

Living Together and Robust Political Philosophy

Mark Pennington
King's College, University of London

It is an honor to comment on David Schmidtz's new book *Living Together*.¹ I have been reading his work since the mid-1990s but have never had the chance to share any thoughts or comments and to express my appreciation of him, so I thank the editors of *Reason Papers* for this opportunity and especially thank David for nearly thirty years of inspiration.

Over a decade ago, I wrote a book entitled *Robust Political Economy: Classical Liberalism and the Future of Public Policy*, which responds to some of the major critics of the classical liberal tradition.² In that book I suggest that many of these critics do not offer "robust" arguments. First, they do not fully understand the case for classical liberalism; were they to do so, they would recognize that classical liberals in the mode of Adam Smith, David Hume, and Friedrich Hayek do not operate with an idealized account of fully informed and rational agents whose interests are completely harmonized through market processes. Rather, these latter are thinkers who see human rationality as deeply flawed and markets as highly imperfect tools that make the best use of that limited rationality *relative* to any "real-world" alternatives. Second, these critics are not robust in argumentation or use of evidence because they routinely commit the "nirvana fallacy."³ This fallacy embraces a model of "asymmetric idealization" that unfavorably compares the imperfect operation of "real-world" market economies with a highly idealized conception of

¹ David Schmidtz, *Living Together: Inventing Moral Science* (New York: Oxford University Press, 2023). All subsequent references to *Living Together* will be cited by page number parenthetically in the text.

² Mark Pennington, *Robust Political Economy: Classical Liberalism and the Future of Public Policy* (Cheltenham: Edward Elgar, 2011).

³ A phrase first coined by Harold Demsetz, "Information and Efficiency: Another Viewpoint," *Journal of Law and Economics* 12, no. 1 (1969): 1–22.

human action in the interventionist, social democratic, or socialist regimes they believe are best placed to bring about the goals of economic efficiency and distributive justice.

I did not fully realize it then, but in making these arguments I was trying to contribute to what Schmidtz describes in his new book as a realist political theory or what we might perhaps describe as a “robust political philosophy.” This approach puts “compliance problems” or “political economy” problems front and center when considering the institutional requirements of “justice.” In *Living Together* Schmidtz presents a comprehensive effort to spell out the implications for political philosophy of taking seriously the issue of compliance. He offers perhaps the most succinct, compelling, and inspirational account of ideas that have developed over a long and distinguished career.

In Schmidtz’s view, a “robust political philosophy” is one closely engaged with empirical social science. At its best, social-scientific observation helps us understand the range of practical institutional arrangements that people can live with and that enable agents with different histories, talents, and preferences to achieve their separate goals without placing them in a state of permanent conflict. For too long, however, political philosophy has treated empirical social science as a sideshow. The dominant model of political philosophy specifies principles and institutions it purports to be necessary if justice is to be secured, with little or no attention to how these arrangements play out when they are put into practice and confront “real-world” compliance challenges. Early manifestations of this tendency were apparent in John Stuart Mill’s suggestion in his *Principles of Political Economy* that problems of production (economic efficiency) could be entirely separated from those of distribution (social justice).⁴ Mill fails to recognize that in most practical settings these issues are *inextricably* linked. In Schmidtz’s language, whether we treat bakers who make the pies that social justice theorists want to “distribute fairly” as producers or whether we see them as recipients of “manna from heaven,” may affect whether people are willing to become bakers, and hence whether there is any “pie” to distribute in the first place (pp. 27–28).

In its most extreme form, represented by Gerald Cohen, contemporary political philosophy sees the empirical observation of “what works” as entirely *irrelevant* to the problem of what is just. Indeed, it describes as inherently “unjust” institutions of contract,

⁴ John Stuart Mill, *The Principles of Political Economy* (London: John W. Parker, 1848).

property, and open markets that have a demonstrated record of success in enabling human agents to achieve their goals.⁵ In Cohen's view, ethical theory should be "fact-insensitive," that is, it should proceed by trying to identify the right "principles." For Cohen, when faced with people who prove incapable of living up to these principles, we might have to accept that justice should be traded off against "humanitarian objectives," but it is important that we do not see such trade-offs as requirements of justice. Rather, we should call out injustice for what it is—a human failure to live by the right principles—and we must recognize that policies that trade off these principles against other values are "rules of regulation," *not* of justice.

