

LAW
Reserve 317 No 1
Room 2FL 1997

Legal Studies

The Journal of the Society of Public Teachers of Law

Editor: Professor John Bell,
Faculty of Law, University of Leeds

CONTENTS

Articles

Reconciling protection of children with justice for parents in cases of alleged child abuse by Mary Hayes 1

The boundaries of the firm: the theories of Coase, Knight and Weitzman by Alice Belcher 22

Approaches to broadcasting regulation: Australia and United Kingdom compared by Leslie Hitchens 40

Negative enforcement of employment contracts in the sports industries by Paul McCutcheon 65

Strikes and the contract of employment: a comparison of the laws of Spain and England by Joaquin Garcia Murcia and Charlotte Villiers 101

Relativism, reflective equilibrium and justice by Justin Schwartz 128

The application of the 'broad principle of *Hedley Byrne*' as between parties to a contract by Simon Whittaker 169

Book reviews 192

Books received 213

Relativism, reflective equilibrium, and justice

Justin Schwartz[†]

Ohio State University College of Law Columbus, Ohio

1. INTRODUCTION[‡]

As the issue is usually framed, the fundamental issue at stake between mainstream liberal jurisprudence and various forms of Critical Legal Studies (CLS) is, as Jeffrie Murphy puts it, whether there are 'neutral principles in law and morality. By neutral principles [are] mean[t] those principles that can be agreed to by all rational beings.'¹ CLS theorists of all sorts typically hold that there are no neutral principles in a society divided into groups with vastly unequal power and status.² Socialist Critics assert the class character of the law and morality. Feminist and Critical Race Theorists hold that these are infected with gender or racial biases. Social conflict between groups translates into irreconcilable conflicts of values. But in rejecting liberal neutrality, Murphy claims, the Critics fall into a radical 'value relativism or skepticism', which he regards as pragmatically self-defeating given their political commitments to the interests of subordinate groups.³ If morality is merely perspectival, how can such biases, even if real, be criticized as wrong? Morally engaged liberal jurisprudence avoids this pitfall, he thinks, by appealing to neutral principles of justice to adjudicate among intractable differences about ends and goods.

[†] AB, Princeton University, 1979; MPhil, Cambridge University, 1982; MA, University of Michigan, 1984; PhD, University of Michigan, 1989.

[‡] Thanks for helpful comments and criticism are due to Elizabeth Anderson, Robert Brenner, David Finkel, Milton Fisk, Richard Garner, Allan Gibbard, Don Hubin, Peter King, Todd Lekan, Joan McGregor, Ulf Nilsson, Calvin Normore, Rodney Peffer, Peter Railton, Tony Smith, Mark Van Hook, and Chris Yonashonis, as well as to several anonymous referees. Hannah Michael-Schwartz, then age three, suggested by example the crucial argument for the strong progress claim. This paper is descended from Justin Schwartz 'Revolution and Justice', 44 *Against the Current* 37 (1993) and related ideas are developed in 'Rawls and Relativism', unpublished manuscript, and 'Which Side Am I On? Relativism, Motivation, and Justice', unpublished manuscript.

1. Jeffrie G Murphy & Jules L Coleman, *Philosophy of Law* 51 (rev ed 1990). Murphy wrote the chapter from which I quote.

2. Roberto Unger, in his earlier works, advocated a strong version of this claim. See Roberto Unger *Knowledge and Politics* (1975) pp 83-84 and *Law in Modern Society* (1976) p 180. Other varieties of the CLS non-neutrality thesis can be found in, eg, Gary Peller 'The Metaphysics of American Law', 73 *Cal L Rev* 1167 (1985), James Boyle 'The Politics of Reason', 133 *U Penn L Rev* 133 (1985), both reprinted in *Critical Legal Studies* (J Boyle, ed 1994), see also the papers in *Critical Legal Studies* (A Hutchinson, ed 1989). An especially careful and sensible statement of the CLS perspective is Mark Kelman *A Guide To Critical Legal Studies* (1987) ch 9. A hostile but conscientious survey of CLS attacks on the very idea of neutral principles is Andrew Altman *Critical Legal Studies* (1990).

3. Murphy & Coleman, above n 2, at 52, 55.

I suspect that the relativist problem for jurisprudence raised by conflicting standards in a divided society is more complex and unsettling than is allowed by either side to this dispute. Critics, including Feminist and Race Theorists, are correct that actual agreement on moral principles by 'all rational persons' is not to be found in a divided society, given the pervasiveness of antagonistic conflicts of group interest. But liberals are right that relativism threatens to undermine the normative force of moral critique or justification of law. The problem is then whether relativism can be avoided without denying the reality of interest-based dissension over principles of justice. I suggest that to a great extent it can, although not in a way that vindicates liberal neutrality by producing consensual principles of justice.

Against the liberals, on one hand, dissension due to such conflicts is unavoidable and cuts deeper than mere pluralism of conflicting ends. It reaches to the choice of principles of justice themselves. In section 2, I argue that the most sophisticated liberal attempt to generate neutral principles of justice, that of John Rawls, is open to a powerful version of the relativistic worry. His attempt to sidestep it by invoking a hypothetical consensus created by abstracting from the sources of divergence founders because the resulting justice is unrealizable in a divided society, thus inadequate. For this reason, its realizability in a society that is not divided makes it irrelevant in one that is divided. The argument is easily generalizable to any basis for such purportedly neutral principles and is not restricted to Rawls' hypothetical contractarianism.

Against the Critics, on the other hand, the doctrine that justice is relative to irreconcilable group interests is unappealing, if it does not force upon us a scepticism that renders pointless moral judgment or indeed critique itself. In section 3, I consider the most coherent and plausible version of relativism about justice, that of Milton Fisk, by way of showing why that alternative is not to be lightly accepted and to make clear the stakes in the debate. In a divided society, relativism commits us to accepting the justice of domination from the perspective of dominant groups even while rejecting it from that of subordinate groups. But for the relativist, there is no non-arbitrary reason to prefer the subordinate groups' perspective. While relativism does not follow from mere dissension, Fisk is nonetheless right that we may be stuck with it if there is no non-question-begging way of maintaining a universalistic or objective justice in the face of ineliminable conflicts of interest and consequent dissension in a divided society.

