

## Schmidtz on Justice

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Early on in *Living Together*, David Schmidtz rejects John Rawls's claim that "justice is the first virtue of social institutions" (p. 24).<sup>1</sup> To the contrary, Schmidtz writes: "The first thing we need from institutions is a settled framework of mutual expectation that keeps the peace well enough to foster conditions that enable society to be a cooperative venture for mutual benefit" (p. 24). Several pages earlier, though, he says that "[j]ustice enables people to navigate the social world" (p. 19), which sounds a lot like "the first thing we need from institutions" (p. 24), and four pages earlier he tells us that "Humean justice is not everything—not even close—but almost everything depends on it" (p. 20). If "almost everything depends on" justice, why isn't it "the first virtue of social institutions"?

This seeming inconsistency can be explained, I think, by recognizing two different concepts referred to by the English word 'justice,' which I will call *interpersonal justice* and *social justice*. Interpersonal justice covers what Schmidtz calls "Humean justice." It is equivalent to what we owe each other as a matter of strict duty or right: not to murder, not to assault, not to steal, not to cheat, and so on. If we are to get along and cooperate productively, we must observe certain rules, and the rules that prohibit these wrongs are the ones most important for mutually beneficial cooperation. Social justice, on the other hand, refers to what Rawls calls "the proper distribution of the benefits and burdens of social cooperation."<sup>2</sup>

Although social justice cannot be achieved without interpersonal justice—because, for one thing, theft is incompatible

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<sup>1</sup> David Schmidtz, *Living Together: Inventing Moral Science* (New York: Oxford University Press, 2023), citing John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press), p. 3. All subsequent references to *Living Together* will be cited by page number parenthetically in the text.

<sup>2</sup> Rawls, *A Theory of Justice*, p. 5.

with a proper distribution—interpersonal justice can be achieved without social justice, a possibility illustrated by Robert Nozick’s Wilt Chamberlain example.<sup>3</sup> Suppose that the “benefits and burdens of social cooperation” are distributed properly now, but, going forward, there are unlimited voluntary exchanges and no interpersonal violations of rights. Over time, some will predictably have much more than others and the children of those who have much more will predictably have advantages that the children of those who have little do not have. Suppose, for the sake of illustration, that this degree of inequality of opportunity is inconsistent with the proper distribution of the benefits and burdens of social cooperation, as Rawls maintains.<sup>4</sup> It nonetheless could have come about and could be maintained without any violation of interpersonal justice, so although social justice requires interpersonal justice, interpersonal justice does not require social justice.

When Schmidtz says that “almost everything depends on” Humean justice, I interpret him as saying that almost everything depends on interpersonal justice because without it we will not have peace and prosperity. Social justice, on the other hand, is not necessary for peace and prosperity. When Schmidtz rejects Rawls’s claim that justice is the first virtue of social institutions, then, he is rejecting the claim that *social justice* is the first virtue of social institutions. He is not rejecting the claim that *interpersonal justice* is the first virtue of social institutions. In fact, he agrees with Bernard Williams that securing interpersonal justice *is* the first virtue of social institutions because this is necessary to “the securing of order, protection, safety, trust, and conditions of cooperation” (p. 24).<sup>5</sup>

Schmidtz does not like theories of social justice. One reason is that they focus our attention too much on the distribution of goods and not enough on the conditions for prosperity. They focus too much on who ends up with what and not enough on how things get produced in the first place. In this way, he suggests, theories of social justice are disrespectful in treating producers as mere means (pp. 27–28, 114 n. 10, 224). “The first question of justice,” he writes, “is not how to treat the pie, but how to treat bakers” (p. 27).

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<sup>3</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 160–62.

<sup>4</sup> Rawls, *A Theory of Justice*, pp. 62–63.

<sup>5</sup> Schmidtz is here quoting Bernard Williams, *In the Beginning Was the Deed* (Princeton, NJ: Princeton University Press, 2005), p. 3.

Another reason Schmidtz does not like theories of social justice is that pictures of what an ideal society would be like strike him as sectarian in the way that religious ideals are: “[W]hat any theorist calls [social] justice is his or her vision” (p. 28), and we cannot reasonably expect everyone to accept our personal vision of an ideal society, not in the way we can reasonably expect everyone not to murder, assault, steal, and cheat. Because “our personal visions of perfection” are “idiosyncratic,” they are “unfit . . . as blueprints for a community” (p. 26). Furthermore, Schmidtz believes that some of those who endorse conceptions of social justice are prone to impose them on others who do not accept them. They are prone “to condescendingly dismiss rival visions as unreasonable” (p. 28) and to “ram” their agendas “down the throats of people who see things differently” (p. 26).

