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THE SOVEREIGNTY OF JUSTICE

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The usual view, in the literature of the subject as well as in the popular mind, accords primacy to either liberty or equality—the highest value, the greatest good to be sought.

This is not correct. Justice is the controlling idea, without which the other two become illusory and misleading ideals. All three are goods—all are real, not apparent, goods, answering to basic human needs. But not all real goods are equally good, and not all are unlimited goods (goods without any limitation in quantity). For example, wealth and pleasure are good only to a certain extent: one can seek too much of them, more than one needs. And, in addition, wealth is good as a means, not good in itself or for its own sake. In contrast, knowledge and virtue are unlimited goods: one cannot have too much of them; and though they are indispensable means to living a good human life, they are also to be sought for their own sake.

Of these three goods—liberty, equality, and justice—only justice is an unlimited good. One cannot seek or have too much justice in society or in the relation of one individual to another. But one can ask for and have too much liberty and too much equality.

The failure to observe the limitation that should be imposed in the quest for liberty and equality leads to serious errors and, in addition to an irreconcilable conflict between them.

The *libertarian error* consists in a demand for freedom without limit and even though trying to achieve such unlimited freedom results in an irreducible inequality of conditions that is unjust—an inequality in conditions that involves serious deprivations for a majority of the population. The only equality that libertarians favor is equality of opportunity and unlimited freedom: the race goes to the strongest or the most cunning, and the devil takes the hindmost.

The *egalitarian error* consists in a demand for a complete equality of conditions, especially economic conditions, even if it infringes on individual liberty, severely restricting equality of opportunity and freedom of enterprise. The most glaring and grievous example of the egalitarian error in recent history is the “cultural revolution” in China under the rule of the gang of four.

There is an irreconcilable conflict between liberty and equality when each is regarded as a primary good to be maximized without limit. This is not really a conflict between liberty and equality, but a conflict between two extremist misconceptions of liberty and equality—the libertarian and the egalitarian errors just noted.

The conflict is resolved and removed by correcting these extremist errors: both liberty and equality can be maximized within limits that are set by criteria of justice. The resolution can be seen at once by considering the following questions, and the answers we must give to them.

Should an individual have unlimited freedom of action or enterprise, or only as much as he or she can use without injuring anyone else, without depriving them of freedom and without causing them the serious deprivations that result from an inequality of conditions? In short, should an individual have more liberty than he can exercise justly? The answer is that everyone should have only as much liberty as justice allows, and no more than that.

Should a society try to achieve an equality of conditions attended by no inequalities in the degree to which individuals enjoy that equality of conditions? Should it seek to maximize such an equality of conditions, even if it results in wrongful deprivations of individual freedom? Should it ignore the fact (that the Maoist egalitarians ignored) that human beings are unequal as well as equal, in both their endowments and attainments, and that they can make unequal contributions to the welfare of the community? The answer is that a society should seek to achieve only as much equality of conditions as justice requires, and no more than that. More than that would be unjust, even as more freedom than justice allows would be that unjust exercise of liberty which is license. Please not: one case, we say only as much as justice *allows*; in the other, we say only as much as justice *requires*.

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What is the freedom to which, within the limits imposed by justice, we can make a rightful claim—the liberty to which we are entitled? When, in the Declaration of Independence, Jefferson, following John Locke, said that liberty was one of man's natural and unalienable rights, what liberty did he have in mind?

To answer that question, we must first distinguish three major forms of freedom.

One is natural freedom—the freedom of a free will, of free choice, which enables us to choose otherwise. Either we are born with this freedom, as an innate and inherent component of our nature or we do not have it. No society or set of external circumstances can confer it upon us. Hence, there is no sense in speaking of our right to it.

The second major form of liberty is acquired freedom—the freedom of the virtuous or wise individual who is able to will as he ought to will, able to conform to the requirements of the moral or civil law by overcoming the resistance of contrary passions or appetites. Hence, this being a liberty that individuals either do or do not acquire through the exercise of their natural freedom, a liberty that no society or set of circumstances can confer, there is no sense in speaking of our right to it.

The third major form of liberty is circumstantial freedom—the freedom that is conferred on individuals by external circumstances that either permit or enable them to do as they please, to act as they wish, to carry out in action the choices or decisions they freely make, wisely or unwisely. Negatively, this freedom consists in the absence of coercion, duress, constraints, impediments, or the lack of enabling means. It is a *freedom from*. Positively, this freedom consists in the possession of enabling means—a freedom to do as one wishes because one has access to the requisite means.

