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Justice as Fairness: The Best We Can Do?

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Preface: The Background Story

My interest in the topic of justice comes from my experiences with the legal and judicial systems, experiences which were unhappy and discouraging and, frankly, unjust. I provide here just a brief summary indicating my acquaintance with both criminal and civil proceedings.

My brother Salvatore was killed on December 6, 2002. He was no innocent; he was seriously involved in drug trade on the west side of Columbus, OH. His killers have not been caught.

Around the same time, our family business (CMI Imaging) suffered serious losses when our accountants perpetrated fraud, funneling funds out of the business. In addition, some of our properties were transferred without our permission. A realtor friend asked why my family was selling its properties; had that realtor not asked, we would not even have been aware of the title transfers. When we discovered the fraud, we hired attorneys and attempted to sue those we thought responsible. It was then that I was shot in the right temple. Responsible parties have not been located. A few of our attorneys were also threatened, and they quit. Others have come and gone; some have acted unethically. I have had to act on my own behalf in the courts. I have had to lodge complaints with the Supreme Court of Ohio's Office of Disciplinary Counsel, but to date I have had no satisfaction.

I began my exploration of the topic of justice convinced that the system was itself inherently unjust, that no justice could be found anywhere. My own experiences colored my perception. What has become clear over time is that my family and I have been

victims of a series of individuals who acted unethically and illegally. What also became clear is that the courts themselves are full of individuals who do not always act well.

But justice is about more than instances of individual corruption. What I decided to do in this essay instead is to investigate how legal and judicial theorists throughout history have understood justice, how that understanding has changed, and whether the current structures of legal and judicial institutions can promote justice at all.

Introduction

This essay will analyze and compare four different theories of justice in order to determine how they might operate within the actual legal/judicial system in the United States and whether they can bring about genuine and concrete justice. These four theories have, for the sake of clarity, been classified into two general types, the classical/medieval model and the modern (and post-modern) model. This general classification is based upon different worldviews regarding the existence of objective truth, its origin and foundation. While there are contemporary legal theorists and other thinkers who still actually subscribe to some version of the classical/medieval model, the worldview of the modern model has pretty much replaced the classical/medieval model and dominates our legal and judicial institutions. The nature of this rupture between the classical/medieval model and its successor modern model has been thoroughly argued in *Passage to Modernity: An Essay in the Hermeneutics of Nature and Culture* by philosopher/intellectual historian Louis Dupre (1993); his argument continues in *The Enlightenment and the Intellectual Foundations of Modern Culture* (2005). The spirit of this essay is thus informed by his critical contributions to the history of thought. The originality of this essay lies in its attempt to apply his argument to a specific topic: the definition of justice and its operation within contemporary (Western) legal and judicial institutions.

The contrast between the classical/medieval and modern models as they define justice will be illustrated by an examination of the works of Plato (427-347 BCE), Aristotle (384-322 BCE), Thomas Aquinas (1225-1274 CE), and John Rawls (1921-2002 CE). The

first three offer definitions of justice in accord with the classical/medieval model, definitions that are substantive and based upon sophisticated metaphysical inquiry. Rawls articulates how the modern rejection of metaphysics leads to a procedural rather than a substantive definition of justice; his work focuses on fairness as the means to acquire it. The analysis of these various definitions and their effects on the operations of legal and judicial institutions constitutes the heart of this essay.

Ultimately, this essay hopes to explain why the attainment of substantive justice is more difficult now than ever, even though it has probably never been a regular or expected outcome of any judicial system. In addition to arguing that point, it will attempt to explain failures and to suggest some measures that might improve the system. But a complete cataloguing of remedies falls beyond the scope of this essay, as does an investigation of how the concept of justice is understood in other parts of our world.

The Classical/Medieval Model

From the outset it should be noted that neither the classical/medieval worldview nor the modern/post-modern worldview is monolithic, despite being pretty much limited to Europe, North America, and Australia. There are wide-ranging variations among the different formulations of these perspectives. Nevertheless, they share certain similarities which this essay aims to examine.