So my question is this: can choice of principles of justice be non-arbitrary, and their justification objective, without their being agreed on, actually or hypothetically, by all rational persons? In section 4, I argue that we can eliminate or constrain the most troubling sort of relativism, that which would preclude non-arbitrary choice between conceptions of justice that license domination and those that do not. My claim is that the former are not stably realizable because the interests they promote cannot be publicly acknowledged, but the latter are because they are based in emancipatory interests which can be so acknowledged. If so, conceptions of justice that license domination will be less adequate than ones that do not, and a non-arbitrary basis exists for choosing the latter.

This proposal faces at least three sorts of challenges: whether the asymmetry it requires in fact holds (section 4.2); whether it unhappily leaves us with the conclusion that stable domination would be just (section 4.3); and whether the strong and optimistic assumptions about the long-term unrealizability of domination on which it depends are true (sections 4.4-4.6). I discuss these after

explaining the core proposal with some care. I believe these challenges can be met, the first two more completely than the third. I offer no defence of reflective equilibrium as a method in ethics beyond replying to the worry about relativism.

2. RAWLSIAN JUSTICE AND REALIZABILITY⁴

Adapting modern pragmatic ideas about justification in science to moral theory,⁵ Rawls says that 'a conception of justice cannot be deduced from self-evident principles.' Its justification is 'a matter of the mutual support of many considerations, of everything fitting together into one coherent view.'⁶ Coherence with our considered judgments in (wide)⁷ reflective equilibrium is a constraint

4. Whether the 'Rawlsian' view I criticize is indeed Rawls' need not concern us, since my purpose is not the interpretation of his philosophy but the tenability of an initially attractive solution, one widely attributed to Rawls. But his early view is often read as involving commitments to the abstraction I wish to attack. It is so interpreted by Brian Barry *The Liberal Theory of Justice* (1973); the commentators in *Reading Rawls* (N Daniels, ed 1975) Michael Walzer *Spheres of Justice* (1983); Robert Paul Wolff *Understanding Rawls* (1977); and Michael Sandel *Liberalism and the Limits of Justice* (1979). Rawls' own later refinements suggest that his present view is closer to 'the weak case' discussed in section 4.6. See *Political Liberalism* (1993) as well as 'Justice as Fairness: Political Not Metaphysical', 14 *Phil and Public Affairs* 223 (1985) and 'The Idea of an Overlapping Consensus', 7 *Oxford J Legal Affairs* 1 (1987). These changes or clarifications were made partly in response to criticisms of the general sort bruted here. I take no position on the interpretative question, but I suspect that Rawls' early view, in *A Theory of Justice* (1971), contained, somewhat unstably, tendencies towards both positions.

5. Rawls' point of departure is the neopragmatism in philosophy of science of his Harvard colleagues W O Quine and Nelson Goodman. Quine's core insight, for my purposes, is his doctrine that '[a]ny statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system [of beliefs].... Conversely, by the same token, no statement is immune from revision.' W O Quine 'Two Dogmas of Empiricism', in *From A Logical Point of View* (rev ed 1961) p 43. For a more extended discussion, see W O Quine & J S Ullian *The Web of Belief* (2nd edn, 1978). See also Nelson Goodman *Fact, Fiction, and Forecasts* (4th edn, 1983) p 64.

6. John Rawls *A Theory of Justice* (1971) p 21.
7. The qualification that reflective equilibrium be 'wide' is urged by Norman Daniels 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', 74 *J Phil* 256 (1979) and 'Two Approaches To Theory Acceptance in Ethics', in *Morality, Reason, and Truth* (D Copp & D Zimmerman, eds 1985). It indicates that we must take into account not only our considered moral judgments, the principles that systematize them, and the methodological principles that govern their revision, but also a set of relevant background theories, both moral and nonmoral, as well as interests (see section 3.1). This is clearly Rawls' own intention, as reflected, for example, in his use of economics and psychology in developing his theory of justice. I drop the term 'wide' as redundant, on the presumption that all reflective equilibrium is wide. A useful discussion of wide reflective equilibrium in a specifically legal context is provided by Susan Hurley *Natural Reasons* (1989) pp 203-224.

on a conception of justice, if not constitutive of its correctness.⁸ Reflective equilibrium, roughly, is a state where our considered judgments about substantial justice in particular cases coincide with our most deeply held convictions about moral principles. We try to systematize and explain particular judgments about what is just by appeal to widely shared principles, 'going back and forth',⁹ changing the judgments or the principles to satisfy similarly revisable methodological constraints, such as consistency, simplicity, and explanatory power.¹⁰ The aim is to make our principles and judgments coincide in a (provisional) equilibrium that is reflective in that 'we know to what principles our judgments conform and the premises of their derivation.'¹¹

This approach raises a problem about relativism, here understood as the view that no non-arbitrary basis exists for choice among conflicting conceptions of justice. Rawls asks whether a unique reflective equilibrium exists: 'Perhaps the judgments from which we begin, or the course of reflection itself (or both), affect the resting point, if any, that we eventually achieve.'¹² If so, mutually inconsistent conceptions of justice may be justified in reflective equilibrium. That is to say, we may end up with at least two incompatible conceptions of justice each of which are in reflective equilibrium with the different set of particular judgments with which we start. No a priori reason exists to think that the different 'resting points' will be consistent. Indeed, systematic disagreement is to be expected. In divided societies, where social homogeneity is limited and power is unequally distributed (see section 3), people have conflicting interests and ends, and thus will tend to start from disparate particular judgments, to find different systematizations cogent, and to regard as acceptable divergent revisions of judgments or principles. Can

8. Rawls, above n 6, seems equivocal or ambivalent between these two views. He leans towards the second in 'Kantian Constructivism in Moral Theory', 77 *J Phil* 515 (1980), but in *Political Liberalism* (1993), he argues for a principled agnosticism on this issue. I think, but will not argue here, that if reflective equilibrium is a matter of coherence of beliefs, then coherence in reflective equilibrium is only grounds for belief that a conception of justice is correct and not constitutive of its correctness, which depends crucially, in my view, on whether it embodies a 'genuine reconciliation of interests.' Rawls, above n 6, at 141-42. Such a reconciliation depends on the nature of the interests involved and not merely on beliefs. On the other hand, if, as suggested in section 3.1, reflective equilibrium encompasses interests as well, then a constitutive view is defensible.