This circumstantial freedom is possessable by bad men as well as good. Natural freedom and acquired freedom are not indispensable antecedents of circumstantial freedom.

Of the three major forms of freedom, only circumstantial freedom—the freedom to do as we please—needs to be regulated by justice. Herein lies the distinction between liberty and license.

Liberty consists in doing as we please *lawfully*, or within the limits set by justice. License consists in doing as we please *unlawfully*, or in violation of the limits set by justice. Furthermore, to ask for unlimited circumstantial freedom is to ask for anarchic freedom—for autonomy rather than liberty. Autonomy is incompatible with living in society under law and government.

The distinction between liberty and license, and between autonomy and freedom in society, leads us to a further freedom—a variant of circumstantial freedom, which is also a liberty to which all human beings are entitled.

This is political liberty: not a freedom to do as we please, but the freedom of an enfranchised citizen, governed with his own consent and with a voice in government, and, therefore, self-governing to the extent of his participation in government. This

liberty is the freedom of which slaves and the subjects of despotic rule are completely deprived.

The citizen with political liberty is not free from regulation by law, but free under laws that are just and justly made (with consent), as well as free in all matters where the law prescribes not. Locke's basic insight was that the rule of law in a constitutional or republican government is the very bulwark of freedom—especially freedom from unwarranted interference by others. Here Mill made an error. He thought that the sphere of freedom contracts as the sphere of law or regulated conduct expands. One further insight lies in Aristotle's observation that only criminals are coerced by just laws, not virtuous or law-abiding individuals who would voluntarily do what such laws command even if no laws commanded it. What the criminal is deprived of by law enforcement is not liberty, but license.

I come now to the most fundamental point of all: our possession of free will—the power of free choice—is indispensable to our having a right to the circumstantial freedom to do as we please within the limits set by justice.

Our natural rights are grounded on our natural needs. Because we have freedom of choice, as a natural endowment, we have a natural need to be able to carry out in action the choices or decisions we freely make. What good would it do to make decisions that we cannot carry out? Without liberty of action, our freedom of choice would be rendered totally ineffective. We would be exercising it without being able to achieve the goods we are under a moral obligation to seek. Brute animals in cages are not deprived of a freedom to which they are entitled because, being brutes, they lack the freedom of choice or free will that human beings possess.

With regard to political liberty, the reasoning runs parallel. We have a natural right to such freedom because, being by nature political animals, we have a natural need to participate in politics—to be self-governing individuals. We are born to be citizens with suffrage.

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With regard to equality, as with regard to liberty, it is necessary to consider its forms or dimensions.

First of all, we must distinguish between personal and circumstantial equality. Personal equality, or inequality, consists in the equality, or inequality, of individuals with respect to their innate endowments or acquired attainments. Circumstantial equality, or inequality, consists in an equality or inequality of conditions or of opportunity.

Next, we must observe that our statements about equality and inequality may be either declarative or prescriptive. They are declarative when they assert, as a matter of fact, that individuals are or are not equal in certain respects, either personally or circumstantially. They are prescriptive when they assert that individuals who are equal in a certain respect should be treated equally, or assert that individuals who are unequal in a certain respect should be treated unequally.

Our statements with regard to personal equality or inequality are always and only declarative, never prescriptive. It makes no sense to say that persons *should be* equal or unequal in their endowments or attainments. Prescriptive statements, demanding equality or inequality, apply only to circumstantial equality—equality of results or equality of opportunity. Hence, criteria of justice apply only to circumstantial equality, never to personal equality.

We come now to what is the most important distinction in our consideration of equality, as governed by considerations of justice. Equality in degree consists in that equality whereby one individual is neither more nor less than another in a given respect. Two individuals are unequal in degree if, in a certain respect, one is more and the other is less. In contrast, equality in kind occurs when two individuals both have a certain condition, even though one may have more of it, and the other less. Two individuals are unequal in kind if one possesses or enjoys a condition that the other totally lacks.

Let us consider examples of this basic difference between equality in degree and equality in kind.

All citizens with suffrage are politically equal, though all do not have equal amounts of political power. Citizens in public office exercise more political power than citizens out of office. In any society in which some individuals have the status of citizenship and some are deprived of it (either as slaves or as disfranchised subjects), an inequality of political conditions exists, and this is an inequality in kind, not an inequality in degree. In a constitutional democracy, in which all mature and competent individuals enjoy the status of citizenship, an equality of political conditions exists, accompanied by inequalities in the degree of political power exercised.

