

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 115

NOVEMBER 1966

No. 1

THE CONCEPT OF JUSTICE AND THE QUEST FOR A PERFECTLY JUST SOCIETY *

ROBERT WAELDER †

The demand for justice, for more and more justice, for absolute justice, is in the center of the sentiments of our time. We read every day in our papers what injustices are committed here and there in every part of the globe and that it is our responsibility to set things right, or else there will be the most dire consequences. This is a rather novel attitude.

Of course, it has been held since ancient times that *justitia fundamentum regnorum*, justice is the foundation of kingdoms. But that meant essentially justice in the conflicts between individuals or small groups *within* the established social order. It did not mean to challenge the existing social stratification *as such*.

The idea that the social stratification itself has to be just, *i.e.*, has to comply with an abstract concept of justice, is fairly new, probably not more than two hundred years old.

During the recent student rebellion in Berkeley, one of the students was reported to have said that what the students wanted was a society of justice and brotherhood. His formulation was essentially identical to one given by Maximilien Robespierre in his speech on June 7,

* This article is a modified version of a speech delivered at the Twenty-Eighth Annual Judicial Conference of the Third Judicial Circuit of the United States. The original speech was published in 57 J. CRIM. L., C. & P.S. 1 (1966), and 39 F.R.D. 413 (1966), and its modified version is reprinted here with permission. Dr. Waelder treats the subject under discussion in his forthcoming book, *Progress and Revolution*, to be published early in 1967 by the International Universities Press.

† Professor of Psychiatry (Psychoanalysis), Jefferson Medical College. Ph.D. 1922, University of Vienna.

1794. It was the goal of the regime, said Robespierre, "*de fonder sur la terre l'empire de la sagesse, de la justice et de la vertu*," to establish on earth the empire of wisdom, justice and virtue.

The two statements differ slightly in the style of expression; Robespierre uses some words which sound dated to us. The word "wisdom" is not fashionable today and we prefer to speak of "reason" or "sanity," and "virtue" is altogether antiquated; we would rather say "brotherhood." But the ideas are substantially identical.

What really is justice? This is something about which people have always agreed as long as one remained on a highly abstract level, and have always disagreed as soon as one got down to concrete details. *Summ cuique*—to each his due—is the Roman formulation of justice. The digest of Roman law prepared on order of the Emperor Justinian in the middle of the sixth century A.D., the so-called *Institutiones*, begins with the words: "Justice is the constant and perpetual disposition to render to every man his due."¹

So far it is easy to agree. But what is every man's due? If we turn, for instance, to the greatest thinker of antiquity, Aristotle, we see the following:

It is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal.²

Justice thus means for Aristotle to treat unequal things unequally.

This concept can serve to justify practically everything. One can justify slavery in these terms and that is in fact what Aristotle has done.

In later times, a different view of the matter was taken. Justice was no longer considered to be the unequal treatment of things which were unequal by nature (or social conditions) but the equal treatment of all men regardless of how unequal they might be in terms of nature or social conditions. *Justitia*, the Goddess of Justice, was depicted as blindfolded; she would give her verdict without regard of person, equal for the mighty and the weak, for the rich and the poor.

In modern times, a still different view has more and more taken hold, viz., that the Goddess of Justice should not be blindfolded at all, but should be made to see again so that she may differentiate between the people in a way opposite to that envisaged by Aristotle, compensate for the inequalities of nature and social situation and give

¹ JUSTINIAN, *INSTITUTES* 5 (3d ed. Cooper transl. 1852).

² ARISTOTLE, *POLITICS* 211 (Rackham transl. 1959).

preferential treatment to the weak, the sick, the poor—to the “disinherited of the earth” as they have sometimes been called.

Social justice is often viewed as equal opportunity for all. But here, too, we face a variety of possible interpretations. We may perhaps hold that it means equal opportunity for human beings as they are now; all should have equal access to the good things of life—for instance, all should receive equal consideration for employment or promotion—regardless of family origin, race, ethnic extraction, religion, sex and the like. This is one interpretation.

A second interpretation may hold that this is not justice at all because there are vast differences in previous education; in order to make things just, all would have to have equal education first.

A third interpretation goes further still. It is pointed out that equal schooling is not sufficient to make conditions really fair and equal, because there are vast differences in the home situation of people. Formal education is received by youths who are differently equipped, depending on whether or not they had received stimulation in their homes, had a good home atmosphere, adequate objects of identification and so forth.