Schmidtz has, of course, his own ideal of “living together”—the title of his book—namely, a productive cooperative society in which people respect each other’s rights and do not use government offices to impose their particular vision of an ideal society on other people. One reason Schmidtz refers to interpersonal justice as “traffic management” (p. 16) is that these rules do not presuppose that only one destination is worth aiming at and they function to coordinate the activities of individuals who have different destinations. “Destinations” here is a metaphor for what some have called “conceptions of a good life.” The idea is that people with different conceptions of a good life can nonetheless remain at peace and cooperate beneficially with each other as long as they accept and follow the requirements of interpersonal justice. “Liberalism’s defining insight,” Schmidtz writes, “is that effective traffic management is not about agreeing how to rank destinations. Liberal justice does not task travelers with even knowing other people’s destinations, much less with ranking them” (p. 19).

Another reason Schmidtz does not like theories of social justice is that they treat justice as a “peak” and, according to Schmidtz, “justice is not a peak” (p. 75). By “a peak” he means an ideal outcome (pp. 75, 79); in the context of this discussion, which focuses on Rawls, the kind of ideal outcome he has in mind seems to be an ideal distribution of goods or, as Rawls puts it, “the proper distribution of the benefits and burdens of social cooperation.” So in claiming that “justice is not a peak,” Schmidtz seems to be claiming that the proper distribution of the benefits and burdens of social cooperation is not, strictly speaking, a matter of justice at all. If, however, this is his claim, he gives no reason to agree with it. Although it is true that in some

contexts the English word ‘justice’ refers only to interpersonal justice—for instance, where John Stuart Mill equates justice with duties of perfect obligation<sup>6</sup>—in other contexts it refers to social justice, as in Rawls’s *A Theory of Justice*. If the claim that justice is not a peak is only that interpersonal justice is not social justice, then it is true, but it provides no reason to think there is no such thing as social justice. If the claim is that there is no such thing as social justice, because there is no such thing as the “proper distribution of the benefits and burdens of social cooperation,” then, in this book at least, Schmidtz gives no reason to agree.

Another reason Schmidtz does not like theories of social justice is that the realization of justice so understood would “confer more power on leaders than a society properly can afford” (p. 118). It is a “truism,” he writes, “that power corrupts” (p. 118). He does not define “power” or “corrupts” or cite any serious social science in support of this empirical claim, but his paradigm case of corruption is “using public office for private gain” (p. 121). “What should we infer,” he asks, “from the premise that officials, given power, use it to pursue their agenda, not ours?” “The lesson I draw,” he answers, “is that we should be skeptical of conceptions of justice that mislead us into thinking we have reason to invest enormous power in people who *crave* enormous power” (p. 129).

This seems to me the wrong lesson to draw. If someone has identified the correct conception of social justice and good reasons to accept it, then, although it is true we should not be misled by it into thinking we should invest enormous power in the wrong people, our susceptibility to being misled does not provide a good reason to reject this conception of justice. If Charles Darwin’s theory of natural selection misled us into believing that we should let poor people starve to death, this would not be a good reason to reject Darwin’s theory. However, a couple of pages later, Schmidtz doubles down. After distinguishing an approach to justice that focuses on conflict resolution (good) from an approach to justice that focuses on identifying the ideal distribution of goods (bad), Schmidtz writes: “An orientation toward conflict resolution . . . weighs against creating power to ram through a thick conception of justice, which implies that when it comes to society’s basic structure no *thick* conception of justice is a *true* conception” (p. 131). This is an invalid inference from a false premise. As to the premise, although there may be good reasons against creating

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<sup>6</sup> John Stuart Mill, *Utilitarianism*, 2nd ed., ed. Geroge Sher (1863; repr., Indianapolis, IN: Hackett, 2002), p. 50.

the power necessary “to ram through a thick conception of justice,” Schmidtz’s psychological orientation toward conflict resolution is not one of them; even if this were a good reason, it would not imply that no “thick” conception of justice is true or that no conception of social justice is valid.

Perhaps it is worth observing here that commitment to the idea of a “proper distribution of the benefits and burdens of social cooperation” does not commit one to an egalitarian policy of wealth redistribution, much less one that would require a dangerous amount of state capacity. One might think that in the absence of interpersonal injustice, any distribution is proper that results from voluntary transfers; if there are interpersonal injustices, any distribution is proper that results from voluntary transfers after restitution has been made for past injustices.<sup>7</sup> Consequently, because, at least in theory, achieving one of these distributions would require no more state capacity than an effective criminal and civil justice system, which Schmidtz presumably endorses in endorsing “justice as traffic management” and “justice as conflict resolution,” it is an error to hold that realizing *any* conception of social justice requires a dangerous amount of state capacity. Consequently, legitimate concerns about abuse of power cannot justify us in concluding that there is *no such thing* as the “proper distribution of the benefits and burdens of social cooperation” or no true conception of social justice.