9. Rawls, above n 6 at 20.

10. Shelly Kagan *The Limits of Morality* (1989) pp 11-15.

11. Rawls, above n 6 at 20. Reflective equilibrium as a method in ethics, as I understand Rawls, Daniels, and other expositors, does not require that in the equilibrium that emerges at the end we give weight to or find a place for all the moral judgments that we start with, since it allows, and indeed demands, revision in both judgments and principles to get as good as possible a 'fit'. Some initial judgments may be discarded on reflection as failing to cohere with others or with the best explanation we have of the ones we wish to keep. This allows us to exclude certain prejudices, even if strongly held, as having no claim to being maintained, eg. homophobic or racist bigotry. However, since by the Quinean principle which allows such revision, any judgment may also be maintained come what may, there is no guarantee that such views may not find a home as considered moral judgments in some reflective equilibrium.

12. *Ibid* at 50.

capture the idea of a fair choice of principles, one that does not give anyone an unfair bargaining advantage or allow any morally irrelevant or improper considerations to influence the choice of principles. Since the choice in the original position is fair, Rawls thinks, its outcome is binding and the principles chosen in it correct.

Given this framework, Rawls ascribes to the parties to the original position identical general interests and ends, thereby creating grounds for consensus on the outcome of their deliberations. Unfortunately, however, even if Rawls' two principles of justice are the ones that would be chosen in the original position, a difficulty arises about motivation for those of us who are not in the original position, one that raises again the specter of relativism and undermines the justificatory force of the Rawlsian procedure. People who have the conflicting interests and ends from which the original position abstracts, I argue, are unlikely to be able to act on a conception that is formed in abstraction from these conflicting interests and ends. Rawlsian justice is not, in my terms, *stably realizable* as long as interests and ends conflict. On the moral principle that *ought implies can*, i.e. that we are not bound by principles that we in some sense cannot obey, Rawlsian justice is non-binding if it is unrealizable.

My objection should be distinguished from one urged by Ronald Dworkin, according to which merely hypothetical agreements have no binding force and so cannot ground a conception of justice.¹⁶ Dworkin's thought is that what hypothetical parties to the original position may choose in idealized circumstances cannot bear on what principles are right for people who themselves did not make this choice. Contracts, even social contracts, cannot bind those who did not in fact agree to them. It is beside the point, he says, to argue that the individuals concerned would have agreed under specially described hypothetical circumstances if they did not agree in the actual ones.

A Rawlsian can reply that the original position is a way of representing the considerations we actually do take to be morally relevant, of producing reflective equilibrium given the judgments we in fact share about how to choose a conception of justice. Appeal to that position is not a foundational alternative to reflective equilibrium, the results of which are to be checked against such an equilibrium attained in another way. Reflective equilibrium is attained by constructing the argument from the original position. 'We may think of the interpretation of the original position I shall present as the result of such a hypothetical course of reflection,' Rawls says. 'The conditions embodied in the description of the original position are ones that we *do in fact accept* ... [o]r ... can be persuaded to do so by philosophical reflection.'¹⁷ The agreement thus produced is in this sense not hypothetical but expresses an actual consensus, at least on procedure for choosing a conception of justice, a consensus attainable by adopting this 'perspective'.¹⁸ This reply to Dworkin is decisive as far as his objection goes.

My point, however, is that we have no such consensus or that one created by abstracting from the sources of disagreement cannot provide a stable basis for cooperation. The worry is that Rawlsian justice is unrealizable, not that it is too hypothetical. Dworkin's objection is that merely hypothetical agreements *should* not bind us morally; mine, that agreements made in abstraction from actual

16. Ronald Dworkin 'Justice and Rights' in *Taking Rights Seriously* (1978) p 151.
17. Rawls, above n 6, at 21, emphasis added.
18. *Ibid* at 139.

we then say which, if any, is the correct conception or give any non-arbitrary grounds for preferring one to another? If not, we face relativism about justice.¹³

After introducing the relativist worry in this way, Rawls dismisses 'speculation' about such matters as 'useless' and says that he will assume basic agreement.¹⁴ But the divergence that generates the worry is *the* fundamental problem for a theory of justice like Rawls'. Without it we would not need a theory of justice: 'If [our] intuitive... judgments are similar, it does not matter, practically speaking, that [we] cannot formulate the principles which account for these convictions, or even whether such principles exist. Contrary judgments, however, raise a difficulty, since the basis for adjudicating claims is to that extent obscure.' So we must seek a basis for agreement which tends to 'make our considered judgments converge'.¹⁵

One solution is indeed to *make* our judgments converge by abstracting from sources of disagreement. This is one function of the 'original position' in Rawls' theory. The original position is a hypothetical state of affairs in which 'parties' deliberate on the choice of principles of justice under special constraints. These constraints are meant to impart to the outcome of their deliberations a special justificatory force, such that the fact that parties so constrained would choose a given set of principles means that the principles so chosen are the correct ones for us, who are not parties to the original position. The constraints confer justification on the principles in virtue of representing the considerations that, according to Rawls, we think are relevant to choosing principles of justice, and, most importantly, by excluding those considerations we regard as irrelevant or improper, such as class, race, or gender. The original position is supposed to

13. Perhaps about all morality, as maintained by R M Hare *Moral Thinking* (1981) pp 12-13, but I here restrict my discussion to justice. Someone may worry that we do not have a problem about relativism at all if, on one reading suggested above, n 8, we take reflective equilibrium to be only evidence for, and not constitutive of, the correctness of a conception of justice. For surely in science as well as ethics rational people can disagree, and be equally justified in their conflicting views, without fear of relativism! Such merely epistemic relativity ought not be problematic.

But, first, while I agree that such disagreement does not commit us to relativism, this is not *obvious* in science or ethics. Relativist worries give the concern about the underdetermination of scientific theory by empirical evidence part of its bite. See Thomas Kuhn *The Structure of Scientific Revolutions* (2d edn, 1970) or W O Quine 'On Empirically Equivalent Systems of the World', 9 *Erkenntnis* (1975) p 313. Divergence about justice in reflective equilibrium is an ethical version of this worry. That such disagreement does not imply relativism must be *shown*, and with regard to justice, this is my object here. In Justin Schwartz 'The Paradox of Ideology', 23 *Canadian J Phil* 541 (1993) [hereinafter Schwartz] I argue similarly for science.