And finally, there is a fourth view that would argue that even if this were equal, there still would be no equality of opportunity because people have been equipped differently by nature: some, for instance, are in sturdy health, others are sickly; some have been endowed with high intelligence, others with low; some are attractive, winning immediately the goodwill of people, others are not, etc. Not until all natural endowment is equal, or its inequalities properly compensated for, can we speak of real equality of opportunity.

One can readily see that as we proceed in this sequence of interpretations, the ideal of equality of opportunity gradually turns into an ideal of equality of station.

It seems to me that the concept of social justice is today oscillating between the poles of equality of opportunity and equality of station, between the ideal that all people should participate in the race of life on equal terms, and the ideal that they should all arrive at the same spot at the same time. If the latter is to be achieved, if all are to arrive at the finish line together, it must be a race of differential handicaps.

One can also see that this question of equality of opportunity versus equality of station is related to the question of liberty and equality.

Liberty and equality have been coupled together in the slogan of the French Revolution and have remained so in the consciousness of

countless people ever since. Nevertheless, it is easy to see that there are instances in which liberty and equality interfere with each other. If, for instance, people are free to engage in acquisitive activities, it will soon turn out that some will be more prosperous than others; if we want them to be equal in income and possessions, we must prevent them from engaging in such activities, or determine the rewards they are permitted to receive or to keep.

If people are free to choose the neighborhood in which they live, and the circles in which they move, there will soon be a social differentiation of residential neighborhoods and social circles; if we want to prevent this from happening, we must reduce, or cancel out, the freedom of choosing one's neighborhood or one's circle.

How did it happen that liberty and equality have so long been considered as brothers when they are actually often antagonists? The answer to this question should not be too difficult.

There is an area of life in which liberty and equality actually go together, and an area of life in which they do not go together.

For a group of oppressed—say, for slaves who want to be emancipated from slavery—liberty and equality mean actually the same. They want to be *free from* their masters and *equal to* their masters; that means the same to them.

But as soon as one extends the concept of liberty from the relations of the lower to the higher echelons into the relations *within the peer group*; as soon as liberty does not only mean freedom from domination by the master but also freedom in the inter-relations within one's group, liberty and equality become irreconcilable because freedom within the peer group will immediately lead to social differentiations. If this is to be prevented, liberty must be curtailed.

A simple example from daily life may serve to illustrate the point. There may be a group of children at a birthday party. If they are left free, without adult supervision, there will soon be some who will dominate and others who will follow, some who will determine what games are to be played and who will allocate the more desirable roles in these games to themselves and to their friends, and others who will have to take what remains. If we want them to be equal, all to have the same influence in the choice of the games, and all the same chance of occupying the desirable places in them, an adult must be there to supervise the proceedings and to lay down the law and restrict the freedom of some of the children. Equality inevitably demands authority which constantly interferes whenever, in the free play of forces, social differentiation appears. It is noteworthy that the situation, simple though it is, has rarely been faced. Thomas Jefferson was well aware

of it. Goethe wrote shortly after the French Revolution: "Legislators and revolutionaries who promise equality and freedom at the same time are either dreamers or charlatans."³

In the beginning of our century George Santayana said: "The only free man in a social democracy [social democracy is Santayana's term for an egalitarian society] would be one whose ideal was to be an average man."⁴

But such voices are rare and the confusion persists in the public conscience.

It is possible to inculcate through education the kind of conscience that demands sharing. In that case, the authority necessary to counteract the emergence of stratification becomes internal, within the person, rather than external; outside pressure would be needed only in the beginning during the childhood years, while this education and indoctrination is taking place, and might relax later. But this kind of conditioning, while effective with some people all the time, and with most people some of the time, does not work with all the people all the time; external authority ready to interfere must remain as *ultima ratio* to insure compliance. Moreover, an internalized demand to love others like oneself, if effective, is hardly equally effective with regard to *all* objects; its effectiveness is likely to diminish the more we move away from an inner circle like family, party, nation, etc.