Summarizing now, there are four main reasons Schmidtz does not like theories of social justice. (1) They focus too much on the distribution of goods, and not enough on the conditions for prosperity. (2) They express idiosyncratic, personal visions of the ideal society that are not widely shared. (3) They mistakenly identify justice with an ideal outcome or distribution of goods. (4) Implementing a conception of social justice will require a degree of state capacity that will inevitably result in the abuse of power. Schmidtz also concedes, however, that “Humean justice is not everything—not even close” (p. 20) and, in endorsing what he calls “ecological justice” (pp. 219–26), he concedes that the seven features of it that he identifies “do not exhaust it” (p. 226). We might wonder, “What else, in his view, does justice involve?”

One thing it might involve is *justice as acceptability*. Social institutions are just in this sense only if they are acceptable to everyone who lives under them and they are acceptable to everyone if and only if

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<sup>7</sup> This is similar to Nozick’s entitlement theory of justice, in Nozick, *Anarchy, State, and Utopia*, pp. 150–53.

no one has a decisive objection to them on their own behalf or an unanswerable valid complaint against them. The difference between justice as acceptability and interpersonal justice is that social institutions might not be acceptable to everyone, even if they have not resulted from and do not perpetrate any interpersonal injustice. The difference between justice as acceptability and social justice is that social institutions might be acceptable to everyone in the relevant sense, even if they do not ensure the “proper distribution of the benefits and burdens of social cooperation.”

Schmidtz does not explicitly recognize justice as acceptability as a distinctive kind of justice, but toward the end of his book he makes some comments related to equality of opportunity that suggest he might have something like this in mind. He writes: “High [political] standards are ones that, when met in practice, leave us with opportunities to muddle through that everyone in the community can live with, dignity intact” (p. 243). On the next page, he writes: “We can hope everyone will have a reasonable chance to compete in some arena of their choosing. . . . We do not want people to even imagine that the world owes them a guarantee, but we do want people to be able to see that the game is not rigged. The deck is not stacked against them. They have real opportunity” (p. 244). One might think that if social institutions do not provide everyone with “real opportunity” or opportunities to succeed sufficient to leave their “dignity intact,” then they are not acceptable to everyone and so are unjust in this sense.

Consider in this connection James Buchanan’s view, as summarized by Thomas Scanlon:

When there is only “one game in town,” Buchanan writes, everyone must be given “a fair chance of playing.” Buchanan believes that differences in family circumstances are the main obstacle to everyone’s having such a fair chance. To counteract this unfairness, he believes that good public education for all and limits on the intergenerational transfer of wealth should be “constitutional requirements,” even if this involves some sacrifice in individual liberty and in economic efficiency.<sup>8</sup>

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<sup>8</sup> Thomas Scanlon, *Why Does Inequality Matter?* (New York: Oxford University Press, 2018), p. 54, citing James Buchanan, “Rules for a Fair Game: Contractarian Notes on Distributive Justice,” in James Buchanan, *Liberty, Market, and the State: Political Economy in the 1980s* (New York: New York University Press, 1985), p. 132.

Why, Scanlon asks, does Buchanan take such a strong position on equality of opportunity, “in contrast to the views of other supporters of the free market such as Hayek and Milton Friedman”? Scanlon says:

The answer, I believe, is that, unlike them, Buchanan was a contractarian. Like Rawls, Buchanan believed that institutions must be justifiable to everyone who is required to accept and participate in them. He thought that the requirement of justifiability is not met if desirable positions in the society are not “open” to all members, regardless of the family into which they are born. One cannot ask individuals to accept and abide by the rules of a “game” that they did not have a fair chance of playing.<sup>9</sup>

Schmidtz does not offer an equally clear position on equality of opportunity. He writes: “We can hope that everyone will have a reasonable chance to compete in some arena of their choosing” (p. 244). But conceding that we can *hope* for something does not seem like treating it as a requirement of justice. Does he believe, then, that there is no injustice if some people lack opportunities that they “can live with, dignity intact”? No injustice if some members of our society do not “have a reasonable chance to compete in some arena of their choosing”? No injustice if some people are unable “to see the game is not rigged”? No injustice if they lack “real opportunity”? Neither Humean justice nor justice as traffic management on its own will ensure that everyone has “real opportunity.” Nor is “real opportunity” for all ensured by the seven features of “ecological justice” that Schmidtz explicitly identifies, such as justice as judicial conflict resolution (p. 220). If these features were all there is to justice, lack of real opportunity would not be an injustice. What other features of ecological justice are there, then, and do they require some form of equality of opportunity?