Second, the worry about epistemic relativity is nontrivial. It may be reformulated as a problem about skepticism. Disagreement does not imply there is no unique right answer, nor does agreement imply that we have a correct answer. See Justin Schwartz 'Revolution and Justice', 44 *Against the Current* 37 (1993) [hereinafter Schwartz] 'Revolution and Justice'. But if we have no agreement in reflective equilibrium, how can we be justified in maintaining that we have such an answer? The question is not rhetorical. I do not maintain that we can only be thus justified if we have such agreement. My point is that we can even if we do not. But again, this must be shown.

14. Rawls, above n 6, at 50.
15. *Ibid* at 45, emphasis added.

interests will not motivate us practically. This is not a criticism of reflective equilibrium as a method in ethics. The method need not abstract from actual interests. If it is to avoid the problem of realizability, it should not. But if it does not, the problem of relativism emerges. The task is to find a stable basis for cooperation that does not abstract from actual interests but that also avoids relativization to those interests.

The Rawlsian abstraction from interests and ends under consideration is made by putting the parties to the original position behind a 'veil of ignorance'.¹⁹ In the hypothetical circumstances of the original position, the parties do not know their 'class position or social status', their 'natural assets and abilities', any particular facts that would lead them to favour their actual interests, their special 'conceptions of the good', or the particulars of [their] rational plan of life. These sorts of considerations are morally irrelevant to the choice of principles of justice, and, we think, in fairness should not influence our choice of principles of justice. That is why they are hidden behind the veil. It is their being hidden that makes the choice in the original position fair. (With respect to Dworkin's objection, note that it is we, not the parties, who in fact agree that these considerations are morally irrelevant.)

But since some knowledge and motivation is needed to come to any conclusion, the parties know relevant 'general facts about human society',²⁰ and desire more rather than less of the 'primary social goods'—rights and liberties, powers and opportunities, income and wealth—that 'have a use whatever a person's rational plan of life'.²¹ These primary social goods are the admissible interests in the original position. Rawls' two principles are the ones that he argues the parties would choose to regulate their distribution. I agree that we do have interests in these goods, but our actual interests in my sense include *all* our interests—not only these general interests but also the particular interests hidden behind the veil of ignorance. Once we abstract from the latter, unanimity becomes possible, so we can say that the 'preferred conception of justice ... represents a genuine reconciliation of interests'²²—at least of our general, if not our actual, interests. The 'reconciliation of interests' is the key thing.

But for a conception of justice to bind us we also must be able to abide by it. As Rawls admits, '[i]t is ... a consideration against a conception of justice that, in view of the laws of moral psychology, men would not acquire a desire to act upon it even when the institutions of their society satisfied it.'²³ So 'the requirements of justice [must not be] too much in conflict with the citizens' essential interests as formed and encouraged by their social arrangements.'²⁴ This is part of Rawls' point, following Hume, in restricting the scope of justice to circumstances of moderate scarcity.²⁵ If resources are too scarce, no one will abide by any conception of justice, and all bets are off. We may express this as the realizability condition on principles of justice:

19. Ibid at 137.

20. Ibid.

21. Ibid at 62, 93.

22. Ibid at 141–42.

23. Ibid at 138.

24. Rawls *Political Liberalism* (1993) p 134.

25. Rawls, above n 6, at 125–126.

(1) A conception of justice is adequate only if it can be realized, ie, only if (most) agents can in the long run be motivated to accept and act upon it.

The constraint is not that the adequacy of such a conception depends on whether most agents can in the long run be motivated to accept and act upon it *without coercion or deception and given full awareness of their actual interests*. I reject appeal to hypothetical ideal conditions, whether Rawls' or the different sort indicated in the italicized clause—see section 4.1(i). The weaker constraint (1), is warranted because, as I take it, it would be accepted in reflective equilibrium. The principle backing (1) is something like *ought implies can*. That is, if we cannot abide by a conception of justice, it cannot bind us.²⁶ As an ethical principle this is fairly uncontroversial, as is its legal counterpart, that a person cannot ordinarily be held criminally responsible or legally liable for acts that she could not, in some suitably strong sense, avoid committing.²⁷

The inability intended in (1) is not psychological (much less physical) impossibility for any given person. Individuals do sometimes behave high-mindedly, acting against their interests in the name of what they think is right. It is rather what I call *sociological impossibility*, which ranges over groups rather than individuals. A social arrangement is thus impossible if, given the facts about the moral psychology of group behavior, its probability is so low that it would not form a stable basis for cooperation.²⁸ Rawls' characterization of the circumstances of justice—that justice is only at issue where scarcity and egoism are 'moderate'—relies upon something like this idea. People sometimes act high-mindedly even under absolute scarcity, but we cannot count on such behaviour as a basis for cooperation.

'Impossibility' may seem too strong for states of affairs that are merely improbable. But strict impossibility is a limit case, where the probability approaches zero. In social explanation that degree of improbability is rare. There is no harm, however, in characterizing the improbabilities that I have in mind as sociologically impossible if they are improbable enough and the notion is clearly understood. Principles that describe sociologically or otherwise impossible states of affairs I call *unrealizable*. Unrealizability is a matter of degree. For *simply* unrealizable principles the probability of realization approaches zero. Others are not *stably* realizable. Their endogenous dynamics make them self-undermining. The probability that they can be maintained in the long run is very low. The *can* in the version of *ought implies can* invoked here must be interpreted accordingly.

My objection, then, is that in a divided society generalized high-mindedness is sociologically impossible, so in such a society Rawlsian justice is not stably realizable. People in a divided society will be motivated by the interests from which the original position abstracts and will not act on principles that reconcile merely their general interests, at least not consistently enough to make this

26. See also section 4.1(ii), below, where I argue that a social order that fails to satisfy the realizability condition cannot be just.

27. See H L A Hart *Punishment and Responsibility* (1968) pp 28–53.

28. The inability or unwillingness of a few individuals—eg, habitual criminals—to cooperate does not render a social arrangement sociologically impossible as long as their behavior does not destabilize the social order. Only when noncooperation is general enough to undermine the social order should we speak of sociological impossibility. Hence the parenthetical 'most' in (1).

extraordinary heroism or saintliness could physically perform it, but only, roughly, as long as a reasonable person could be expected to act accordingly.

