies at the heart of moral and political philosophy. It is a necessary virtue of individuals in their interactions with others, and the principal virtue of social institutions, although not the only one. Just as an individual can display qualities such as integrity, charity and loyalty, so a society can also be more or less economically prosperous, artistically cultivated, and so on. Traditionally defined by the Latin tag 'suum cuique tribuere' - to allocate to each his own - justice has always been closely connected to the ideas of desert and equality. Rewards and punishments are justly distributed if they go to those who deserve them. But in the absence of different desert claims, justice demands equal treatment.

A common division of the topic distinguishes between corrective and distributive justice. Corrective justice covers that which is due to a person as punishment, distributive that which is due by way of benefits and burdens other than punishments. Within the sphere of

corrective justice there is disagreement about the justification of punishment itself. But there has been – and is – widespread agreement on the criteria for just punishment: just punishments must be properly imposed and the quantum of punishment must reflect the seriousness of the offence.

There has been no such agreement about the content of just principles for the distribution of benefits and (non-punitive) burdens. Conventionalists claim that what is due to each person is given by the laws, customs and shared understandings of the community of which the person is a member. Teleologists believe that an account can be given of the good for human beings and that justice is the ordering principle through which a society (or humanity) pursues that good. Justice as mutual advantage proposes that the rules of justice can be derived from the rational agreement of each agent to cooperate with others to further their own self-interest. Theorists of what may be called justice as fairness believe that justice is a thin concept which provides a fair framework within which each person is enabled to pursue their own good.

- 1 Corrective justice
- 2 Conventionalism
- 3 Teleology
- 4 Justice as mutual advantage
- 5 Justice as fairness
- 6 Critics of justice

1 Corrective justice

There is general agreement that a just punishment should meet the following criteria. First, it should be imposed only on a properly convicted wrongdoer. Second, the quantum of suffering should satisfy the principle of ordinal proportionality. This means, as Hirsch (1990) has put it, that 'persons convicted of crimes of comparable gravity should receive punishments of comparable severity' except where mitigating or aggravating circumstances alter the culpability of the offender. Third, the quantum of suffering should satisfy the principle of cardinal proportionality: there should be a vertical ranking of crimes and penalties by seriousness.

There is, however, disagreement over the justification for punishment, and this makes it controversial how 'seriousness', 'severity' and 'culpability' are assessed and how the scale of penalties should be fixed. Those who appeal to deterrence may regard a widespread and socially disruptive crime as serious (whatever its degree of moral wrongness), and favour a scale of penalties designed to deter criminality. Those who favour retribution, however, have traditionally regarded seriousness as a factor of moral culpability

and the scale of penalties as being derived from some notion of desert (see CRIME AND PUNISHMENT).

2 Conventionalism

Turning to social, or distributive, justice, the attraction of some form of conventionalist approach is clear. Since there are institutions, conventions and systems of law that determine what is due to whom, resolving issues of justice may be thought merely to require reading off the correct answer from such sources. The earliest extant statement of a conventionalist view of justice is offered by Socrates' interlocutors, Cephalus and Polemarchus, in Book I of Plato's *Republic*. Polemarchus states that justice is giving a man his due, or what is appropriate to him, and it is clear that for Polemarchus what is appropriate to each person is dictated by the conventions prevalent in contemporary Athenian society.

A more complicated statement of conventionalism has been offered by Michael Walzer (1983). He argues that every social good (for example, health care, wealth, income and political rights) has an appropriate criterion of distribution which is internally related to how that good is understood by society. For example, in the UK (as elsewhere), health care is understood essentially to concern itself with illness and the restoration of health. This shared understanding of health care seems to entail a distributive criterion: medical need. Anyone, therefore, who claims that health care in the UK (and many other societies) ought to be distributed in accordance with, say, status has either failed to grasp the nature of the good of health care or falls outside the community which is united and defined by its shared understandings. The only universal principle of distributive justice is the demand that respect be given to different shared understandings: no community ought to impose its own understanding of a given good, and its criterion for the distribution of that good, on any other community with different views.