Pertinent to this problem is the so-called pecking order of animals, a universal phenomenon of nature. In groups of animals, a social order or hierarchy establishes itself. The zoologist, Schjelderup-Ebbe, discovered nearly half a century ago that a kind of social hierarchy exists among chickens:⁵ there is a top animal that pecks everybody else in the flock with impunity; the victim does not resist but suffers it to happen although it must often be very painful and may on occasions be fatal. Then, there is another hen who is being pecked by the top bird but pecks everybody else, and so forth down the line to the "buck private" who is pecked by everybody and does not peck anybody else. Schjelderup-Ebbe saw in these conditions the prototype of social stratification and called it a "pecking order."

It is not always as simple as with chickens. Chickens have one of the more tyrannical and more rigidly stratified societies. In other instances things are more complex and the hierarchy is a matter of relative statistical frequency, of a quotient of pecking versus being

³ 12 GOETHE, WERKE 380 (1953).

⁴ SANTAYANA, THE LIFE OF REASON 146 (1953).

⁵ Schjelderup-Ebbe, *Weiterre Beitrage zur Sozial- und Individualpsychologie des Haushuhns*, 92 ZEITSCHRIFT FUR PSYCHOLOGIE 60 (1923); Schjelderup-Ebbe, *Soziale Verhaltnisse bei Vogelrn*, 90 ZEITSCHRIFT FUR PSYCHOLOGIE 106 (1922); Schjelderup-Ebbe, *Beitrage zur Sozialpsychologie des Haushuhns*, 88 ZEITSCHRIFT FUR PSYCHOLOGIE 225 (1922). These publications marked the beginning of extensive research in the social stratification of animals.

pecked, rather than a strict line of command and obedience. Sometimes there are circular orders: *A* pecks *B*, *B* pecks *C* and *C* pecks *A*.⁶ There are all kinds of complications just as there are among humans.

In general, one may sum up the essential points of this research in approximately these terms: there are several criteria of social hierarchy; some have to do with preferred access to desirable things, others with the possibility of using another ruthlessly as a means to one's ends.

The superior animal has, first of all, preferred access to food. It feeds first; others do not touch the food before the dominant animals are fully satiated. If supplies are scarce, they may get nothing.

Second, there is preferred access to the sexual object. If the big male is around in a group of baboons, the bachelor males are practically condemned to celibacy; they do not dare to come close. If the big male is not there, they may take a chance.⁷

Third, there is preferred access to safety. In danger, the dominant animal can escape first. It was about this way in the "Titanic" disaster when more men were saved in first class than children in third.

Finally, there is the possibility of abusing others with impunity; this is the case of pecking, which was discovered first and gave the whole system its name.

By and large, all these criteria coincide; *i.e.*, those who are dominant according to one criterion are so according to the others, too. But there is one important exception: one of the criteria of hierarchy, the preferential access to safety, is in contradiction with another feature also found in the hierarchy—that of leadership. A leading animal does not escape first in danger; rather, it goes ahead of the flock, exposing its body to danger first and permitting the rest to take cover behind it. This point marks the difference between genuine leadership and mere dominance.

Dominance in the animal kingdom depends on a variety of factors; among them are health, physical strength, age and sex. In most mammals the male is dominant except for the time of oestrus in which dominance may shift to the female. Pugnacity and courage are also important factors. A smaller animal who is an excellent fighter may be dominant over a physically stronger one. The ability to bluff also has something to do with it. And so has closeness to home territory.

Hierarchy among humans seems to manifest itself in fundamentally similar terms though, of course, with many more variations and complications.

⁶ See Allee, *Social Dominance and Subordination among Vertebrates*, in *LEVELS OF INTEGRATION IN BIOLOGICAL AND SOCIAL SYSTEMS* (Redfield ed. 1942).

⁷ ZUCKERMAN, *THE SOCIAL LIFE OF MONKEYS* (1932).

After this cursory glance at phenomena of the animal kingdom, we may return to our question: where does justice lie? Does it lie in *sanctioning* the order established in the free play of forces, as it is rooted in nature or in individual or collective history? Or does it lie in *correcting* and changing the natural order, either *wholly or partially*? Should we allow more to those who have occupied the top places than to others, or the same, or less?

There are various answers to these questions and the views change with time, place and circumstance.

In any case, we must realize that if we feel that justice demands compensating for the inequalities of the natural order, authority is needed to carry out this compensation and to maintain it against the constant pressures of the natural order to reassert itself; and the further we wish to go in correcting the natural order, the more authoritarian the regime has to be.

Once again, where does justice lie? A few examples may help to show how difficult it is to answer the question in concrete cases, and how impossible to give a general answer which would be satisfactory to all.

