

# Unfair to Justice

Wallace Matson

## I

JUSTICE IS CLASSICALLY DEFINED as a constant disposition to give every man his due. We are treated justly when we get what “is coming to us,” what is “owed” us, whether good or bad—and get it from other people, it is important to add, for nature treats us neither justly nor unjustly.

Justice is a virtue of human beings, and of assemblages of human beings, and of nothing else. An institution, a law, or a government can be said to be just or unjust only in the derivative sense that its enforcement or its policies tend to operate such that people get what is coming to them. It could not be the case that a government (or more broadly, a society) was just while the authorities frequently, and as a matter of policy, distributed goods and evils to its citizens that were not due them.

This is the *concept* of justice: quite uncontroversial, supported by all the

dictionaries. What may be controversial are questions of what specifically people have coming to them—what they deserve, what they are or should be entitled to. Here is where there can be different theories of justice.

What academic philosophers call the null theory of justice would be that no one deserves anything or is entitled to anything; therefore justice is a vacuous concept. Or alternatively, the null theory would be that justice collapses into fairness, which is the concept applied to distributions when deserts or entitlements are equal, as in a tied race, or zero, as in how to cut up the cake at the birthday party. This is the degenerate case, as it were.

John Rawls’s theory of justice, set out in his famous book, *A Theory of Justice* (1971), is very close to the null theory, differing only in that he deems citizens to be entitled to whatever rewards (and, presumably, punishments) the government has promised them on the condition that they behave in particular ways. He denies that anyone deserves or mer-

### BOOKS DISCUSSED *in this* ARTICLE

*A Theory of Justice*, by John Rawls. (Revised Edition) Cambridge: Harvard University Press, 1999.

*Collected Papers*, by John Rawls. Edited by Samuel Freeman. Cambridge: Harvard University Press, 1999.

*The Law of Peoples*, by John Rawls. Cambridge: Harvard University Press, 1999.

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WALLACE MATSON is Professor Emeritus of Philosophy at the University of California, Berkeley.

its anything in any other sense. The reason given is that we cannot really be said to deserve our natural endowments and the circumstances of our upbringing—these are the arbitrary awards of a “natural lottery,” mere chance. Hence, we cannot have any moral claim on the fruits of the exercise of our natural endowments or of the virtues we acquire in our upbringing. The common-sense objection that, even if we do not deserve what we start with, we may nevertheless deserve what we make of it, is brushed aside with the observation that “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.”

In light of the fact that Rawls calls his theory “Justice as Fairness,” and cites equal portioning of the birthday cake as an illustration of “pure procedural justice,” it is perhaps fairer to consider him as putting forward a quasi-null theory of justice—in other words, as maintaining that the only philosophically defensible content of the concept of justice is simply fairness—rather than to consider him as not really saying anything at all about justice. If we do so, some of the more egregious theses of *A Theory of Justice* suddenly deviate into sense. For example, the astonishing remark, “Injustice is simply inequalities that are not to the benefit of all,” becomes “Unfairness is simply inequalities that are not to the benefit of all [parties concerned in the distribution],” which has some plausibility. And the basic Rawlsian pronouncement, that “institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life,” seems acceptable when amended to read “institutions are *fair* when...” etc. This is essentially the first part of Rawls’s Second Principle of Justice—a context where

the notions of justice and fairness coincide, since in a well-ordered society nobody has a personal claim on any public office.

To say, however, that avoidance of arbitrariness is sufficient to make institutions just, conflicts with the intuition that “justice is blind”—blind precisely to the interests behind the “competing claims” of the parties concerned. Deciding justly who is to get what depends on correctly adjudicating which party deserves it or is entitled to it, a question to which interests are irrelevant. Not only do people have interests in getting what they do not deserve, they also frequently deserve to get what is not in their interest.

One might naïvely suppose that in the nearly thirty years between the first and the revised editions of *A Theory of Justice* these simple and obvious points would have been grasped. A genuinely revised edition of Rawls’s book would have been titled *A Theory of Fairness*, saying plainly what the author meant all along—namely, that justice is merely a concept of folk-ethics and the aim of political philosophy is to describe the *fair* society.

But no. Apart from such problems as that the strange phrase “fairness as fairness” would recur in abundance, such a revision would come to grief on the first page. Consider the following passage:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.... Being first virtues of human activities, truth and justice are uncompromising.