The main characteristic of the classical/medieval model is the belief in an external, objective reality that exists independently of individual, particular humans. It is against this reality that human judgments may be measured. Truth, therefore, is understood as correspondence to that reality (Dupre 1993:15-93). Laws must be measured against that reality. And justice, like truth, is some kind of correspondence.

While there are many proponents of this worldview, this essay explores three that, on the face of things, appear very different but which, in fact, are all variations of it. Those three are Plato (427-347 BCE), Aristotle (384-322 BCE) and Thomas Aquinas (1225-1274 CE).

It was Plato who first formulated a version of this vision and who incorporated it into his theory of justice. And he was careful to note that he was offering a vision that was not universally shared. In fact in his dialogue entitled *Theaetetus*, section 152a, he quoted the earlier Sophist Protagoras (481-420 BCE) as claiming that "man is the measure of all things" (Plato 1985:856). Prior even to Protagoras, under the influence of Greek polytheism, there was a sense that justice was capricious, that the gods did as they wished, and that there was no predictability to their responses. They rewarded those they liked, and they punished those they did not. There were no shared, objective standards that governed their behavior.

Plato's views on justice are grounded in his metaphysics, often called the theory of the Forms. That theory is developed subtly throughout his *Dialogues.* It first appears in *Phaedo* (Plato 1985:40-98) but is better developed in Book VII of Plato's *Republic* in his allegory of the cave and his discussion of education (Plato 1985:747-772). In brief, the Forms (from the Greek word *eidos*, or idea) are non-spatial, non-temporal entities, archetypes, as it were, of elements and objects of our spatio-temporal experience which "participate" in them. This explanation seems vague; scholars as early as Aristotle criticize Plato's view of the Forms and especially of "participation" as being asserted but not demonstrated. The Forms are eternal, necessary, and immutable. As such, they are truly real. Things in our earthly experience (the "world of becoming") are temporal,

contingent, and ever-changing, not quite as real because impermanent. But these things reflect to a greater or lesser extent the Forms which are their source, of which they are but pale imitations. [Plato does not bother to explain how they are the source of all else except to refer to myths about the descent of the soul into the body. See his *Phaedrus* and *Timaeus*.] To complicate matters even further, the Forms also include Truth, Beauty, Goodness, Justice, Piety. Human beings may exhibit these Forms in their character and in their actions; one is a better human when one does. True knowledge is knowledge of the Forms. The philosopher, the "lover of wisdom," pursues the Forms and seeks unity with them.

Plato's *Dialogues* contain his various attempts to define the Forms. He begins, in *Euthyphro*, with the question of what is piety. Justice is the topic of Plato's *Republic*, one of his longest books. In Book I Plato acknowledged that there are many competing definitions of justice, and he seemed to realize that he is the first to offer a metaphysical definition of it. That is, he seemed to understand that he was changing the philosophical conversation to a search for foundations grounded not in the world of our experience but rather in a "world of Being," i.e. the Forms.

Book I begins with Socrates' visit to the home of Cephalus and his father Polemarchus. The conversation turns to the topic of justice when Socrates asks them about the benefits of their old age and their success. Cephalus praises living up to one's legal obligations and being honest – both essential for success – as constituting justice. Polemarchus continues by suggesting that justice is attained by helping one's friends and harming one's enemies (*Republic* I, 331a-335). Socrates, in his own contrarian style, shows them how attempting to help one's friends can actually harm them. And so, in the

best Socratic fashion, the dialogue moves forward with a rejection of these first attempts at a definition. Thrasymachus steps up next to attempt to define justice. He was a real person who lived in the late fifth-century BCE, and he was a Sophist. He offers a stronger position and suggests that "the just is the same thing everywhere, the advantage of the stronger" (*Republic* I, 339a). This is a version of a "might makes right" view.