The dependence of this theory on shared understandings has led to its being criticized on both empirical and theoretical grounds. Empirically, it is doubtful that any society is so homogenous as to boast a single, coherent and uncontested understanding of each of its social goods. (Is the freezing of embryos so that women might have children later in life, after they have established themselves in a career, meeting a medical need?) Theoretically, the account is flawed because the proposed universal principle of justice is not found in any society. A belief may be 'ours' in that it defines justice *according* to us; but it does not follow that we believe it is 'ours' in the sense of *applying* only to us. If justice is internally

related to social understandings, there can be no perspective from which anyone might, from outside a given set of understandings, condemn the understandings or practices of a society as unjust. Yet there clearly is such a perspective. For example, in a hierarchical society it may be that the local conception of justice would require gross inequalities based on ascription at birth; this could be regarded as unjust.

The *prima facie* attraction of conventionalism is immediately undone when one asks why any given set of conventions, laws, or shared understandings should determine the distribution of benefits and burdens. Once this question is asked there is no reason why the answer has to flow from within the narrow resources of the community. It is at this point, when one asks why things are as they are, that the philosophical problem of justice really begins.

3 Teleology

In the history of thought about justice, the most common justification of any given set of laws, conventions or practices has been to appeal to an external, usually divine, authority. In the natural law tradition, to make an act just it is not enough that it complies with the society's positive law. The positive law must itself be in accordance with a natural law which is knowable through the faculty of human reason (see NATURAL LAW). This tradition, owing its origins to the Greek Stoics, found its most lucid interpreter in CICERO (§§2.4) and was given its definitive Christian form by AQUINAS (§13). 'True law', writes Cicero, 'is right reason in agreement with nature; it is of universal application, unchanging and everlasting' (c.54-51 BC: III, XXII, 211). The link to human nature via human reason is important, for it then follows that human beings reach their true end, or realize their true natures, only by living in accordance with natural law. What justice is and why it is a good are, thus, answered at the same time.

A major problem for this account is its reliance on an external source. Cicero is typical in claiming in the same passage that it is God who 'is the author of this law, its promulgator, and its enforcing judge'. Natural law theory faces the difficulty of having to give an account of the existence and verifiability of the 'true and unchanging' moral order. Commonly, the natural law was conveniently said to underwrite the existing positive law: this may reflect the role of the powerful both in formulating positive law and defining natural law.

Suppose we are attracted to the notion that human institutions are to be justified by their contribution to human good, but do not believe that human reason is

capable of discerning a divine plan. Then we may naturally arrive at the secular alternative embodied in utilitarianism: the idea that the ground of justification is human wellbeing, happiness or 'utility'. When the utility of different people conflicts, the criterion for bringing their interests into relationship with one another is that aggregate utility is to be maximized (see UTILITARIANISM).

Utilitarianism can be characterized as a theory of justice if we simply define justice as the principal virtue of institutions. Utilitarians claim that, in the last analysis, there is only one virtue that matters: maximizing utility. However, utilitarianism is liable to violate elementary demands of justice as they are commonly understood: two people with identical deserts will be treated very differently if the utilitarian calculus happens to produce the finding that utility would be maximized by so doing. The common belief is that what is due to a person ought to be related to something about that person, not derived from a calculation about what would most effectively further some overall desirable state of affairs.

An important line of thought within utilitarianism has attempted to head off such criticisms by arguing that in practice the dictates of utilitarianism would underwrite the practices and institutions that are usually thought of as being required by justice. Thus, David HUME (§4), in *A Treatise of Human Nature* (1739-40), described justice as an 'artificial virtue' in that individual acts of justice contributed to utility not directly (as an act of benevolence would) but indirectly *qua* adherence to an institution that was on the whole beneficial. Hume's examples were respect for property, chastity (in women), allegiance to the government and promise-keeping. For Hume, then, justice was a convention – but it made sense to ask what good was served by following it. On somewhat parallel lines, J.S. MILL (§11) argued in 'Utilitarianism' (1861) that 'justice' is the name we give to those precepts whose strict observance is important for the furtherance of the utilitarian end. Thus, utilitarians argue that the arbitrary departures from social rules summoned up by anti-utilitarians as an implication of the doctrine are, in the long term, not really for the general good. Opponents of utilitarianism however have claimed that situations might still arise in which injustice (as normally understood) would be for the general good. Further, they complain that the foundations of the theory remain unsatisfactory because it does not (in John Rawls' phrase) 'take seriously the separateness of persons'.