One conception of equality of opportunity, which might have appealed to Adam Smith, the hero of Schmidtz’s book (pp. xiv, 3–5, 7–9, 56, 60, 99–117), is what Rawls calls “careers open to talents.”<sup>10</sup> Careers are open to talents when firms freely compete for skilled employees; individuals freely compete for desirable employment; and there are no barriers to entry based on hereditary social class, religion,

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<sup>9</sup> Scanlon, *Why Does Inequality Matter?* pp. 55–56.

<sup>10</sup> Rawls, *A Theory of Justice*, p. 57.

sex, race, or ethnicity. When careers are open to talents, Rawls says that there is “formal equality of opportunity”<sup>11</sup> and he holds that formal equality of opportunity is a requirement of justice. Does Schmidtz agree? Does he agree that barriers to entry based on hereditary social class, religion, sex, race, or ethnicity are unjust? If so, he does not say.

Although formal equality of opportunity is a requirement of justice in Rawls’s view, it is not sufficient for genuine equality of opportunity; he explains why in considering what he calls “the system of natural liberty.”<sup>12</sup> In this system, careers are open to talents and goods are distributed entirely by efficient competitive markets via voluntary transfers. Through the workings of competitive markets, some will predictably end up with a great deal of wealth and some will end up with very little. Because, then, the system of natural liberty does not guarantee anyone an education, children of those who end up with very little will lack opportunities to acquire skills needed to compete effectively for desirable positions and, in this way, a person’s lifetime prospects will be heavily influenced by the socioeconomic status of their parents. “[T]he most obvious injustice of the system of natural liberty,” Rawls writes, “is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.”<sup>13</sup> By “distributive shares” he means the wealth one acquires throughout one’s life; by “these factors” he means the wealth and education of one’s parents, which are “arbitrary from a moral point of view” because no one deserves the advantages or disadvantages that result from their parents’ socioeconomic status. Whether this “improper influence” is an injustice is open to question, but it is not difficult to understand why Rawls believes that formal equality of opportunity alone is not enough.

What more is needed? According to Rawls, social institutions must be structured so as to establish what he calls “fair equality of opportunity,” which is achieved when “those who are at the same level of talent and ability, and have the same willingness to use them . . . have the same prospects of success regardless of their initial place in the social system,”<sup>14</sup> regardless, that is, of the socioeconomic status of their parents. This requires, first, that the education system provides everyone with an adequate opportunity to develop the skills necessary to compete for desirable positions and, second, that inequality of

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<sup>11</sup> Rawls, *A Theory of Justice*, p. 62.

<sup>12</sup> Rawls, *A Theory of Justice*, p. 57.

<sup>13</sup> Rawls, *A Theory of Justice*, p. 63.

<sup>14</sup> Rawls, *A Theory of Justice*, p. 63.



wealth is limited. Why a limit on wealth inequality? According to Rawls's first principle of justice, everyone must have a legally protected right to basic liberties, one of which is freedom of association, which protects the freedom of adults to form nuclear families and to raise their biological children together.<sup>15</sup> According to Rawls's second principle of justice, inequalities in wealth that function to benefit the least advantaged are permitted.<sup>16</sup> Even in Rawls's ideal society, some parents will have more wealth than others and they will use their greater wealth to give their children advantages that other children do not have, which will prevent the ideal of fair equality of opportunity from being fully achieved. But because, in Rawls's ideal society, *only* those social and economic inequalities that function to benefit the least advantaged are permitted, there is a limit to the extent to which wealthy parents can give their children advantages that other children do not have, and so, with an adequate education system in place, the ideal of fair equality of opportunity can be roughly approximated.

Perhaps Rawls's fair equality of opportunity principle requires more than justice as acceptability does. Perhaps it requires more than a "proper distribution of the benefits and burdens of social cooperation." As a contractarian, Rawls supposes that the "proper distribution of the benefits and burdens of social cooperation" is whatever distribution would result from social institutions that are acceptable to all and that social institutions are acceptable to all if the basic structure of society is effectively regulated by principles that everyone would rationally choose in an "original position" of equality behind a "veil of ignorance" that prevents them from knowing their particular positions in society. However, he never clearly explains why in this original position of equality everyone would rationally choose a system of principles that includes his fair equality of opportunity principle, so the theoretical grounds of this principle, in Rawls's work, remain obscure.