Socrates points out that the problem with each of these positions is that they are individualist; if one follows any of them, then one finds some individuals benefitted and others harmed. Justice, he thinks, should lead to a situation where everyone benefits. And so he begins to argue, in Book II and to a greater extent in Book III, that justice is harmony or balance (Ebenstein 1969:21). Justice pertains not just to individuals but to the city, i.e. an entire city can be either just or unjust. And so Socrates suggests that, to understand justice more easily, one should examine it in its larger manifestation, in the city. Essentially, there is no difference between a just man and a just society (Ebenstein 1969:38). Books III and IV focus on the needs of the city for goods, for protection, and for leadership. Goods satisfy our appetites, protection requires strength and energy, and leadership calls for reason and wisdom. The city is thus composed of producers, auxiliaries, and guardians. Different citizens have different talents, and Socrates argues that the city is best served when each develops and then contributes his/her special talents, when each plays his/her appropriate role. "The city is thought to be just because three natural kinds existing in it performed each its own function and again it was sober, brave, and wise because of certain other affections and habits of these three kinds" (*Republic* II, 435b). Justice comes from people each fulfilling the particular duties of their particular station, leaving all others to do the same (Bhandari 2016:4).

For Plato, the individual is a microcosm of the city. The individual soul reflects the tripartite division of the city. Like the city, the soul is composed of appetites, spirit, and reason. Just as the philosopher-king should rule the city, so too should the reason regulate our appetites and energies. Justice is the result of a balance or harmony among these parts, which means that the three must work together with each doing its own special job.

Plato was not a fan of democracy for a few reasons. First of all, his family was part of the old Athenian aristocracy. But, worse, the democratic government of Athens in the late fifth century allowed his friend Socrates to be put to death. Furthermore, democracy rejects the idea that society should be directed by expertise and encourages what he considered a radical individualism where everyone is equal to everyone else in the governance of the city (Annas 2003:63). In Book VIII of the *Republic* Plato discusses inferior and what he considers unjust constitutions. Democracy is one of those. In summary, justice is best achieved when everyone contributes his/her special talents to the functioning of the city. Justice is measured by how well a balance or harmony is achieved.

Unlike Plato, Aristotle, his most famous student, focused not so much on the structure and harmony of the soul, but on human actions and virtues. His starting point, like Plato's, was metaphysics. But his book *Metaphysics* followed his *Physics* and indicated his more scientific temperament. For Aristotle even more clearly than for Plato, the structure of nature gives us clues about the structure of humans. Nature is objective and external to us, and yet we are a part of nature. Nature is composed of substances, of independently existing objects. Individual substances are not, like Plato's Forms, eternal,

necessary and immutable. But they contain elements that are. Plato's Forms exist apart from the world of becoming; Aristotle's forms exist within it. In each case, though, forms are separate and intelligible, i.e. knowable. The goal of philosophy for each of these men was to know the Forms/forms. Aristotle claimed that the study of being is primarily the study of substance (*Metaphysics* Book Z [VII]). Substances can only be understood through their forms. Matter, the other component of substances, is everywhere the same. It is the form which gives definition to substance, but forms reside in rather than separate from substances. "That which I spoke of as form is not produced, but the concrete thing which gets its name from this is produced . . . the 'form' means the 'such,' and is not a 'this' – a definite thing" (*Metaphysics* 1033b18-21).

Aristotle's discussion of justice occurs primarily in his *Nicomachean Ethics* and secondarily in his *Politics*. For him justice is not a Form as it was for Plato. Instead, for him justice is a virtue that belongs primarily to humans and secondarily to the city. His primary discussion of justice takes place in Book V of *Nicomachean Ethics* and in Book I of *Politics*, in which he claims that "every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good . . . the state or political community, which is the highest of all and embraces all the rest, aims at good in a greater degree than any other, and at the highest good" (*Politics* 1252a1-5).

That "good" is justice, defined in Book V of *Nicomachean Ethics*: equals should be treated equally and unequals must be treated unequally in proportion to their differences (Boucher 86-87). Like Plato, Aristotle was not a democrat. His view of justice is one of proportional reciprocity and proportional merit, giving people what they deserve

and enabling them to realize their highest nature to live a good life. Justice is "complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also" (*Nicomachean Ethics* 1129b30-1130a1).