An equality of economic conditions exists in a society when everyone has that minimal amount of wealth, in the form of economic goods, which any human being needs to lead a decent human life. In short, when all are *haves*, and none are *have-nots*. An inequality of economic conditions exists in a society in which some portion of the population are *haves* with respect to wealth or needed economic goods, and some are *have-nots*, seriously

deprived of economic goods that everyone needs. When all are economic *haves* and none are *have-nots*, some may have more and some may have less wealth.

The basic point to be observed here is that political and economic equality in kind may be accompanied by political and economic inequality in degree.

We are now prepared to consider the equalities to which all human beings are entitled.

The basis of our right to circumstantial equality in kind (either political or economic) is our natural equality in kind—our equality as persons, as human beings, having the same human nature. As members of the human species, we are all equally persons. This personal equality in kind is accompanied by many inequalities in degree. Though, as human beings, as members of the same species, we all possess the same specific attributes or traits, we do not possess them as individuals to the same degree: one individual has more, another less, of a trait that is common to both. There is only one respect in which all individuals are equal and that is their common humanity. In all other respects, any two individuals may be either equal or unequal in the degree to which they possess this or that human trait.

The natural equality of all individuals as human beings or persons carries with it their equality with respect to all natural rights, since these are grounded on the natural needs that are the same for all individuals because they are inherent in their common human nature. It makes no sense to say that some human beings have a natural right that others lack; or that some have more of a natural right and others less.

The natural equality of all human beings, together with their equal possession of natural rights, entitles all to equal liberty under law; equality of political status; economic equality, with none deprived of that minimum sufficiency of wealth that everyone needs to lead a decent human life.

The natural equality in kind of all individuals does not call for an equality in kind that is attended by no inequalities in degree. In short, it does not call for equality in degree, but only equality in kind and one that is accompanied by inequalities in degree.

In the political sphere, an illegitimate equality of conditions-- more than justice requires—would consist in a direct democracy in which there were no public officials and all citizens exercised equal amounts of political power. This involves an egalitarianism so extreme that it could not possibly exist in any modern society, and probably never existed in the past under much simpler conditions.

In the economic sphere, an illegitimate equality of conditions—more than justice requires—would consist in all

individuals having and holding equal amounts of wealth. This involves an egalitarianism so extreme that it is unfeasible, except perhaps in a monastic community under the strictest vow of poverty observed by all.

Whereas the equality that justice requires is an equality in kind with respect to political and economic conditions, the inequalities that justice also requires are inequalities in degree with regard to these conditions. It is necessary here to remember that two facts control our thinking: on the one hand, that all human beings are equal as persons or in their humanity; on the other hand, that individuals are unequal, one with another, in the degree of their native endowments and their acquired attainments. They may also be unequal in what they do—in the political or economic contributions that they make.

Justice involves two principles, not one: (I) Rendering to each what is his or her due—what is his or hers by natural right; (II) Treating equals equally and unequals unequally in proportion to their inequality.

In the political sphere, the application of the second of these two principles results in giving more political power to those who, as public officials, are constitutionally responsible for doing more. That responsibility arises from the political tasks constitutionally assigned to the offices they hold. The degree of power should be proportionate to the degree of lawful responsibility. In the economic sphere, all do not contribute equally to the production of wealth. Justice here calls for a distribution that is based on the principle: to each according to his contribution.

Are there any limits to the inequalities in degree of power or wealth that justice requires according to the second principle that recognizes inequalities of performance and contribution?

The answer is definitely affirmative. The operation of the second principle of justice must not conflict with the operation of the first principle, which takes precedence over the second. In short, inequalities in degree of political power or degree of wealth are allowable only if they do not preclude the political or economic equality in kind to which all are entitled as a matter of natural right. No one is entitled to more political power or more wealth than is compatible with everyone's having the political power and wealth that everyone has a right to.

A non-egalitarian democratic socialism prevails when each receives what everyone naturally needs, and some receive more than others in varying degrees according to the differences among them in regard to their political performance or their economic contribution.

When justice is fulfilled with regard to both liberty and equality and is not exceeded with regard to either, the result is a non-egalitarian democracy and a non-egalitarian socialism.

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The domain of justice is divided into (a)the justice of the individual in relation to other individuals and to the community; (b)the justice of the state and of government in relation to its people—the governed.

There are three modes of justice: first, justice consists in rendering to each what is his due—what is rightfully his, including the right to liberty and the right to equality and inequality of conditions. Second, justice consists in dealing fairly in exchanges and in distributions: treating equals unequally is unfair; unjustifiable discriminations are unfair: differential wages paid to men and women doing the same tasks; unfairness in exchange as with weighted scales, giving less for more is unfair. Third, justice consists in acting for the common good or general welfare: treason is unjust—not a violation of rights, not unfair, but contrary to the common good; so, too, the public official who usurps power and exceeds his legitimate authority; or the judge who accepts a bribe and corrupts due process of law.