Rawls accepts (1),³⁴ and he is aware of the motivational problem. His solution is to stipulate that we can form a 'sense of justice', a capacity to abide by the results of deliberations leading to a favoured conception of justice, even if these abstract from our actual interests.³⁵ This would be question-begging did Rawls not offer an account of its psychological basis in terms inspired by Kohlberg and Piaget. He asserts three psychological 'laws (or tendencies)' which state that in certain circumstances we acquire the sense of justice.³⁶ The parenthetical qualification, however, is important. Even if, properly trained and situated, we want to abide by principles thus formed, this is only a tendency. For stable realizability, it must be more powerful than any tendency to act on the interests from which the justification of a favoured conception abstracts. The sense of justice need not always trump, but for Rawlsian justice to be stably realizable, and thus adequate, it must usually do so. That in divided societies it does not trump is the argument for my objection.

Sociological and historical evidence supports the idea that interest rather than (the sense of) justice is primary in explaining social behaviour. I do not mean that justice never motivates. What I deny is that a sense of justice motivates strongly enough to form a stable basis for cooperation if a conception of justice opposes basic group interests. Where it does, individuals will tend to formulate and act from a different conception of justice that better accords with these interests (see section 3.1). If basic interests of different social groups systematically conflict, this will tend to generate the conflict between competing conceptions of justice that poses the relativistic problem. Justice may indeed motivate, but the question is, whose justice? Those whose interests are harmed by some justice or other will not find it appealing and will prefer a different and to them more attractive justice that allows them to satisfy their interests. The 'sense of justice' then is no solution at all to the relativistic worry.

It is group rather than individual interest that I intend. Psychological egoism is quite implausible. Mill is right to stress 'the social feelings of mankind, the desire to be in unity with our fellow creatures' as a basic human motivation.³⁷ Individuals will make extraordinary sacrifices for kin, nation, race, creed, or class. But if Mill is right about sociability, Hume is also right that our sympathies are limited.³⁸ The sacrifices individuals will make, more often than not, are to

reconciliation a stable basis for cooperation.²⁹ We cannot expect reasonable persons in such a society to act in accord with principles like Rawls'.

Someone may object that the claim itself amounts merely to the idea that such a motivation is merely weak, so we have not *ought implies can* but *ought implies probably can*. The latter seems implausible for the individual case. The former is true, we think, because inability exculpates. But mere difficulty does not. My bad temper does not excuse murder. Why should the social case be different? Perhaps it is not. Many people believe that if some commendable act would be very costly or burdensome, I am not morally obligated to do it. I am not required to be a hero or a saint. If so, the latter principle is defensible. Kagan disputes this.³⁰ But even if he is right, the social case is different. Working in practice, ie, realizability, is a litmus test for any principles of cooperation, partly because cooperation is what such principles are a basis for. If we cannot stably cooperate on their basis, they are no good. This may be so even if, as Kagan thinks, an individual is culpable if she fails to abide by them. Saintliness or moral heroism may be obligatory rather than merely highly commendable for each of us (although I doubt it), but to build a society on the assumption that we are in fact saints or heroes would be irresponsible. For this reason, in part, the probabilistic *ought implies can* should be accepted in reflective equilibrium.

This is consistent with the kinds of impossibility admitted as excuses for individuals in various areas of American law, which are typically weaker than physical or even psychological impossibility. In criminal law, while an insanity defence may require that a wrongdoer be unable to conform his actions to the law, duress demands only a threat that a person of ordinary firmness would be unable to resist, and a necessity defence requires only a greater evil unavoidable by other means.³¹ (Duress and necessity are kinds of impossibility defences, as a moment's reflection will show.) In contract law, commercial impracticability (vastly excessive expense) is an impossibility defence, as is frustration of essential purpose.³² Tort law rules out the assumption that a reasonable person would feel circumstances impose on a plaintiff action that a reasonable person would feel impelled to take, making such action in the relevant sense involuntary.³³ Law thus reflects our ordinary moral sense that the 'impossibility' involved in *ought implies can* need not mean that a rule is binding as long as someone of

29. Richard Miller 'Rawls and Marxism', in *Reading Rawls* above n 4, at 206, makes a similar claim, but he argues that the parties to the original position will be unable to accept Rawlsian justice given the possibility that they may end up on the privileged side of a divided society. I do not dispute, however, that in the original position the parties may accept Rawlsian justice. I merely deny that they can abide by it outside that position and in a divided society. If that means they could not accept it in the original position either, I agree with Miller, but I take no stand on the question here.

30. See Kagan, above n 10.

31. Paul H Robinson *Criminal Law Defenses* (1984 & Supp 1996) s 37 (necessity), s 173 (insanity), s 177 (duress).

32. John D Calamart & Joseph M Perillo *The Law of Contracts* (3rd edn, 1987) ss 13-1, 13-9, 13-12, 13-20, Arthur L Corbin *Corbin on Contracts*, (one vol ed 1952) ss 1320-1333, see especially s 1325 ('What is meant by the term "impossibility"').

33. W Page Keeton, Dan B Dobbs, Robert Keeton, & David G Owen Prosser and Keeton *on the Law of Torts* (5th edn, 1984 & Supp 1988) s 68.

34. Further evidence of Rawls' acceptance of (1) is his invocation of the idea of 'the strains of commitment' against utilitarianism and in defense of his two principles. See Rawls, above n 6, at 145, 176ff, 423. According to this notion, adequate principles of justice may not 'have consequences [the parties to the original position] cannot accept' in the real world. The parties 'must weigh whether they will be able to stick by their commitment in all circumstances'. They '...will avoid [principles] that they can adhere to only with great difficulty'. Ibid at 176. Rawls claims that utilitarianism will fail this test. My claim is that, in a divided society, so will Rawlsian justice. My point, however, is not about what parties to a hypothetical choice situation would choose: but about how people will behave given their actual interests.

35. Ibid, chapter 8; Rawls, above n 24, at 86-88.

36. Rawls, above n 6, at 490-491.

37. John Stuart Mill *Utilitarianism* (M Warnock, ed 1962) p 284.

38. David Hume *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* (2d edn, L A Selby-Bigge, ed 1962) p 229.

advance their own group at the expense of another. We may call this the interest thesis:

(2) Basic group interest is generally a more powerful motivation than any common interest shared by groups with antagonistic interests, or than any sense of justice.