Aristotle moved beyond Plato not simply by adding a discussion of equality but also by addressing the role of law. Unlike Plato, who believed in the perfect Form of Justice against which human acts were measured, Aristotle accepted that laws created by men could never be perfect but always only approximations based upon the best our reasoning could give us (Ebenstein:76). He recognized that the unequal could never righteously be made equal (Gallagher 2012:667). His theory of reciprocal justice reflects the Platonic political position that society relies upon differences in balance to promote the common good. And, finally, it seems that justice is a somewhat negative virtue in that one of its primarily purposes is to keep us from hurting our neighbor (Sandel/Swanson 2009:1398). Aristotle's view of justice reflects his more modest metaphysics, where nature is objective and the source of laws but is simultaneously temporal, contingent, and changeable. It is important to note, though, that nature and its laws are independent of humans and not products of human convention. They are objectively real; they just are not separable from our world in the way that Plato's Forms are; the laws are embedded within nature.

Many scholars understand the work of Thomas Aquinas as a synthesis of classical Greek thought with Judeo-Christianity. The works of both Plato and Aristotle influenced him, and he presents one of the first substantive works on law in his *Summa Theologica* I-II, qq. 90-95 (Aquinas 1948:609-650). As with Plato and Aristotle, his theory of justice

reflected his metaphysics. Like Plato, he believed in the existence of an external reality that was the source and ground of all of nature. Unlike Plato, though, this existent was not a group of Forms but rather a transcendent and yet immanent God or Being who created all of the universe and is intimately connected with it. (Plato's Forms become, in Aquinas, ideas in the mind of God.) From Aristotle Aquinas derived his empirical epistemology according to which the human mind can attain knowledge and discern truth through the observation of nature that is the product of and reflects Being. Aquinas' analogical view of Being understands humans to share in God's existence in a finite and limited way; in fact, all of nature shares in God's Being. One might even say that the being of all of nature is of the same sort as the Being who is responsible for its existence. Truth for Aquinas, then, is an accurate understanding of how nature reflects Being. And justice is activity in accordance with that nature.

Aquinas begins, in question 90, article one, by claiming that "law is a rule and measure of acts . . . Now the rule and measure of human acts is the reason . . . it belongs to the reason to direct to the end." In article two he agrees with the Philosopher (Aristotle) that the end to which the law is directed is happiness, and happiness can only be achieved through the "body politic" (quoting Aristotle's *Nicomachean Ethics* Book V 1129b17). Therefore, he concludes, "every law is ordained to the common good."

Question 91 defines the various kinds of law. Eternal law (article one) is "the notion of the government of things in God." Law has previous been defined as "nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is governed by divine providence, that the whole community of the universe is governed by the divine reason." The second

article explains the natural law: "The rational creature is subject to divine providence in a more excellent way . . . it itself partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creative is called the natural law." This is because (article two) "the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the divine light." Question 91, article three, adds to these two what Aquinas then names human law: "From the precepts of the natural law, as from common and indemonstrable principles, the human reason needs to proceed to a more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws."

For Aquinas human laws are just when they correspond to the natural law. In question 94 he provides a few more details based upon the Greek and Judeo-Christian insistence that all things aim at the good, and the good for humans is happiness. Aristotle articulated that teleological perspective in the first book of his *Nicomachean Ethics*; Judeo-Christians like Aquinas will later add that happiness is not just leading a life in accordance with virtue and reason, but also seeking unity with God. The first precept of law, according to Aquinas and stated in article two of question 94 is "that good is to be done and promoted, and evil is to be avoided." More specifically, Aquinas continued, "There is in man, first of all, an inclination to good in accordance with the nature which he has in common with all substances, inasmuch, namely, as every substance seeks the preservation of its own being." Secondly, we share a nature with the animals and "in virtue of this inclination, those things are said to belong to the natural law which nature

has taught to all animals, such as sexual intercourse and the education of offspring." Finally, "there is in man an inclination to good according to the nature of his reason, which nature is proper to him. Thus man has a natural inclination to know the truth about God and to live in society." In conclusion, for Aquinas justice was living in accordance with the natural law, which is rational.