It is nonetheless one of Rawls's major contributions to political philosophy to give a clear answer to the question of what genuine equality of opportunity requires, a clearer answer, I believe, than any given before him. Ideally, then, a theorist who rejects Rawls's conception of social justice would have something equally clear to put in its place. What Schmidtz says about equality of opportunity (pp. 243–44) is not clear. What does "real opportunity" require in his view? What degree of opportunity is necessary to leave our "dignity intact"?

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<sup>15</sup> Rawls, *A Theory of Justice*, pp. 53, 64, 245–46.

<sup>16</sup> Rawls, *A Theory of Justice*, pp. 65, 107.

What role, if any, does the government have in ensuring that everyone has “real opportunity”? Does Schmidtz believe that his concerns about the inevitable abuse of political power constitute sufficient reason for the government to do nothing to promote equality of opportunity? If not, what system of education, in his view, would adequately address these concerns?

The system of education favored by pure libertarians is a set of private schools funded by tuition paid by family members and private charity. Does Schmidtz think that this system would provide everyone with “real opportunity”? If not, is he open to a system of private schools with tuition paid for by tax-funded vouchers? Such a system might address his concerns about government corruption, but it raises further questions. How much must the vouchers be worth to effectively ensure that every child has an adequate education? Is funding vouchers at this rate a requirement of justice? If so, isn't this a matter of social justice understood as the “proper distribution of the benefits and burdens of social cooperation”? And if so, doesn't a view about the proper level of voucher funding presuppose that some conception of social justice is true?

One reason Schmidtz dislikes contemporary theories of social justice is that they focus unduly on the distribution of wealth and not enough on the social conditions for the creation of wealth. Ideally, though, a critique of this kind would address the reasons political philosophers have cared about the distribution of wealth; one of the main reasons is that the distribution of wealth affects the distribution of opportunities. Furthermore, although Schmidtz refers to liberalism approvingly throughout (pp. 17, 19, 20–23, 82, 84, 108, 126–27, 141, 175), he does not mention that one of the primary goals of self-identified liberals for well over a century now has been greater equality of opportunity.<sup>17</sup> Early-twentieth-century liberals would have agreed with Schmidtz that competitive global markets had led to an unprecedented improvement in human welfare via an unprecedented increase in average wealth, with corresponding increases in life expectancy brought about by improvements in nutrition, sanitation, and literacy. But they also saw that people were still poor, that some still worked in bad conditions, had inadequate nutrition and health care, were uneducated, and that some still did not have much chance of success due to their family circumstances, conditions they referred to

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<sup>17</sup> Leonard T. Hobhouse, *Liberalism* (1911; repr., London: Williams and Norgate, 1919), pp. 40, 81; John A. Hobson, *The Crisis of Liberalism* (London: P.S. King, 1909), pp. 92–97.

collectively as “the social problem.”<sup>18</sup> It occurred to those who identified themselves as “liberals” (in England) and “progressives” (in the United States) that the government should do something to improve these conditions and they held that improving these conditions was a matter of what they called “social justice.”<sup>19</sup> Ideally, then, a critique of theories of social justice would recognize that the requirements of equality of opportunity are an important theoretical question, it would offer a clear view of what these requirements are, and it would give supporting arguments. Schmitz does not do this here.

Perhaps he says so little about equality of opportunity because he senses that it is not possible to present and defend a clear conception of equality of opportunity without saying something about the “proper distribution of the benefits and burdens of social cooperation,” and so without giving a theory of social justice, however “thin.” However, if it is only by developing such a theory that one can present and defend a clear conception of equality of opportunity, this is a good reason to develop one, and none of Schmitz’s reasons for disliking theories of social justice provides a good reason to avoid theorizing of this kind. Let us grant that theories of social justice should pay due attention to the conditions of peace and prosperity and should warrant respectful treatment of productive individuals. Let us grant that no one picture of the ideal society will be endorsed by all reasonable citizens and that we should be tolerant and respectful of those who hold different ideals. Let us grant that the amount of state capacity necessary to achieve distributions of wealth favored by egalitarians such as Rawls will create opportunities for government corruption that would not exist within the kind of minimal state endorsed by Nozick. None of these propositions provides a good reason to think that justice requires *nothing* in the way of equality of opportunity or to conclude that theorists should not think seriously about what it does require.

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<sup>18</sup> Hobhouse, *Liberalism*, pp. 18, 224; John A. Hobson, *The Social Problem: Life and Work* (New York: James Pott, 1902).

<sup>19</sup> Hobhouse, *Liberalism*, pp. 100, 184, 227.