If (basic) group interests conflict either with common interests or with what a sense of justice demands, people will tend to behave in accord with the former.

Cooperation requires compromise, coerced or voluntary, and since cooperation is actual, compromise is possible. However, (2) indicates its limits. Compromise of basic interests can only be coerced and (I argue in section 4.5) will be resisted. A conflict of basic interests I call *antagonistic*. The basic interests of a group are those which most deeply affect its flourishing as a group. The basic interests of dominant groups involve their continued enjoyment of the advantages they enjoy at the expense of the subordinate groups. Those of the subordinate groups involve the cessation of the disadvantages they endure for the benefit of the dominant groups. The more some compromise harms basic group interests, the less stable it will be. Slaveowners might compromise more willingly, for example, on whether slave families are to be kept together than on whether slavery itself is to be outlawed.³⁹ Which interests are thus basic in any particular case and how strongly they are defended depends on the group and the circumstances.⁴⁰ Questions about which interests are basic when, and how to tell, cannot be settled a priori and need not concern us here. All the present argument requires is the concession that *some* interests are basic in the relevant sense, i.e. that their compromise even in the name of justice will be resisted, and in fact will be regarded as unjust by those whose interests are at stake.

An exception to (2) might be urged for common interests in physical survival. We might concede this for the sake of argument, but I suspect that group interest is still the stronger motivation—witness the nuclear arms race. This ended because of the collapse of one of the participants, not because of a shared recognition of any such common interest. No exception is in order for common interests in social stability. The stability of an order that harms a group's basic interests will not recommend it to that group.

To illustrate (2), we might consider what would happen were Rawlsian justice adopted in a divided society marked by great inequalities of wealth. The egalitarian redistribution required by the difference principle—roughly, that inequalities must be to the advantage of the least well off—probably would be

39. American slavery never established a legal bar to breaking up slave families by sale. On the contrary, as Jones argues, 'The threat of sale was the most effective long term mechanism of control'. Norrece T. Jones, Jr *Born a Child of Freedom, Yet a Slave: Mechanisms of Control and Strategies of Resistance in Antebellum South Carolina* (1990) p. 63, see the whole of chapter 2. But masters would keep families together to reward compliance. It took a civil war to force them to give up slavery itself.

40. Given the reality of multiple and overlapping group identities—race, gender, class, religion, nationality, kin, etc.—ascertaining which group identities come into play in any given circumstance is a difficult matter. However, we may avoid the issue here. As long as whatever groups there are can be classified as dominant and subordinate in the specified sense, it does not matter for the purpose of my argument which groups are most salient in particular circumstances.

blocked by the better off. The resistance we see to much more limited redistribution, eg, higher taxes for social programmes, supports this prediction.⁴¹ That is in part why Rawlsian proposals are not on the legal and political agenda of real world politics.⁴² If (2) is correct, Rawlsian abstraction will generate a conception of justice that cannot be stably realized in a society divided by groups with antagonistic interests. Rawls admits this in considering a situation similar to the one envisaged. He says:

'Suppose that we transpose people from a society in which property, in good part as the result of fortune and luck, is very unequal into a society regulated by the two principles of justice. There is no guarantee that all will gain by the change if they judge matters by their previous attitudes. Those owning large properties may have lost greatly and historically they have resisted such changes.'⁴³

41. This point also applies to Nozickian justice. The least-well off, those who would be most disadvantaged in the completely laissez-faire economy advocated by Nozick, would strongly resist the abolition of the safety net. See Robert Nozick *Anarchy, State, and Utopia* (1974). Such resistance helps explain why the safety net exists. Resistance on the other side helps explain why it is as low as it is.

42. If Scandinavian social democracy is adduced as a counterexample, two replies suggest themselves. First, one might deny that the Scandinavian countries are divided societies in the sense or to the degree that, for example, the US might be argued to be. This might be supported by reflection on whether Scandinavian arrangements are, or might reasonably be expected to be, on an American political agenda. To take income inequality, in the US the ratio of the top 20% to the bottom 20% of the population in 1979–1990 is almost 9, compared with Sweden at half that, Norway at slightly over 6 and Denmark at about 7.25 (World Bank figures). A Glyn & D. Milliband 'Paying For Inequality' (Institute for Public Policy Research 1994), cited in 198 *Dollars and Sense* 19 (1995). For a more comprehensive and nuanced picture, see J. Freeman *Democracy and Markets* (1989) pp. 137–148. Neither the World Bank or Freeman take into account monetary value of the more extensive Scandinavian social welfare system, which would undoubtedly widen the gap. The likelihood that the US will move in the direction of Scandinavian standards in the foreseeable future is slight.

Second, one might remark that even in Scandinavia, inequality is increasing. A comparison of the World Bank figures from the 1980s and Freeman's figures from 1970 indicate that Norway and Denmark in particular are markedly more unequal than they were a generation ago. Moreover, the social democratic consensus is under considerable pressure from conservative parties, which are beginning to break the long Social Democratic hegemony in those countries. See Rudolph Meidner 'Why Did the Swedish Model Fail?', in *Real Problems, False Solutions: Socialist Register 1993* (R. Milliband & L. Panitch, eds 1993) p. 211. Whether Scandinavian conservatives will succeed in their aims is open, but if they do, that is evidence that social democracy is not stably realizable in Scandinavia.

43. Rawls, above n. 24, at 17. The situations seem to differ in subtle but important ways. I imagine trying to institute Rawlsian justice in a divided society; he, 'transpos[ing] people into a society governed by Rawlsian justice with their current attitudes. My situation emphasizes the obstacles interest poses to a transition to such a society; his, those posed by old-fashioned attitudes in one that exists. In raising this problem, Rawls has assumed a solution to my problem without saying what it is. In addition, in my situation, the better off retain their wealth and the problem is persuading them to surrender that part of it to which they are not entitled on the difference principle. In Rawls' situation, as far as I can make out, transposition somehow deprives them of that share and the problem is to reconcile them to this loss. The question remains open just how this transposition took place with that effect. This matters because those who still have resources are better placed to retain them.

Since the change is not to their advantage, they cannot be expected to agree to it.