The formulations of the classical/medieval worldview vary from Plato to Aristotle to Aquinas. They are certainly not identical. But at their core they share some assumptions about the nature of reality that the modern worldview came to reject:

- What is "really real" is external to and independent of human beings. Thus, meanings are not human inventions or conventions but are instead embedded within nature.
- Nevertheless, humans are an integral part of that nature; they are not separate from it.
- The cosmos, therefore, is an organic whole, and the role of the human is to find his/her place within it.
- The cosmos is intelligible and full of ends and purposes, i.e. teleological.
- Humans are not the center of the universe, although they are very important.
- True knowledge is correspondence of the mind to the structure of the universe. Humans can acquire true knowledge by using their reason.
- The city/community/society precedes and pre-dates individuals. Individuals become unique selves by individuating themselves from the city/community/society.

- Justice is a virtue, a Form, an idea in the mind of God. The pursuit of justice entails evaluating every action to determine whether or not it accords with the structure of nature. If it does, then it is just. If not, then we have injustice (Dupre 1993:65-92 and Finnis 2015:2-3).

It is important that we do not fall into the trap of romanticizing this worldview. Yes, reality was an organic whole. But it was also hierarchical and denied power, much less autonomy, to whole groups of people. Education was restricted, as was access to the political arena. The unity that we can appreciate in retrospect carried with it large elements of exclusion and impotence. There is no sense in pretending that we can return to an earlier era; that world changed and ended. Furthermore, while in theory that world may have given us an understanding of justice that could be measured and tested against an objective reality, much ultimately depended upon individuals who were themselves fallible and sometimes even corrupt. In addition, that world gave us a foundation for measuring justice, but it was not very good in pretending to have universal procedures that insured it.

Collapse and Transformation

Intellectual historians attribute the collapse of the medieval worldview to a number of factors, including improved transportation, the growth of cities, Protestantism, and the Black Death. In his *Passage to Modernity* (120-144 and 167-189), Louis Dupre argues that the medieval worldview began to fall apart in the late Middle Ages with the increased popularity of the nominalism of Franciscan William of Ockham (1287-1347). Nominalism maintains that there are no universal essences (forms) in things, nor are there any essences in which individuals participate. All that truly exists are individuals; they

are grouped together into classes, genus and species arbitrarily and by convention alone, by the act of naming (hence nominalism) (Dupre 1993:39). Humans do not recognize within individuals any essences; convention rather than recognition is employed in the naming of those groups. This radical individualism becomes a hallmark of modernity but has its source in the Middle Ages.

Almost more important for the development of the worldview of modernity, however, is Ockham's insistence upon God's omnipotence as His overarching characteristic. This is called Ockham's voluntarism. Ockham believed that God was all-powerful and could choose whatever He wanted for the world. The cosmos was not (as it had been for Aquinas) the ordered expression of God's rationality. For Ockham, what was more important than God's reason, what was in fact most important, was his will. God can will whatever He wants. His willing defines Him. No longer is nature an extension of God. God is transcendent and totally other; neither nature nor humans need reflect His essence because His essence is simply to choose (Dupre 1993: 124). Both nature and humans are separate from God; neither nature nor God's mind gives us any guidelines for how to organize our existence. Instead humans, like God, can choose whatever they will, including how to govern themselves and how to organize their lives. The cosmos has been stripped of innate meaning and purpose and ends. All meaning is assigned by humans because humans have no access any into the mind of God. And the mind of God is no longer simply reason, but is instead simple volition.