Should one, for instance, educate highly gifted children in the same classes with less gifted ones, or should one place them in separate classes? If we do the latter, we give them opportunity to progress faster, at their own speed, and to realize their abilities better. On the other hand, such a set-up is humiliating for the other children who know quite well that they do not belong to the elite. They are stigmatized. If all are put together in the same classes, the stigma is avoided at the price of handicapping the development of the more gifted ones. Where does justice lie?

Let us assume that a couple has three normal children and one retarded one. Perhaps, by denying their three normal children a college education, they may be able to provide for their retarded child such special remedial training as will make the difference between permanent institutionalization and a restricted life outside of institutions. Which course is just? Different people will take different views of this matter.

In the simplest possible form the question appears in the family between two brothers of different, but not too different, ages—perhaps two or three years apart. It often happens that the younger brother wants to go along with the older brother, to join in the games the latter is playing with his group; he thinks he is old enough. But the older brother takes a different view of the matter; he thinks the kid brother does not belong in his crowd and would merely disturb the

fun. In a certain sense one can say that every older brother is naturally a segregationist, every younger brother an integrationist.

Where exactly does justice lie?

The simple fact is that every solution involves sacrifices for some. *Who shall sacrifice what for the sake of whom* is a question for which I see no clear, unambiguous, moral answer.

For this reason, it would appear as the first result of our considerations that an absolutely just order cannot exist, in fact *cannot be devised*; not only because people are morally imperfect—or sinful, if you like—but simply for the reason that there is no agreement as to what justice is and no likelihood of there ever being complete agreement. There will always be situations in which one man's justice is another man's outrage.

Second, the demand for absolute justice which is so strong in this day and age adds to the difficulties of the situation rather than diminishing them. As long as we look upon such conflicts—as between older and younger brother, or between the gifted and the average, or the average and the retarded, child—as conflicts of interests only, they can be adjusted with charity. But once we ideologize and moralize them and see them as conflicts between Good and Evil, they become inaccessible to compromise and thus insoluble, with nothing but violence left.

It seems to me that the demand for absolute justice, the very *evangelical fervor* of our time, *makes all problems insoluble*, with violence the only possible outcome, noble though the idea is in the abstract.

The French poet, Paul Valéry, once said "every doctrine, every sentiment, if carried pedantically to its ultimate conclusion, must lead to the destruction of man."⁸

Let me now offer some suggestions regarding the historical significance of the modern movement. It seems to me that what we are witnessing today is a change in moral concepts.

All morality is a restriction and modification of inborn strivings. If man were only good by nature, no morality would be needed; he would always want to do what he should do—a state of affairs which ancient writers like Ovid attributed to a mythical golden age of the past but which has not existed in historical times.

The morality of the Christian ages has put the emphasis on the restriction of sexuality. Complete "purity," *i.e.*, actual abstinence, was the goal of an elite while to the masses the ideal of a "clean life," in which sexuality was severely restricted, was held up.

⁸2 VALÉRY, *TEL QUEL* 89 (21st ed. 1943).

At the same time, these ages took a lenient view of the manifestations of selfishness; callousness and cruelty in the pursuit of one's interests or whims were readily condoned. The rule "thou shalt love thy neighbor like thyself" was part of the religious teaching but few took it even half seriously. Social stratification with enormous distance between the highest and the lowest was unquestioningly accepted; punishment in the home, the army or the law courts was savage and war was accepted as a fact of life.

In our days, things have completely turned around. Sexuality is now considered as needing practically no restrictions whatsoever. Selfishness has become the main target of moral censure; men are expected to be concerned only about the good of all and not about their own personal interests. Aggression in the service of self-assertion or self-aggrandizement including the mitigated expression of aggressiveness in the form of status differentiation—one man considering himself as better than another man and looking down on him—is completely condemned. The change is from a form of morality which puts the main emphasis on the restriction of sexuality while making generous allowances for the pursuit of self-interest and for aggression, to a form of morality which is permissive toward sexuality but outlaws self-concern. The demand for chastity has been replaced by a demand for universal brotherhood. This difference is perhaps due to the fact that Christianity looked for the main virtue in man's relation to God while the modern age, with its humanistic rather than supernaturalist orientation, seeks the main virtue in man's relations to his fellow men.