This is from the first (and far and away the most eloquent) substantive paragraph of *A Theory of Justice*, suitable to

be carved in marble and set up somewhere in Washington, D.C. How could anybody disagree with these noble sentiments?

But now try reading it with “justice” replaced by “fairness.” Is *fairness* the first virtue of social institutions? Does each person possess an inviolability founded on *fairness*? Are there rights secured by *fairness*? Is *fairness* on a par with truth as an uncompromising first virtue of human activities? Things become still worse if we read the paragraph a third time, substituting the term *Difference Principle* (“All differences in wealth and income, all social and economic inequalities, should work for the good of the least favored”), which is the distinctive feature of Rawlsian justice, in place of either *fairness* or *justice*.

This little thought experiment suggests that Rawls wants to have it both ways. The word *justice* has enormous emotive weight. “Let there be justice, though the heavens fall”—for what greater wrong can we suffer than being deprived of what is rightly ours, or being punished for what we did not do? And what can better justify (note the word!) our sense of indignation than seeing injustice done to others? But if nobody deserves anything (save for government awards), then a case can be made for its being fair to divide up everything with absolute equality; and where things cannot be divided—for example the talents, looks, and “willingness to make an effort” that one is born with or acquires early, thanks to that suspect institution, the family—then to compensate the losers in the “natural lottery” out of the winners’ prizes. It is important for Rawls to retain the emotive associations of the word *justice* for these otherwise unattractive proposals. If something is perceived as just, we feel we must go along with it, whether we like it or not. Rawls says as much when he writes about “the sense of justice,” which he avers must be

depended on to make his new constitution viable.

## II

John Rawls received the National Humanities Medal from the hands of President Clinton. Polled about the most significant philosophy books of the twentieth century, American teachers of the subject overwhelmingly put *A Theory of Justice* second only to Ludwig Wittgenstein’s *Philosophical Investigations* (1953), a work on an entirely different topic. American academic philosophers were right to do so. For in a way, Rawls is the twentieth-century Locke. Both men sought to provide an ideological underpinning for political practices that had come to be accepted as right despite their departures from what were hitherto the received canons of propriety. Locke justified limited monarchy; Rawls justifies radical equalitarianism and welfarism.

Beginning with the New Deal, the thrust of government policy not only in this country but also throughout much of the world has been toward economic, social, and educational equality brought about through use of the state’s power of taxation. Since government produces nothing, the only means at its disposal is to take from those who have more and give to those with less. Government can do this because it is the ultimate repository of force.

But despite this fundamental change in policy, the public ideology (except among intellectuals) largely continued to be oriented toward free enterprise—let people compete, openly and honestly, and let the most hardworking, efficient, and intelligent keep what they can get, recognizing a duty to help the unfortunate through charities. Government was seen as an umpire, and in anti-trust legislation, as a means to counteract the alleged tendency of competition to end in monopoly. When departures in practice from this ideology were too flagrant to

escape notice, they tended to be justified *ad hoc*: as emergency measures during the Great Depression; or as facilitating equality of opportunity with free education; or as metaphysical "compensation" for the wrongs suffered by the long-dead ancestors of groups singled out for special favors.

This basically free-enterprise ideology continued thus to be honored in the breach as well as the observance because at its core was a strong moral conviction that people ought to get what they deserve—justice. Progressive income taxes and confiscatory death duties perhaps could be reconciled with this intuition, for the feeling was that while some people deserve more than others, nevertheless they are not so different as to justify *very* large discrepancies, especially when the wealth enjoyed was not worked for. But when it was found necessary to take large amounts not just from the idle rich but also from the industrious middle classes, the ideology began to falter.

Marxism overlapped with welfarism. It did not, however, reject the notion that people ought to get what they deserve; on the contrary, this was the basis of its "moral" condemnation of capitalism. It held that the worker creates surplus value (and therefore deserves to enjoy it) but that the capitalist expropriates that value (and therefore enjoys what he does not deserve).

But the view of man underlying Marxism—underlying, as well, the behaviorism of B. F. Skinner (1904-1990), Rawls's colleague at Harvard—is a genetical-social determinism denying individual responsibility in any real sense. Rawls's lamentation on the "natural lottery" and the dependence on it of "even the willingness to make an effort" is one presentation of this familiar theme. Man is nothing but a machine—a computer, in fact. And it makes no sense to speak of a machine's deserving anything. So, it came

to be held, there is no moral basis for discriminating between any person and any other in the distribution of goods. Fairness, which is what is left when desert is dismissed, demands equal shares for everyone.