At the risk of over-simplification, the end of the Middle Ages saw the emergence of incredible creativity (the Renaissance), of science and technology, and of the primacy of the subject. Humanism meant that humans – no longer God – had become the source

of meaning. Old political structures began to collapse, replaced by more representative and less hierarchical forms of government. The process was slow and continues even today, but it introduced several perspectives into our thinking including human ability to create governmental systems that were more inclusive and thus more just.

One part of this process that emerged through the time of the Enlightenment was a proliferation of social contract theories. They begin with Thomas Hobbes (1588-1679) and continue through John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778), culminating in John Rawls' (1921-2002) monumental and transformative *A Theory of Justice* in 1971. His ideas about justice as fairness both limit the range of judgment to procedures rather than to substance and yet broaden the range to give many more people access to participation in the process. That is the result of an expanded notion of equality that comes from social contract theories.

Earlier pre-modern views of government saw the Greek city, for example, as having a real existence prior to and separate from the individuals who composed it. The city was natural, i.e. a part of nature. When the medieval worldview collapsed, however, an individualism prevailed that saw each individual as a unique bearer of rights and as a separately existing being. That individualism gave more authority to the individual and began to limit the power of the state. That is in part a result of a new interest in and a dominance of social contract theories. According to those theories, individuals in a state of nature – which for them means prior to the existence of the city or state – come together freely and give up their absolute freedom to enter into a contract that creates the state. Whether for protection or to promote economic interests, the state only begins to exist because individuals agree to construct it (Dupre 1993:139). It is not always clear

whether they believe this story about the origin of the state to be historically accurate or simply an explanatory myth, but this account of the origin of the state (and, thus, of laws and of justice) takes hold beginning in the 16th century.

Concerns about equality characterize the passage to modernity and its own passage into the Enlightenment. There was also a renewed interest in the democracy of the ancient Greek world with an expansion of who could count as a citizen. Social contract thinking plays into a vision of the newly-created United States of America as a government that derives its power from the consent of the governed. Autonomous individual citizens now rule and become the source of justification (Bibas 2012:136). Such a model was thought to be more capable of assuring justice and just outcomes because it was based on building fairness into the system, at least as far as access to procedures and election of officials like judges and prosecutors. The vision of this new understanding of government for legal and judicial institutions includes commitments that:

- Legal representation should not be based on an individual's ability to pay.
- Ordinary people cannot be excluded from participation in the system due to financial constraints.
- The system requires uniform procedures, rules, and regulations to guarantee fairness.
- Punishment in a prison system should not simply be retributive but should allow for the reformation of prisoners.
- Redress for victims of crime should be possible.

- Policies must be established to protect appropriate jurisdictions and ensure the smooth functioning of it (Bretherton 2015:274-275).

Central to this view is the expectation that justice can be secured through the use of such procedures, and that the equality of all citizens will be preserved and protected. What is interesting is that reason is no longer the very structure of the cosmos or of nature or of the mind of God, but it is seen as that which defines what it means to be human and makes us equal to one another. Reason led to better science, and it also was used to argue for and promote liberty, progress, tolerance, and representative government (Powell/Menedian 2007:1037).

John Rawls: Justice as Fairness

Perhaps the most important articulation of this modern position that re-defines justice as fairness in the second half of the 20th century is the work of John Rawls, most notably his 1971 work *A Theory of Justice*. In that work he points as well to a re-definition of "good." For him, "The definition of the good is purely formal. It simply states that a person's good is determined by the rational plan of life that he would choose with deliberative rationality from the maximal class of plans" (Rawls 1999:372). Justice is not about the promotion of a particular version of the good, not Plato's Form of the Good nor Aristotle's human happiness as "excellence," nor Aquinas' God. For the classical and medieval thinkers, the good was what humans ought to pursue. How well a society pursued it determined how just that society was. For Rawls and the moderns, justice is achieved when proper procedures are followed, when everyone has access to those procedures and to the legal/judicial institutions in which they operate. Rawls acknowledges as early as page three of the 1999 edition that the "primary subject of