Rawls says, however, that this is 'not to the point': Strains such as this 'belong to the process of transition' and 'are not covered by the principles of justice for a well-ordered society'.⁴⁴ The effectiveness of the sense of justice depends upon the society in which it develops being 'well-ordered', that is, 'designed to advance the good of its members and effectively regulated by a public conception of justice'.⁴⁵ That a society is so regulated 'implies that its members have a strong and normally effective desire to act as the principles of justice require'.⁴⁶ If a society is not so regulated, something like the interest thesis will operate and the sense of justice will not motivate. The requirements of justice would conflict too much with 'citizens' essential interests as formed and encouraged by their social arrangements'.⁴⁷ But this situation is excluded *ex hypothesi* from the Rawlsian account. The problem of relativism arises in a society that is not 'perfectly just', whereas the Rawlsian is concerned with one that is perfectly just.⁴⁸ Is relativism a problem for the latter? Perhaps not, since in a perfectly just society the conflicts that generate the problem are reduced to the point where the sense of justice can motivate. In a well-ordered society, *ought implies can* is satisfied.

On this reply, though, the theory becomes utopian, and fails by Rawlsian standards. Rawls says, '[e]onceptions of justice must be justified by the conditions of our life as we know it or not at all'.⁴⁹ In those conditions, however, society is divided;⁵⁰ interests and ends conflict in an antagonistic way, and we face relativism. If the effectiveness of the sense of justice is built into the definition of the well-ordered society, we must ask, first, whether Rawlsian justice is stably realizable in a divided society, ie, could such a society in the long run be effectively regulated by that conception? The reply concedes that it could not. It defers the issue of realizability to a society where interests do not conflict so sharply. But the stable realizability of such a conception in a well-ordered society cannot recommend it to citizens of a divided society, or at least

44. *Ibid* at 18.

45. Rawls, above n 6, at 453.

46. *Ibid* at 454.

47. Rawls, above n 24, at 134.

48. Rawls, above n 6, at 8.

49. *Ibid* at 454.

50. This presupposes a claim about 'the conditions of our life as we know it', namely that our societies are divided in a way marked by what I call domination (see section 3). But the claim is only moderately contentious. Even someone as convinced of the relative homogeneity and 'moral consensus' of our societies as Rorty identifies himself as a moderate reformist who is deeply concerned about 'the very slow extension of hope and freedom to marginal social groups'. Richard Rorty *Objectivity, Relativism, and Truth* (1991) pp 201, 15–16. Fukuyama, who notoriously denies that 'we cannot picture to ourselves a world that is essentially different from the present one, and at the same time better', admits that 'most existing liberal democracies do not measure up' to their own standards of eradication of eliminable inequalities. Francis Fukuyama *The End of History and the Last Man* (1992) pp 46, 291. Even those who are more sanguine about our present state than Fukuyama, Rorty, or myself may take the point to be about the logic of justice in genuinely divided societies like mid-19th century America, my main example in the following.

to those who benefit from its inequalities, whom, the Rawlsian grants, it will not motivate. It cannot, therefore, be represented as an adequate conception for the latter, at least if the realizability condition holds. The objection is thus very much to the point.

But second, perhaps the stable realizability of Rawlsian justice may constitute a recommendation to transform a divided society into a well-ordered one. This, however, renders puzzling Rawls' summary dismissal of the relevance of the 'strains of transition'. If its stable realizability is such a recommendation, Rawlsian justice may be said to be more adequate than the official justice of a divided society. I think there is something deeply right about this (see section 4.2), but a Rawlsian cannot use this reply if the justification for the transition is consensual motivation by the conception. Outside the well-ordered society, this consensual motivation exists only in the hypothetical space of the original position. In the actual world, those who benefit by social divisions will oppose their abolition. Their hypothetical agreement to such a transition in abstraction from their interests cannot bind them if it will not motivate them as they are. We need a justification for the transition that does not require the support of those whose interests it would harm. The reply is then available as long as some effective group motivation exists for the transition, eg, the interests of those who would benefit thereby. This is the key to the solution proposed in section 4. There I argue that the greater stable realizability of a justice like Rawls' provides reason for everyone, including the dominant groups, to prefer it, but that the motivation to attain a conception so favored springs only from the interests of the subordinate groups.

In recent work Rawls considers the charge of utopianism, addressing how 'to bring about an overlapping consensus (where one does not exist)'.⁵¹ Such a consensus is a moral agreement on a conception of justice among 'reasonable comprehensive doctrines,' whereby the former is affirmed on moral grounds according to the particular values and beliefs in the latter. Comprehensive doctrines are general world views embodying, eg, particular conceptions of the good, such as individual self-realization, consumerist self-gratification, honor and glory, religious salvation, or other ends that people might embrace. These comprehensive doctrines need not themselves be consensual as long they each, for their own reasons, support the shared conception of justice as morally right, not merely as a *modus vivendi* to protect group interests.⁵² 'Reasonableness' includes 'willingness to propose fair terms of cooperation, and to abide by them, provided others do'.⁵³

Rawls' solution to the transition problem, then, is this. If our 'comprehensive doctrines' are not so comprehensive as to preclude 'the development of an independent allegiance' to democratic procedures for modulating conflict, then morally based respect for and consistent adherence to such procedures will produce the 'increasing trust and confidence in one another' necessary for an overlapping consensus.⁵⁴ A consensus on justice is bootstrapped from a prior moral commitment to democracy.

51. Rawls, above n 24, at 158.

52. *Ibid* at 144–146.

53. *Ibid* at 54.

54. *Ibid* at 168.

I do not dispute that such a consensus would be stable if it were realized, but whether it can come about in a divided society is doubtful. Relativism beckons again when we consider what groups with conflicting interests will say is fair and by what principles they can abide given those interests. The appeal to 'reasonableness' faces the same problems as the appeal to a sense of justice. To suppose that respect for democratic procedures will defeat the motivation to resist by those groups that would be harmed by implementing Rawlsian justice is naive. These groups would be unlikely to remain 'reasonable' in Rawls' sense. I do not mean that the privileged would affirm their interests against justice. Rather, they would affirm that their interests are just. The disadvantaged would differ, but appeal on their part to what the privileged would agree to in abstraction from their actual interests is unlikely to produce an overlapping consensus. Whether respect for democratic procedures could survive the likely ensuing conflict is itself unclear.⁵⁵