From a Schmidtzian perspective, however, this is entirely the wrong way to think about justice. It is a dark day if political philosophers are reduced to saying implicitly or explicitly, "If my ideal cannot work with the crooked timber of humanity, then I reject humanity" (pp. 29–30). Similarly, there is something deeply wrong with a theory that purports to favor justice but would see a cancer treatment that extends two lives by five good years for each patient as somehow more "just" than one that extends one person's life by seven good years and the other person's life by six. As Schmidtz puts it:

Imagine saying, "Compared to (7,6), (5,5) is *bad* because the second patient has one year less, but (5,5) is *just* because the first patient has two years less." . . . If I am terrified by a prospect of my children growing up in what I call a just society, then I need to rethink what I call justice. (pp. 29–30)

Although *Living Together* can be read as a plea for political philosophy to take seriously social-scientific observations of "what works" in a manner that sounds distinctly consequentialist if not utilitarian, the focus on compliance problems reflects an ethical core that takes the "separateness of persons" as its starting point. The latter does not imply a solipsistic account of the human subject, but rather, one that gives full recognition to the *social* character of human action and hence of the need for a *social morality* that accounts for the fact that we live in an environment populated by actors with goals of their own. What this means is that neither we as individuals nor the rules of justice we uphold should treat other human agents, *pace* Smith, like

⁵ Gerald A. Cohen, "Facts and Principles," *Philosophy & Public Affairs* 31 (2003): 211–45.

“pawns” on a “chessboard,” with no “principal of motion of [their] own” (p. 106).⁶

If we take seriously the separateness of persons, we must look toward rules that embody both a “strategic consequentialism” and a “strategic deontology.” These twin perspectives inform the distinctively Schmidtzian suggestion that justice should be conceptualized as akin to a form of “traffic management” (Chapter 3). By this, he means that a properly social morality does not seek to rank destinations. Empirical observation reveals that people rarely, if ever, reach consensus on what is the right destination or goal to pursue, but that they can reach something approaching a consensus on conventions or Humean “artifices” that specify who has the “right of way.” The key contribution of liberalism, as Schmidtz understands it, is that it favors institutions that do not require us to know about or to rank others’ goals. Liberal justice is based on a thin set of shared understandings or expectations about who has the “right of way” and that enable us to see that “our turn will come.” Crucially, institutions such as property rights and contract law afford people the “right to say no” (p. 138) to destinations they do not care for. Property rights allow people to disagree peacefully; they make it safe for people with different goals and even different conceptions of justice to live together with a minimum of conflict. This Humean framing of justice may be very thin, but almost everything else depends upon it. A richer social life is made possible precisely *because* of its spartan character (Chapter 3). While some might consider it to be unduly “austere” and others might see it as “exclusionary,” the “right to say no”—not to be raped and not to have one’s justly acquired property subject to theft or expropriation—is the foundation for social cooperation, *properly understood* (Chapter 14).

Schmidtz’s liberalism recognizes the separateness of persons and the implications that follow from it in several ways. First, rules facilitating cooperation will be those that respect the fact that people have distinct histories and that they arrive at places at different times reflecting those histories. This means that rules treating either skills or natural resources as “common assets,” such as those proposed by various “luck egalitarian” theories, are unlikely to turn out well. Attempts to eradicate the influence of culture and family background on individual outcomes, for example, may be incompatible with

⁶ Schmidtz is here citing Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (1759; repr., Indianapolis, IN: Liberty Fund, 1982), VI.ii.2.17.

recognizing the deep attachments that people form with their children and others based on a common heritage or cultural standards, attachments that may not readily be extended to those who have different histories and who may subscribe to different and perhaps even contradictory standards. Similarly, rules preventing people from owning natural resources or that seek to redistribute the profits from developing them on the grounds that they should be equally distributed or held in common are unlikely to provide much if any motivation to engage in productive investments, if potentially unlimited numbers of other agents can claim a share of the proceeds by mere virtue of their existence.