4 Justice as mutual advantage

Utilitarianism is based on the assumption that the

good of different individuals can be in some sense lumped together, and the pursuit of aggregate utility proposed as the objective of everyone. But, in the absence of an external lawgiver, how can an (not naturally benevolent) individual be encouraged to adopt the maximization of total utility as a binding demand? If we doubt that any satisfactory answer can be given, we may be tempted by a theory of justice that takes as its starting point the assumption that each person has a conception of their own good, and that justice must be shown to contribute to the attainment of that good. Justice is thus the terms of a *modus vivendi*: it gives everyone the best chance of achieving their good that they can reasonably expect, given that others are simultaneously trying to achieve their (different) good. Versions of 'justice as mutual advantage' can be found in Thrasymachus' 'might is right' argument in Book I of Plato's *Republic* and in the fraudulent social contract identified by Rousseau (1755: Part II) as having been perpetrated by the rich on the poor. But the *locus classicus* of this theory is undoubtedly *Leviathan* by Thomas HOBBS (§7).

If the terms of agreement are to be to the advantage of each (compared with unrestrained conflict), they must reflect the relative bargaining strengths of the cooperators. The strong and talented have little to gain (or to fear) from the weak or infirm, and the latter may even 'fall beyond the pale' of morality if the strong have no reason for taking their interests into account (Gauthier 1986: 268). Intuitively, it may seem perverse to call this a theory of justice. It is true that justice as mutual advantage has much of the structure of a theory of justice in that it results in rules that constrain the pursuit of self-interest. But the content of those rules will correspond to those of ordinary ideas of justice only if a rough equality of power holds between all the parties.

Even if this objection is not regarded as decisive, the theory suffers from internal problems. These concern the determinacy of the rules and their stability. The determinacy problem arises because of the necessity for all to start from a common view of the relative bargaining strengths of the participants. This is an immensely demanding condition, given the information about resources required and the different predictions that are liable to be made about the outcome of conflict. Even after rules have been agreed, some parties will have reason to press for changes if their bargaining power increases. Justice as mutual advantage results in rules which are no more than truces and, like truces, they are unlikely to be stable if there are changes in the balance of power between the sides (Barry 1995: 41).

Stability will also be challenged by the problem of non-compliance. Justice as mutual advantage appeals

to the self-interest of each and does so by establishing rules that, if generally complied with, will further the interests of all individuals. However, this gives the agent no reason to comply with a given rule when there is greater advantage to be had by breaking it. This applies especially when the agent can free ride on the compliance of others. All that can be attempted is to increase the costs of non-compliance by increasing the sanctions if the agent is detected. To run a society using only self-interest and sanctions, however, would mean using a degree of coercion and of 'policing' hitherto unthought of in even the most totalitarian society.

5 Justice as fairness

Theories of justice as fairness start, like those of justice as mutual advantage, from the premise that the role of justice is to provide a framework within which people with competing ideas of the good can live together without conflict. However, justice as fairness seeks a framework that can be said to be fair to all the parties. It aspires to allocate to each person a fair set of opportunities to pursue their idea of the good life. The problem is that if what is due to each person is not determined by convention, by some overarching theory of the good, or by mutual advantage, how is it to be determined? On this question there is widespread disagreement. What is agreed is that there is an initial equal claim to consideration (see Kymlicka 1990). The root of disagreement lies in determining the scope, grounds and nature of this equality.