But can a society actually function on this principle—"From each according to his ability, to each according to his need"—the latter limited to what is required to "cover the costs of the necessary efforts of training and cultivating their endowments," like scholarships for Harvard students and grants for Harvard professors, luxuries beyond these to be shared like the fairly cut birthday cake? Marx and Engels waved their hands at the problem: technology would eliminate scarcity and drudgery, after which people would cease to be greedy and competitive and would work joyfully for the common good as in the days before the division of labor and alienation. And, Rawls agrees, that is how people *ought* to be: he defines a well-ordered society as "a fair system of cooperation [*n.b.*, not competition] between free and equal persons" and declares wistfully that "people ideally should want to serve one another." With the worldly wisdom accumulated in the twentieth century, Rawls knows this is not a practical proposition. For Rawls, there can be no *moral* objection to counteracting the "injustice" of the "natural lottery" by a lump-sum tax on natural abilities, for example; but if the government tried it, "individuals [would] have a strong motive to conceal their talents." Rawls grudgingly allows profits as "concessions to human nature," in order to "draw out better efforts."

Does that mean, then, that the vision of the just society must vanish? No. Here is Rawls's great stroke of originality. Reconsidering the birthday cake, we see that the reason why only equal slices are fair is that otherwise the children who get smaller slices would have grounds

for complaint. We can make that our definition of fairness: a distribution is fair if no one affected has grounds for complaint. Applying this to society at large, if A gets less of the "primary goods" than B, he still has no ground for complaint if it can be shown that were B to get less, the amount of goods produced would thereby be decreased so that A would get still less. In other words, the less advantaged have no ground for complaint if they get as much as they *can* get—if trying to give them more would actually get them less because taking it from the more advantaged would result in a diminution of the total goods available for distribution. Thus we arrive at the celebrated "Difference Principle": differences in wealth and income are justified only if they work to ameliorate the condition of the least advantaged "representative person" in the society—the most abysmal loser, that is to say, in the "natural lottery."

Another way to put this (not Rawls's) is to think of a continuum of social distributive institutions, with at one end perfect equality, the Marxian "to each according to his needs"; at the other end, unrestricted Darwinian competition, in which everybody keeps whatever he can get—the "more advantaged" flourish, the less advantaged go to the wall. The former case would result in a "just" but unbearably poverty-stricken society, for people with the abilities needed for production would have little incentive to develop and use them. The latter case would be wealthy but "unjust," afflicted with unacceptable inequalities. So what would be both just and reasonably prosperous would be a society in which the progressive income tax took exactly that amount from the more advantaged, to give to the less, such that taking any more would provoke a strike of the producers as imagined by Ayn Rand in *Atlas Shrugged* (1957). A nice problem, to determine this point in advance.

Rawls tells us in some detail how the system would work. There are to be four "branches of government"—Allocation, Stabilization, Transfer, and Distribution—which will fiddle with the economy to see that all the curves intersect at the morally correct points. While prices and wages would be for the most part set by the market, incomes would be adjusted to the proper levels by positive and negative income taxes, taxation being frankly regarded as primarily for redistribution and only secondarily for support of the government. If, despite all this, anyone managed to accumulate a very large fortune, which Rawls regards as inherently dangerous to a well-ordered society, it would be confiscated.

### III

Rawls strives to convince us that this kind of society is not merely a good idea but a moral requirement. He does so by means of a revived social contract theory: the famous choice of a set of "Principles of Justice" by free and equal contracting parties in an "Original Position" behind a "Veil of Ignorance." The idea is that the right principles of justice must be those that would be chosen by rational persons designing the society in which they were to live, if they did not know, when they chose, what their positions in the society would be—that is, how they would come out in the "natural lottery." Rawls awes us with mathematics purporting to show that in such a situation it would be irrational to choose anything but the principles that would lead to the mildest worst-case scenario: we should choose "as if our enemy is to assign us our place." Thus, it would be in our interest to choose the principles of the society that will do the most possible for the least advantaged, which is, by definition, the Difference Principle. And what rational people would unanimously choose must be right. Despite thus deriving morality from prudence and interest,

Rawls claims the mantle of Kant.