These three modes of justice are irreducible to one another. No theory of justice is sound or adequate unless it includes all three and puts them in proper relation to one another. This explains the inadequacy of Professor Rawls theory of justice as fairness, compared with Aristotle's and Aquinas's much more comprehensive doctrines.

Justice on the part of the state or community toward its members involves all three modes: in rendering to each what is his due and securing all natural rights for all; in treating all fairly with no unjust discriminations; and in making laws for the common good of all, not for the sake of the private interests of any faction, least of all those in power. By these criteria, constitutional democracy is the most just, the only perfectly just, form of government. And the socialism which aims at having all participate in the general economic welfare is the most just economic system.

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Now let us consider justice in relation to law and as the ultimate ground for the authority of the law. Here the basic issue is between those who say that might makes right and those who say that the exercise of force or power without authority is illegitimate and unjust.

On the one hand, we have the position of the positivist (Thrasymachus, Ulpian, Hobbes, Austin) that man-made law is the only source and measure of what is just and unjust in the conduct of individuals.

On the other hand, we have the position of the naturalist (Plato, Aristotle, Aquinas, Locke) that man-made law has authority only to the extent that it is just. Let us remember here what Augustine said: that an unjust law is a law in name only. It has coercive force, but no authority; it is obeyed only from fear of coercion.

Man-made laws can be just in the three ways already indicated: by securing natural rights; by requiring fairness in exchanges and distributions; by being directed to the common good or general welfare; and, in addition, by emanating from those who are constitutionally authorized (with the consent of the governed) to legislate or make laws by due process.

Drastic consequences flow from these opposed views of justice in relation to law.

Here are the consequences of the positivist view of justice as subservient to positive law (the man-made law of the state). Positive laws, constitutions, and governments cannot be appraised as just or unjust. Being the source and measure of justice, they cannot be judged by any applicable criteria of justice. What is just or unjust in one community may be the very opposite in another. The saying of the ancient sophists was that fire burns in Greece and in Persia (natural law), but what is just in Greece and in Persia are not the same, for their conventions (their positive laws) are different.

Here are the consequences of naturalist view of the man-made law as measured by principles of natural justice (justice considered as antecedent to such laws). States, governments, constitutions, and positive laws can be judged to be just or unjust, according as they conform or violate the principles of justice. What is just or unjust is always and everywhere the same: e.g., chattel slavery, the disfranchisement of women, the deprivations suffered by the destitute.

However, there are some positive laws concerning matters that are intrinsically neither just nor unjust, but morally indifferent; for example, traffic ordinances. Herein lies the distinction between *mala per se* (murder, theft, slander, mayhem) and *mala prohibita* (driving on the wrong side of the road, wrong not in itself but only because it violates a man-made ordinance).

We are now prepared to consider a resolution of conflicting theories of justice in relation to law. In the history of the subject, there have been three competing theories about the just and the unjust.

(1) The ancient view first advanced by Socrates in the Republic: the naturalist view that what is just and unjust can be determined without reference to man-made laws, and by reference to natural rights or to what is fair.

(2) The equally ancient, opposing view advanced by Thrasymachus against Socrates: the positivist view that might makes right, that what the enforceable law of those in power prescribes is just and what it prohibits is unjust.

(3) The 19th century view advanced by utilitarians and pragmatists that what is just and unjust can be determined by reference to what is for or against the common good or general welfare.

Though I favor the naturalist view as the soundest of these three, it goes too far if it claims to answer all questions about justice by reference to natural rights or by reference to criteria of fairness in exchanges and distributions. Some questions of justice remain that can be answered only by reference to the utilitarian criterion of what is expedient for the common good or general welfare.

In addition, it must be conceded that about matters otherwise indifferent (neither intrinsically just or unjust, neither more nor less expedient for the general welfare), those with legislative responsibility must make a choice between alternative prescriptions or regulations. Driving on the left side of the road is not more just and not more expedient than driving on the right side. But for the peace, order, and safety of the community, one or the other rule of the road must be prescribed and enforced. And when it is, conformity with that regulation is just conduct; violation of it, unjust.

We are now in a position to see a resolution of the conflict among theories of justice in relation to law. It involves three steps.

1. Everything that is naturally just by reference to natural rights or by reference to principles of fairness is also expedient for the common good or general welfare. Herein lies the truth of the naturalist view that justice is, by these criteria, antecedent to positive law and also the source of authority in man-made laws.