Second, rules respecting the separateness of persons and recognizing agents as having projects of their own should not make demands for people to lead lives of permanent sacrifice as, for example, do certain extreme forms of utilitarianism. Peter Singer's famous thought experiment of the child drowning in a shallow pond and the injustice that would be done should passersby who could easily pull the infant out but refuse to do so, is powerful precisely because most people will rarely, if ever, encounter such a scenario. In "shallow pond" cases the projects of others and the need for cooperation is irrelevant; there is only one player who has the option of either saving the drowning child or carrying on their way and leaving it to certain death (Chapter 6). Such a logic does not, however, apply in contexts such as famine or poverty relief. Not only are famine and poverty the default human condition, but unlike the case of the drowning child, the story of hunger and poverty will not end with the decision of someone to send a charitable donation or to campaign to have themselves and their fellow citizens taxed so that funds can be sent to the hungry. Acts of this kind have little or no capacity to alter the institutions (and those who work within them) that may be responsible for producing the problem of famine. Even assuming the aid reaches those it is supposed to, such acts are often powerless to alter the behavior of the recipients in ways that may make the society in question famine-proof.

Third, rights should not be conceived in abstract or absolutist terms such that instead of working as tools that facilitate cooperation, they become instead "weapons of mass destruction" (Chapter 15). The latter problem arguably afflicts the more extreme "propertarian" forms of libertarianism that refuse to countenance any act of noncontractual "interference" with private property rights and that forget that the purpose of such rights is to *facilitate* peaceful social interaction, *not to block it*. Though Schmidtz does not mention it directly, an equivalent

type of charge might be laid at the door of some deliberative democratic theories that require that multiple “stakeholders” who might in *any* way be affected by a decision should have a right to participate in that decision, a principle that if applied on any scale would paralyze social life.⁷ Although the right to say no is fundamental, what this means cannot be worked out from a purely “principled” position, but must pay attention to what works practically to deliver the motivating force behind it.

Fourth, rules of justice must not require that those responsible for enforcing them know more than they possibly can. If actors are not pawns and if they operate according to their own principles of motion, then they may respond in unanticipated ways to the actions of others within their environment. In conditions of social complexity, the causal relationships that produce specific outcomes cannot be grasped; workable rules of justice must not be ones that require them to be so grasped.

The implications of this Humean approach are set out to great effect when Schmidtz considers the relationship between political economy, property, and the rule of law (Chapter 15). Private property rights are to be defended, even though they require acts of “exclusion,” because in providing security for those who invest in the future, far from reducing the opportunity sets of those lacking property, they *expand* the range of options for latecomers. Property rights are akin to traffic lights; they specify who has the right of way and, though they put limits on what people can do and when they can do it, they make it easier for people to travel and to reach multiple destinations than if they were absent. For such rights to facilitate human interaction rather than to block it, they must, however, be adapted to the practical contingencies of the situation. Thus, with the advent of air travel, courts did not grant landowners the right to stop planes from traversing or “interfering” with the space many miles above their property. Practical arrangements and new rules or conventions were required to consider what qualifies as “interference” and to reduce the need for airlines to negotiate with everyone under their flight path. Elsewhere, liability rules that specify that no one has a right to use or damage an asset without compensating the owner are a way to keep social interaction going in settings where certain actions may pose risks to

⁷ See, e.g., the work of Iris Young, especially Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).

person and property but where it may be too costly to seek the owner's permission to engage in acts that may accidentally damage the property in question. Similarly, externalities should only be considered as potential rights violations when they involve acts that interfere directly with the capacity of someone to use their property; this means that pecuniary externalities should not count as unwarranted interference. While it may be an externality if someone pollutes the air we breathe without our consent or if someone's view is threatened by a new construction project, it is not a justice-relevant externality when an incumbent loses market share to a new entrant or when the value of houses falls because the supply of homes on the market has increased.