Rawls's system is an inverted pyramid, wobbling on the point that we do not deserve our innate endowments and family circumstances. But a little thought will expose the confusion at the basis of this *pensée*. Asking whether one deserves one's endowments is a nonsense question, like asking whether an acorn deserves to grow into an oak. Who is the tiny *one* who does or does not deserve his or her eye color or gender or ambition or whatever? There is not, and never was, a *me* distinct from my native abilities and family circumstances, on which to bestow "endowments." I am, and from conception was, this particular being with all its coincidences with and deviations from the statistical norm. And this being is what deserves, or does not deserve, this or that, when it tries, or does not try, to do the best it can with what it has got—including, let us not forget to mention, helping others.

Yet Rawls's elegies in a way express a mood that everyone gets into from time to time. As the Existentialists used to say, we are "thrown" into the world; we never asked to be born; yet we are all expected to manage nonetheless, though some are better equipped than others, and is that fair? The answer, "That's life," seems unfeeling. All the same, it *is* the answer. If we were all equal naturally or artificially, with no hope of rising nor fear of falling, we might as well be dead; in fact, when we are dead, we *are* equal at last. Why do Rawls's rational choosers in the original position not unanimously opt for mass pre-natal suicide? After all, it would guarantee not merely minimal suffering but absolutely zero suffering.

#### IV

Naturally, the Harvard University Press had to bring out the *Collected Papers* of their best-selling philosophical author ever. Only piety or the reviewer's oath, however, could motivate anyone actu-

ally to read this fat volume. A few pages in, and a torrent of *déjà-vus* make evident to those familiar with *A Theory of Justice*—and who else would look?—that they are rummaging in the file folders from which that celebrated treatise was assembled. In the first ten essays of *Collected Papers* ("chapters," the editor curiously calls them) not an idea occurs that does not turn up in *A Theory of Justice* in virtually identical words. What is more, the later essays in this initial stretch of ten contain large chunks from the earlier.

"Chapters" 16-18 and 20-22 are, similarly, modules for Rawls's other large book, *Political Liberalism* (1993). In between (11-15) are expansions of some points in *A Theory of Justice* (no taking anything back) and replies to some criticisms of it (none fundamental). "Chapter" 23 is a piece on Kant. "Chapter" 24, "The Law of Peoples," is the windup for the longer monograph printed in the book of that name, advocating forcible interference by peoples with "just (or at least decent) social policies and...basic institutions" into the affairs of lesser breeds without the law, never mind their "so-called sovereignty." "Chapter" 25, "Fifty Years after Hiroshima," is Truman-bashing.

Finally, "Chapter" 26, "The Idea of Public Reason Revisited," is printed again in *The Law of Peoples* as the other component of that book. The main idea of the latter essay is that only people with "a sense of justice"—that is, who substantially agree with Rawls about "justice"—are competent to engage in rational political debate. Society, as in *A Theory of Justice*, is "a fair system of cooperation over time." Nobody with a different notion—for example, of society as a fair system of *competition*—belongs in the forum. Nor are considerations based on "comprehensive doctrines"—religions, philosophies, morals—to play any part in public discussion. So much for the

First Amendment. That hardly matters, however, for it seems the United States does not qualify as a "reasonably just constitutional democratic government." We do not qualify because we do not finance political campaigns publicly and, in consequence, are manipulated to serve the "interests of large concentrations of private economic and corporate power." Periclean Athens did not make the grade either, having been "an autocracy of the 35,000 male members of the assembly." Is there or has there ever been any such thing as a "liberal democratic society"?

Yes, Rawls insists: Belgium and the Netherlands, to which might have been added "the democracies of Allende in Chile, Arbenz in Guatemala, Mossadegh in Iran, and, some would add, the Sandanistas [*sic*] in Nicaragua" had they not been squelched by "covert operations ... carried out by [the United States] government prompted by monopolistic and oligarchic interests."

Are you not glad that the century containing the 1960s is over? Do you not wish it were in Cambridge, Massachusetts, too?

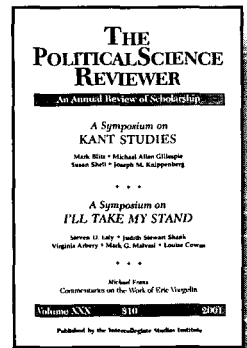
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