justice (is) the basic structure of society." "I then present the main idea of justice as **fairness**, a theory of justice that generalizes and carries to a higher level of abstraction the traditional conception of the social contract" (emphasis mine). From the start, Rawls announces himself as a part of the social contract tradition of political theory, and he wants to examine the concept of justice through those lenses. He is not interested in pursuing any substantive conception of the good; he limits himself instead to the examination of rights. "This priority of the right over the good in justice as fairness turns out to be a central feature of the conception" (1999:28). Rawls assumes the modern commitment to fundamental and basic equality, as he does to individualism. And he suggests that maximizing individual liberty is essential for the promotion of justice. "The primary subject of the principles of social justice is the basic structure of society, the arrangement of major social institutions into one scheme of cooperation" (1999:47), and his purpose is to develop those fundamental principles.

Rawls' basic idea seems to be that the correct principles of justice are those to which free and rational people, those subscribing to some version of enlightened self-interest, would agree in order to organize our society under conditions that are fair to all parties and that maximize individual liberty. Justice is about guaranteeing as extensive personal liberty as is possible. And, furthermore, justice is conventional; we decide on our foundational principles. Like other social contract theorists, Rawls begins by assuming individuals in a hypothetical state of nature, what he calls the "original position, the appropriate initial status quo which insures that the fundamental agreements reached in it are fair" (1999:15). Those individuals operate "deprived of the knowledge of those contingencies which set men at odds and allow them to be guided by their

prejudices" (1999:17). This he calls the "veil of ignorance." All parties in the original position are equal; each can contribute to making proposals. They are encouraged to choose foundational principles such that the worst outcome for the chooser would still be better than the worst under alternative principles. In freely choosing principles of justice, we are fully expressing our nature as rational and free individuals.

After this rather lengthy introduction, Rawls finally proposes the first formulation of his two fundamental principles of justice. He will spend the rest of the 500-page book refining them, interpreting them, re-defining them, addressing other theories, and looking at concrete problems. The first formulation of the principles is: "First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others, and Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (Rawls 1999:53). Rawls later argues, when refining these principles in light of Kant's moral philosophy, "The force of justice as fairness would appear to arise from two things: the requirement that all inequalities be justified to the least advantaged, and the priority of liberty" (Rawls 1999:220).

One can easily imagine entire books being written about Rawls' *A Theory of Justice*. Countless journal articles and doctoral dissertations have been, and it has been widely acknowledged as one of the most influential books of the last half of the 20th century. The purpose of this essay, though, is not to study the whole of Rawls' thought but rather to demonstrate the differences between the classical/medieval worldview and that of modernity. What is interesting is that some of the critiques of Rawls actually

reflect the classical/medieval worldview. Among them are those that comment upon the artificiality of the mythical contract ("original position") situation; it is, so they claim, not "natural" with "natural" meant in a classical/medieval sense (Craig 1975:63). Feminists have criticized the assumption that the original contractors are all adults and equals; throughout most of human history, one would assume that women would have been excluded from this process. Children and animals have no status in the original position, but they would certainly have an interest in the outcome. While the classical/medieval worldview did not consider women, "barbarians," and children as the same as everyone else – that is, while the classical/medieval worldview did not share our concept of equality – provisions were definitely made in those societies for their care and protection. They were at least on the radar, even if paternalistically.

In summary, Rawls' work on justice illustrates a modern approach to the concept. Justice is simply procedural; it is achieved by a set of rules and regulations (following from principles) that are arrived at through some kind of democratic deliberations among individual citizens who seek to maximize their own freedom and economic advantage. "Rational self-interest" is the main value in this world characterized by pluralism and a variety of perspectives. Perhaps truth is attainable about the natural world through scientific inquiry, but mostly people believe that truth about other things depends upon the community in which one lives. If not relative, it is at least contingent. Tolerance of different viewpoints is a modern virtue, and people are hesitant to pass judgment on others. Thus, agreement on procedures may well be the best we can do. Fairness to everyone may well be the best we can do. Substantive justice may well be an illusion or, at least, a throwback to a different era.

Concluding Considerations: The Best We Can Do?