Only those whose youth was still cast in the Victorian or Edwardian age can fully realize the magnitude of the change. Just half a century ago, at the beginning of the First World War in 1914, the British Minister of War, Field Marshall Lord Kitchener, said in his order to the British Expeditionary Force which every soldier had to carry in his pay book on his body and which formulated the rules of conduct for the soldier:

In this new experience you may find temptations both in wine and women. You must entirely resist both temptations, and, while treating all women with perfect courtesy, you should avoid any intimacy.⁹

Thus, the head of the British Army asked soldiers in wartime in all earnestness never to touch any woman. Anything of the kind would seem absurd today.

On the other hand, I may cite a recent newspaper article which dealt with topless bathing suits. The author found it preposterous

⁹ 3 ARTHUR, LIFE OF LORD KITCHENER 27 (1920).

that anybody should take objection to them on the ground of public morals. Breasts are an organ of the body; why should any organ be obscene? What is really obscene, he argued, is for one man to call another man a nigger.

We can see here the change in the meaning of "obscenity" from a term of opprobrium for certain sexual expressions to a term of opprobrium for an expression of status differentiation. It is a radical shift of emphasis.

The recent revolt of students at the Berkeley campus of the University of California broke out when the Board of Regents refused the students the use of college grounds for the preparation of sit-ins in the community of Berkeley. These sit-ins were obviously related to the current civil rights movement. The last act in the series of events, on the other hand, was an episode in which a group of students shouted Anglo-Saxon four-letter words for some time.

It seems to me that these two events, the first and the last act, are closely interrelated; they are the two sides of the same coin, viz., of the newly-emerging morality that has no objection to any kind of sexual expression at all but objects strenuously to social inequality or status differentiation.

I submit that in both cases, the Christian and the modern, radical "idealists" have gone too far in their demands, beyond the capabilities of the flesh. The moralists of yesterday tried to purge man of sexual lust; they refused to believe that, with most people, sexuality cannot be suppressed except at enormous cost in terms of other human values. The moralists of today try to purge man of all selfishness and personal aggressiveness;¹⁰ they refuse to believe that, in most cases, self-concern and a measure of aggressiveness cannot be completely suppressed except at enormous cost in terms of other human values. The attempt to make all people chaste has failed; the attempt to establish complete equality will eventually fail as well.

In the ages now past, the attack against sexuality did not really obliterate or totally subdue the sexual aspect of man. It came out in other ways: in hypocritical behavior, in actions in which the right hand did not know what the left hand was doing, in perversions—including, in particular, sadistic attitudes whose sexual implications were not seen, in hysterical symptoms so frequent at the time, and in other forms as well.

¹⁰ As these pages are being readied for print, the leader of the African opposition in the Rhodesian Parliament, Chad Chipunza, is reported to have said: "Our problems should not be hard. They are man-made, created by selfishness." Lewis, *In Rhodesia Everybody Is Right—and Wrong*, N.Y. Times, Aug. 14, 1966, §4, p. 3, col. 1. Not hard? The statement is characteristic of the utopian thinking of the time.

The attempt at wiping out selfishness and aggressive self-assertion including the moderated and mitigated expression in the form of status differentiation will not succeed any better because these strivings, too, turn up somewhere through the back door.

As had been mentioned before, an egalitarian society needs an authority which has the power to enforce equality and which sees to it that nobody gets out of line. In this indirect way, the attempt to wipe out the power of man over man and to achieve complete equality, when carried to its logical conclusion, actually leads to the setting up of an authoritarian rule; with it, the power of man over man has returned. Those who started out to eliminate every differentiation between the people end up, inevitably, by creating greater differentiations than have existed before. We may remember the words of Horace: "*Naturam expellas furca, tamen usque recurret*"¹¹—you may drive nature out with a pitchfork, she will always return.

Some day, of course, the present exaggerated demands will exhaust themselves, as the exaggerated demands for the restriction of sexuality have exhausted themselves. But if previous history is any guide, I doubt whether this will happen until men have embraced another fanaticism because, as the late Sir Richard Livingstone, Vice Chancellor of Oxford, once said:

Men can rarely walk in the middle of the road. They reel drunkenly from the ditch on the one side to the ditch on the other.¹²

¹¹ HORACE, SATIRES, EPISTLES, ARS POETICA 316 (1961).

¹² LIVINGSTONE, THE RAINBOW BRIDGE 43 (1959).