The range of accounts of the content of justice which is compatible with justice as fairness is very great: Robert Nozick's entitlement theory and John Rawls' theory of justice, for example, come to very different conclusions about what justice demands, even though both start with the basic idea that justice is to regulate the interactions of free and equal persons. Nozick believes that 'individuals have rights, and there are things no person or group may do to them (without violating their rights)' (1974: ix). From this starting point he generates what he calls an entitlement theory of justice (see NOZICK, R. §2). The just pattern of distribution is that which would result from voluntary transfers, given that holdings were justly acquired in the first place (by just transfer or by an appropriation that makes no one else worse off). Nozick, then, regards the claim to an equal set of absolute rights as defining the limits of justice: any actions which interfere with those rights (such as redistribution) are unjust no matter what the pattern or outcome of the entitlement theory. Nozick does not, however, offer any account of the existence of such robust rights, and his arguments from intuition to

show that any interference with individual rights is unjust are unconvincing. It is plausible that injustice may result from a large number of individual transactions each of which taken separately seems just.

John Rawls (1971) has argued that justice requires the provision of equal basic liberties and fair opportunities for all, and that social and economic inequality can only be justified where it is to the benefit of the least advantaged. These principles are derived by arguing that they would be chosen by free persons in an 'original position', the specifications of which prevent people from making unfair use of their natural and social advantages (see CONTRACTARIANISM §7; RAWLS, J. §1). Rawls then, in contrast to Nozick, believes that justice requires us to do much more for each agent than merely provide them with absolute property rights. Rather, the pattern of distribution is set at that which will maximally benefit the worst off. The question is one of determining the content of justice: when is it appropriate to move away from the concept of equality? 'when have we done enough' for a person to be able to say that variations in outcome are 'deserved'? (Scanlon 1988: 187) (see EQUALITY; DESERT AND MERIT)

Recent work in Anglo-American political theory has been dominated by the development of theories between these positions. Ronald Dworkin (1981), for example, has argued that Rawls goes too far in treating all characteristics that make people more or less productive as 'morally arbitrary', and thus fails to allow for the justice of rewarding enterprise and ambition. Dworkin, in his own work, seeks to accommodate differences in ambition while retaining the feature of endowment insensitivity (see DWORKIN, R.).

A different line of argument is that Rawls' original position is not a bargaining environment because the veil of ignorance entails that the participants are identical. Moreover, Rawls secures the two principles only by building in a number of ad hoc requirements (for example, that the participants are risk averse). The alternative proposed is to posit participants who are aware of their identities and *morally* motivated to seek agreement. Such a position has been proposed by the philosopher Thomas Scanlon (1982) and developed into a theory of justice by Brian Barry (1995) (see CONTRACTARIANISM §9).

All theories of justice as fairness face the problem of grounding the commitment to the fundamental equality of persons and giving an account of each agent's motivation to behave justly. Rawls offers two justifications for his principles. The first is that the principles match our 'considered moral judgements' about justice: we come to a 'reflective equilibrium' in

which the principles reflect and organize our moral intuitions. The second justification is offered as a Kantian interpretation. On this account the original position provides a 'procedural interpretation' of Kant's realm of the 'kingdom of ends' (see KANT, I. §9). The original position and the choice of the principles are viewed as an attempt to replicate Kant's reduction of morality to autonomy and autonomy to rationality. Thus, by living in accordance with justice we realize our true natures as autonomous beings. This provides the motivation required.

In later papers and in his second book, *Political Liberalism* (1993), Rawls has moved away from the Kantian interpretation on the grounds that it requires a controversial metaphysics and that it commits him to a particular view of the good life as autonomy. Instead Rawls now emphasizes that his theory relies on nothing more than ideas 'latent in the public political culture' of modern Western democratic states. This move aligns him with the conventionalist position discussed in §2, and is open to the criticisms raised there. Without the Kantian interpretation it is also difficult for Rawls to give an account of moral motivation. What is left is a theory that claims to give a content to the idea of justice but which cannot, when the demands of justice conflict with the self-interest of the agent, provide the agent with a reason to be moral (Nagel 1991).

Scanlon's and Barry's accounts assume morally motivated individuals who are concerned to find terms of agreement which reflect the equality of persons. Barry has argued that the demands of fairness can be generated from the lack of an authoritative account of the good; but this argument still relies on a prior commitment to freedom and equality. There is, however, no reason why such theories should not claim that such a commitment has universalist implications: an appeal to what we believe does not mean that what we believe applies only to us. Similarly, theorists of justice as fairness need not make the illegitimate claim (much more often attributed to them than made by them) that justice as fairness is neutral between all ways of life (no matter how illiberal) (see NEUTRALITY, POLITICAL).