All the above rules aim at reducing the costs of interaction. They enable people to live well together and they allow the right to say no to operate as a facilitator of social interaction, not as a paralyzing force.

As should be apparent from my remarks thus far, I believe that the Schmidtzian approach to a "robust political philosophy" and to the defense of a classical liberal or libertarian conception of society based on such a philosophy is highly fruitful and persuasive. There are, however, several areas that Schmidtz leaves underexplored and where the implications of his approach are highly ambiguous.

The first of these concerns the role of social-scientific evidence in grounding the institutional conclusions of a robust political philosophy and the appropriate philosophy of social science that goes with it. The empirical differences in performance between market economies that allow extensive scope for private property rights and contractual exchange relative to planned economies that fail to respect such rights are clear to see. However, it must be remembered that "the data" on which these empirical observations are based arose in a global context that allowed for experiments—though sometimes forced experiments—in living between these different modes of social organization and for realized counterfactuals to be generated across time and space. The global setting that allowed this rivalrous process of social experimentation to unfold equates to a "meta-level" framework that mimics to a limited extent the conditions found in the natural sciences where observed differences in outcomes between otherwise relatively similar societies—such as the former East and West Germany, contemporary North and South Korea, and contemporary Venezuela and Chile—might reasonably be attributed to institutional differences.

A further feature of this global context is that it allows for an *ongoing* process of data production, institutional reflection, and evaluation to unfold *through time*. The existence of states such as Cuba, Bolivia, North Korea, and Venezuela and the possibility for future democratic socialist and authoritarian experiments in the current global order affords space for comparative institutional claims about the advantages of predominantly liberal market systems to be *continuously* challenged and to become more or less robust. Just as freedom of speech for those with minority opinions in a democracy sustains the conditions within which the majority may come to confirm or to revise its current opinions, so too the existence of an institutional space for contrarian agents to implement alternatives to market liberalism sustains the background conditions within which the data-driven case for the latter regimes may become more or less apparent.

Although evidence in favor of liberal regimes seems clear, conclusions in any science are only ever provisional. It is, therefore, surely open for proponents of socialism, however implausible their suggestion may seem, to maintain that the relevant tests have *not* been properly specified and that with changed conditions socialist institutions might work better if we try them again. What I am suggesting here is that there is nothing in the empirically informed approach Schmidtz prefers that says it would be “unjust” to continue arguing for and experimenting with various forms of socialism. Indeed, one might even argue that the conclusions of those like Schmidtz and myself, who favor market-sustaining institutions, can only be considered robust if we continue to argue for a framework that allows for people to experiment with socialism—if only to provide continuing confirmation of the value we attribute to private property, markets, and contractual exchange. If we ask what sort of framework allows for the relevant process of conjecture and refutation to unfold and if justice itself can be conceptualized to require such a process, then I think we might be left with an argument—on experimental grounds—for something that looks strikingly like Robert Nozick’s libertarian “meta-utopia” where there is a “wide and diverse range of communities which people can enter if they are admitted, leave if they wish to, shape according to their wishes; a society in which utopian experimentation can be tried, different styles of life can be lived, and alternative visions of the good can be individually or jointly pursued.”⁸

⁸ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 307.

If we value the separateness of persons, then as well as generating the necessary experimental data, the advantage of such a framework is that it allows people to vote with their feet for the arrangements *they* judge as preferable. People can be *their own social scientists*, make their own calls on the claims made by those who profess to have social-scientific expertise, and not have judgments on how to interpret “the data” made for them by those who claim to have the relevant expertise. If philosophers of the Cohen type display a kind of dangerous arrogance when they claim that facts do not matter when determining what justice requires, then perhaps there is a similar type of arrogance in positions that grant too much authority to social scientists. I do not think that Schmidtz himself is guilty of this charge, but I do think there is a need in the Hayekian-Humean sense to “use reason to understand the limits of reason” and to think of frameworks that dethrone the claims of experts. It seems to me that the libertarian meta-utopia concept is especially promising in that regard.