2. Everything that is determined to be expedient for the common good or general welfare is just even if that involves no reference to natural rights or criteria of fairness. Herein lies the truth in the utilitarian or pragmatic view, which also claims that justice by this criterion is antecedent to positive law and the source of authority in man-made laws.

3. Some things are indifferent to all of the foregoing criteria, as the example of alternative traffic regulations so plainly shows. In the public interest, a choice between the indifferent

alternatives must be made—one way or the other. Hence, when that determination is made by the enactment of a positive law (a particular traffic ordinance), the law becomes the standard for judging behavior as just or unjust because the determination was made for the general welfare. Herein lies the truth in the positivist view, but it should be added that it presupposes the truth in the utilitarian or pragmatic view, since making a choice between otherwise indifferent alternatives is dictated by considerations of what is expedient for the general welfare.

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Finally, we come to two soul-searching questions about justice, questions we are indebted to Plato for raising and trying to answer.

Why should anyone be just? How does the individual profit by being just to others? How does his being just contribute to his own happiness or his leading a good life?

Such virtues as temperance and fortitude clearly serve the interests of the individual. The intemperate and the cowardly person clearly injures himself by making the wrong choices—by overindulging his appetites for sensual pleasures, by not enduring the pains or hardships involved in seeking what is really good for himself. Not so in the case of justice: the just man is one who does good to others or at least abstains from injuring others. Justice does not seem to be concerned with the good of the individual who acts justly. Why, then, Plato asks, should a man not be unjust to others if it is expedient to do so in his own interest? Why would he be just unless it is expedient to act justly in order to avoid adverse consequences, such as punishment or social disapproval?

To this extremely difficult question, Plato's answer is in terms of an internal harmony of all the moral virtues. This answer is more fully developed by Aristotle's theory that moral virtue, indispensable for the pursuit of happiness, has three inseparable aspects, of which justice is one. Temperance, courage, and justice are not three separate virtues, of which we can have one or two without having all three. They are three inseparable aspects of moral virtue as an indivisible whole. Since moral virtue as a whole is an indispensable means to making a good human life, being just toward others profits the individual by facilitating his own pursuit of happiness.

We come, finally, to the other difficult question that Plato raised, What should one prefer or choose—to do injustice to others or to suffer injustice at their hands? This is not an academic question. It occurs often in our lives. We are often faced with the choice between doing injustice or suffering injury for not doing it.

Plato's answer was, in my judgment, too simple and was based on an inadequate theory of the good. That inadequate theory consists in maintaining that moral virtue is the only good. Socrates in the *Apology* said that no harm can come to a good man in this life or the next. The Stoics and Immanuel Kant reiterated this view: the only thing that is really good is a good will—a virtuous will. Accordingly, it follows that in being unjust to others one abandons one's own ultimate good; whereas, in contrast, suffering injustice done by others does not diminish one's virtue or good will in the least.

A sounder answer to this difficult question is based on Aristotle's more adequate theory of the good. Moral virtue is only one of the real goods. Wealth, pleasure, health, liberty, knowledge, friendship, and so on, are also real goods. The loss of moral virtue is a serious obstacle to the achievement of happiness; but so also is the loss of liberty, the deprivation of wealth, the impairment of one's health. Hence the choice between doing and suffering injustice must be based upon the following considerations,

On the one hand, to what extent will the threatened injustice to be suffered injure me in a way that will seriously impede my pursuit of happiness? On the other hand, faced with the choice between committing injustice in this one instance or suffering serious injury by refusing to act unjustly, can I commit this one act of injustice without losing my moral virtue? The answer to this question is affirmative. Moral virtue is an habitual disposition to act in morally correct ways, and that habit of right choice and right conduct is neither formed by a single right choice and action, nor destroyed by single wrong one.

It follows, therefore, that it may be clearly preferable, in certain instances, to do injustice, if doing it, in the particular instance, is the only way one can avoid serious injury as a consequence of suffering injustice at the hands of others.

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One final remark, even if it must be brief and, therefore, not fully explained.

I said at the beginning that liberty, equality, and justice constitute one triad of great ideas, The other, and even more basic, triad is truth, goodness, beauty.

I hope it has become apparent from the foregoing treatment of liberty, equality, and justice that an adequate account of these three important ideas ultimately rests on an adequate theory of the good. And an adequate theory of the good, I would like to add, rests on an adequate account of truth—an account that explains the truth of prescriptive statements about what ought or ought not to be

done and sought as well as the truth of descriptive statements about what does or does not exist.



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