Justice as fairness can claim to give a content to the idea of justice by telling us what is justly due to whom, and can do so in a way that matches our fundamental intuitions about the nature not only of justice but of morality generally – namely, that each agent is a locus of equal value. That they cannot provide the agent with a decisive reason to behave morally when to do so conflicts with the agent's self-interest or conception of the good may not reflect a defect of justice as fairness. Rather, it may be an inevitable aspect of moral theorizing without recourse to a divine order or

a single, comprehensive, idea of the good (see MORAL MOTIVATION).

6 Critics of justice

The discussion so far has proceeded on the assumption that justice is the principal virtue of institutions. The theories of justice examined here would explain this primacy in different ways; by appealing to the most important shared understandings, the most stringent demands of Nature or God, the conduciveness of justice to utility or civil peace, or the role of justice in providing a fair framework for the pursuit of different conceptions of the good. But all agree that, where justice conflicts with other values, those other values must give way.

This consensus has been challenged on the grounds that under ideal conditions justice would be unnecessary, and appeals to it would actually destroy valuable social relationships. Thus, a marriage in which the spouses were constantly arguing in terms of rights and duties would be less good than one in which mutual love created spontaneous harmony. By an extension of this sentimental line of thought, an ideal community would be one in which justice had been transcended by a spirit of what used to be called (until feminist scholars objected) fraternity. This is one strand in the thought of Marx, and it recurs in the work of some contemporary feminist and communitarian writers (see COMMUNITY AND COMMUNITARIANISM; FEMINIST POLITICAL PHILOSOPHY §4).

The theorists of justice discussed above would not necessarily dispute such claims. Both Hume and Rawls argued that there are 'circumstances of justice' that make justice necessary. These are precisely the conditions – conflicting demands for material goods and unreconcilable aspirations – that the critics of justice believe would be transcended by a sufficiently strong community spirit. The disagreement is not analytical but turns on the view taken of the possibility and the desirability of creating a community in which justice ceased to be the first virtue. The partisans of justice can point out that the theoretical assault on 'bourgeois morality' has provided the supposed justification for the most appalling violations of rights (for example, in China, Cambodia and the former USSR), and ask if there is any reason to suppose that other social experiments driven by the same animus would be any more benign.

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BRIAN BARRY
MATT MATRAVERS

Laws are intended to achieve justice, but the application of an otherwise just law may yield an injustice in the circumstances of a particular case. This is because laws are framed in terms of general rules which cannot adequately provide in advance for all possible variations in relevant circumstances. Equity modifies the rigid application of the law in such cases in order to secure justice in the light of all the relevant circumstances. So, in Aquinas' example, the law may justly require the closure of the city gates after a certain hour, but officials may equitably decree the opening of the gates during the legal hours of closure in order to save fighters defending the city who are being pursued by an enemy. In this sense, the equitable decision is not distinct from justice, but rather secures justice in the particular case by remedying the deficiencies of positive law retrospectively at the point of application. The question of the proper relationship between justice, equity and law has been explored both by a rich philosophical tradition that finds its classic statement in the writings of Aristotle, and by the world's major legal traditions.

At least two major problems arise for this complex of ideas. First, that of the 'decadence' of equity. As equity is incorporated into formal processes of legal adjudication, for instance in the form of 'maxims' of equity or equitable 'doctrines', it comes to acquire the generality of positive law. This creates the problem that the so-called equitable maxims or doctrines may themselves then be applied in a strict way that leads to injustice in the particular case, which is precisely the problem equity is meant to remedy. Second, in securing justice by the deployment of discretion in the particular case equity also threatens an injustice. For it seems to involve a departure from the principle of legality, that is, the duty to apply pre-existing laws declared beforehand to those subject to them. In being adversely affected by the retrospectively operative discretion of the adjudicator, the party who would have benefited from the strict application of the law may regard the resort to equity as itself unjust.

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1 Positive law and justice

A fundamental objective of positive law is widely thought to be that of achieving justice. Even contemporary legal positivists hold that it is an