Second, while it looks clear that broadly market economies outperform socialist models, it becomes much more difficult to interpret what the relevant data tells us about regimes that—while broadly market-based—also involve varying levels of redistribution. If we consider questions of social mobility as part of “traffic management,” then perhaps we should be looking at the cross-country evidence on what enables children to do better than their parents. Within this context, it has long been commonplace among Rawlsian welfare liberals and social democrats to argue that without significant redistribution, inequalities will develop properties of cumulative causation such that over time the type of fluid liberal society that Schmidtz and I favor would morph into a sort of caste-based or highly class-structured society. Notwithstanding the frequency of these claims, there is little evidence to suggest that countries providing similar levels of income and wealth redistribution show similar levels of inequality and social mobility.⁹ This is not surprising, because in highly complex societies where people exercise their agency in

⁹ On this, see, e.g., Neil Gilbert, *Never Enough: Capitalism and the Progressive Spirit* (Oxford: Oxford University Press, 2017). See also Thor Berger et al., “Social Mobility in Sweden Before the Welfare State,” *Journal of Economic History* 83, no. 2 (2023): pp. 431–63. The latter suggests that while income inequality has decreased since the advent of large-scale welfare-state measures in Sweden, social mobility was higher in Sweden *prior* to the welfare state—and also higher than in Norway, the U.S., and the U.K. after the creation of their respective welfare regimes.

unexpected ways, the magnitude and complexity of the interaction effects between the multiple background variables that contribute to differing levels of inequality and mobility may mean that the causal factors may not be “knowable” or accessible to a form of quasi-scientific expertise. The stronger point I would like to suggest here, however, is that it is precisely under conditions of highly complex causation that there is a case for dethroning social-scientific expertise—and the multiple data gatherers it produces—in favor of a model where people have the greatest scope to make *their own* social-scientific judgments on what contributes to a better life for themselves and their children. This again I would suggest speaks to a principled and “evidence-based” case for something akin to a Nozickian meta-utopia.

Third, it is not clear where the concept of justice as traffic management leads us when the conditions required for the generation of social-scientific evidence on “what works” simply do not exist and arguably cannot exist. If we are going to judge the costs and benefits of different kinds of rights protections that enable us to live well together, then that implies the existence of a process that allows us to come to judgments about the costs and benefits of different rules by observing the consequences that follow from implementing different schemes in different countries, jurisdictions, or localities. Nowhere is this point of greater relevance than in the context of discussions around climate change that are increasingly framed by political philosophers and ethicists as matters of “justice.” As I argue at length elsewhere, the very character of the global climate governance problem may block the production of “the data” required to discern what works as a tolerably “fair and effective” response.¹⁰ If a group of nations pursues a radical emissions reduction program through carbon taxes, emissions trading, or command-and-control regulation while another group pursues a “do nothing” growth-and-adaptation agenda, there will be no way to discern how far reductions in emissions have modified the effects of climate change and whether the costs associated with these reductions are outweighed by the benefits in a setting where other nations are at liberty to engage in activities that may continue to disturb the climate. Given that many of the possible effects of climate change may occur in the relatively distant future, the period between which the

¹⁰ Mark Pennington, “Climate Change, Political Economy, and the Problem of Comparative Institutions Analysis,” in *Climate Liberalism: Perspectives on Liberty, Property, and Pollution*, ed. Jonathan Adler (London: Palgrave Macmillan, 2023), pp. 309–34.

implementation of any governance regime and the forecasted effects this may have both on socioeconomic conditions and on climate change may be too great to allow for comparison with the effects of alternative institutions, policies, and forecasts over an equivalent period.

I raise the above issues not because I think they undermine the value of the approach Schmitz sets out so beautifully in *Living Together*, but because they suggest that the range of applications where the empirically grounded case for a liberal order can be robust is narrower than we might perhaps like it to be. This is a problem, however, not only for classical liberal conceptions of justice, but for *any* approach to justice that depends upon highly contestable social scientific “data.” In many such cases, either the lack of such data or the difficulties of interpreting whatever data there is “correctly” suggests that there may be a significant range of human interactions that lie “beyond justice” and beyond Schmitz’s “moral science.”