U.S. Supreme Court Justice Benjamin Cardozo once said, during a high profile trial, "This is a court of law. It is not a court of justice, and what we decide may not always appear just" (cited by Scardilli 2013:133). That quotation seems especially apt if, by justice, we mean something more substantive than procedural fairness. The classical/medieval worldview is gone; we may view it nostalgically and we may even try to live our lives according to some of its fundamental ideas, but we cannot recreate a world that has passed. And let us not romanticize the situation. The homogeneity of the classical and medieval worlds that allowed them substantive agreement was an exclusive world that achieved agreement at the cost of full participation, excluding women, slaves, those not related to the polis. Sometimes it was hard to discern the agreement when such views as those of Plato, Aristotle, and Aquinas appeared to be so disputable. Theirs was a world that was patriarchal and hierarchical; homogeneity comes at a cost. And theirs was also a world where sometimes private interests were more important that public goods. They had their share of corruption and abuses of the system; they called it "sin."

The justice system in the U.S., built upon procedural justice that allows equal access to everyone, is not perfect because there is no public consensus on what counts as a genuine good. But our laws, at a minimum, exist to protect our physical and material well-being. Do they work well? Not always, perhaps not even often. Crimes against persons are committed; people are hurt and even killed. Justice can fail at many points when that happens, in procedures as well as in outcomes (which we know are jury-dependent). Perpetrators may not be caught. Even if they are, the prosecutor might not be able to get an indictment from a grand jury. Even if alleged perpetrators are bound over

to a jury, they may well convince the jury (especially if their lawyer is good or expensive enough) that they are not guilty. "Beyond a reasonable doubt" is a high standard to meet. Finally, judgment and punishment ultimately depend on a judge who has often been elected by self-interested and partisan constituencies. And all of that is if the system is working well; if people lie or perjure themselves, if they suppress evidence, if they give or receive bribes, then justice is even more difficult to imagine. Much the same is true with civil procedures. Successful lawsuits depend upon good representation and a sympathetic jury. Monetary awards depend not simply on the agreement of jurors but on the beneficence of the judge. Attempts to settle prior to trial become competitions rather than genuine attempts at compensation for injury. And here, too, there are possibilities for dishonesty, bribery, and perjury. It begins to look as if our judicial system resembles what Winston Churchill is reputed to have said about democracy, it's "the worst form of government, except for all the others."

There is, obviously, room for improvement in this system which supposedly embraces impartiality and fairness. This essay concludes with some considerations for further discussion to determine how to improve this system:

- We know that we are not a homogeneous society, nor are we any longer one with shared beliefs about justice, God, the Good, or nature. We ought not to attempt to re-impose unshared religious or moral beliefs upon the populace. We need to stick to procedures.
- We need to conduct studies to determine as scientifically as possible who gets arrested, who gets convicted, how long sentences are for different ethnic or racial or gender or socio-economic groups. If there are disparities, if one's race or

gender or ethnicity or socio-economic status seems to lead to disparate outcomes, then perhaps further study needs to be commissioned to fix that obvious instance of inequality.

- We must also examine the relationship between the cost of the attorney and the success of the outcome.
- We need to streamline legal procedures and move towards quicker trials.
- We should investigate the role played by the media and study its effects when present in courtrooms.
- We could use greater transparency so that ordinary citizens can understand basic legal procedures without constant consultation with attorneys.
- We need better orientation and education for juries.
- We should educate our populace better about the legal system and its procedures, perhaps by instituting a required course in high school analogous to the civics course that used to be required.
- We should encourage constant study of the Ohio Revised Code (in Ohio) and other legal compendia to search for better procedures to achieve better remedies.

The study of the history of ideas serves the purpose of illuminating and illustrating how and why we have arrived where we are in our experience of the legal and judicial institutions of the United States. That study can inform our next steps to consider ways to better implement the justice we all desire, even if that justice is defined as procedural fairness. There is still plenty of room for improvement and plenty of opportunities for a public conversation about this urgent public concern.

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