If the Rawlsian cannot invoke a prior consensus on democracy, neither can he simply call upon coercion to finesse the problem. He might argue that in a divided society it does not matter if there is consensus on Rawlsian justice or the justice of a transition to the well-ordered society as long as that justice can be imposed on the obdurate if that is necessary to bring about such a society. This might come about either through political struggles internal to a society or through force deployed by a foreign power. Rawls rather obliquely thus appeals to coercion in his discussion of why he thinks the ante-bellum Abolitionists and

55. Insofar as Rawls purports to speak for whatever consensus actually exists in 20th century America, the state of race relations does not offer much encouragement about the idea of building overlapping consensus through respect for democracy. See Andrew Hacker *Two Nations: Black and White, Separate, Hostile, and Unequal* (1992) and Thomas Byrnes Edsall & Mary D Edsall *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (1991), or consider the success of California Proposition 187 in 1994, denying undocumented immigrants access to social services. Its implementation has been enjoined by the courts, but the message is clear. The Regents of the University of California have abolished affirmative action in hiring and admissions in the largest university system in the country. Proposition 209, abolishing public affirmative action in California as a whole, named in proper Orwellian fashion, the Californian Civil Rights Initiative, passed in 1996 by a comfortable margin. Race conscious remedies for historical and ongoing racial discrimination, necessary since nominally 'color-blind' measures only perpetuate a status quo where whites are dominant, have been ruthlessly scaled back by the Supreme Court. For general discussion see Girardeau A *Spann Race Against the Court: The Supreme Court and Minorities in Contemporary America* (1993). Particularly notable are decisions limiting race conscious remedies in voting rights, see *Shaw v Reno* 509 US 630 (1993), government contracting, see *Richmond v Croson*, 488 US 469 (1989) and *Adarand v Peña*, 115 S Ct 2097 (1995), and employment contexts, see *Wygant v Jackson*, 476 US 267 (1986). Affirmative action in university admissions is under threat since the Fifth Circuit Court of Appeal's ruling in *Hopwood v Texas*, 78 F 3d 932 (5th Cir 1996) *cert denied*, 116 S Ct 2581 (1996). Meanwhile, the Supreme Court declined to consider statistical evidence of racially disparate application in reviewing death sentences in *McCleskey v Kemp*, 481 US 279 (1987). The upshot will be that Blacks will be increasingly excluded from political representation, business opportunities, advancement in employment, and higher education, and more likely to be executed—all in the name of equal protection of the laws. Such measures do little to promote increasing trust and confidence in one another or to enhance respect for democracy on the part of the less advantaged.

civil rights activists of the 1950s and 1960s were justified in seeking to impose their programmes of racial justice over the opposition of, respectively, slaveowners and segregationists in societies 'marked by profound division on constitutional essentials.'⁵⁶ Despite the lack of an overlapping consensus in these cases, the goal of bringing about 'a well-ordered and just society in which public reason could eventually be honored'⁵⁷ allowed invocation of the 'comprehensive doctrines' that supported freedom and equality if this was 'required to give sufficient strength...[to the overlapping consensus] to be subsequently realized.'⁵⁸

This manifestly will not work. If Abolitionists and civil rights activists could appeal to their non-consensual values to justify coercive imposition of their conception of a just society, the slaveowners and segregationists could do likewise. Their situations are exactly symmetrical, at least as far as Rawls has shown. For the white supremacists, coercion was necessary to maintain a racist society and appeal to their own nonconsensual values was necessary to give sufficient strength to conserve it. To describe the 'well-ordered society' simply as just in the absence of consensus or other basis for its justification is to beg the question. Whether its justice, rather than that of the white supremacists, can be non-arbitrarily characterized as the correct one, is precisely the disputed point. The obdurate advantaged must indeed be coerced to acquiesce to anything like a well-ordered society, but such coercion requires justification that cannot be provided by the flat assertion that the justice of such a society is superior.

The conception of justice of a well-ordered society with an overlapping consensus is stably realizable because people have similar interests—not in a hypothetical original position, but in actuality. A well-ordered society need not be so homogeneous that it could dispense with justice, but its stability would be based on actual, not hypothetical, agreement on justice. This is a consequence of the reply to Dworkin. Such a society could express its actual consensus by agreement on the elements of the original position and abiding by its results. But a divided society would have no such actual consensus nor be able to abide by the results of a hypothetical one. Neither a transition to a well-ordered society nor the development of an overlapping consensus can be built on a consensual basis when a society is divided into groups whose interests are antagonistic. And the argumentum ad baculum, the appeal to coercion, while practically necessary absent consensus, still requires reasoned justification. The CLS theorists, then, are so far correct in rejecting the possibility of a justice based on liberal neutral principles acceptable to all rational beings. If consensus is necessary to avoid relativism, it cannot be avoided in a divided society.

3. FISK'S RELATIVISM

The problem is brought into sharp relief by Fisk, who embraces the relativism Rawls eschews. While Fisk is not strictly speaking a CLS theorist (although he endorses the Critical approach in general terms⁵⁹), his is the most forthright,

56. Rawls, above n 24, at 249.

57. *Ibid* at 250.

58. *Ibid* at 251.

59. Milton Fisk 'Justice and Universality' in *Morality and Social Justice: Point/Counterpoint* (J Sterba et al, ed, 1995) p 240.

careful, and powerful version of relativism about justice of which I am aware, and the apparatus that he develops, sketched in section 3.1, is useful for framing the issues clearly. Moreover, as I argue below, this apparatus can be adapted for non-relativist purposes. Fisk considers the case of divided societies characterized by class, racial, or gender oppression. Such societies, we may say, involve *regimes of domination*. 'Domination' I define as unnecessarily unequal distribution of power to repress or to frustrate interests, such that dominant groups benefit at the expense of subordinate ones in virtue of their greater power.⁶⁰ It is unnecessary if in a feasible alternative arrangement (more) equal distributions of power are possible. This is not yet a moralized notion: domination may be justified or not, but it involves a *claim* to legitimacy. It is the exercise of normative, not merely brute, power, ie, it demands some sort of consent from those over whom it is exercised. This conforms to Fisk's account of justice.

Fisk's main concern is exploitation, the kind of domination he thinks that workers face under capitalism. For the purpose of thinking about relativism we need not take a position on this controversial question. I consider a form of domination about the existence or the legitimacy of which there is little debate, namely slavery, which in America involved racial and gender oppression as well as class exploitation. A vivid way to put the worry about relativism is that Fisk must say that slavery is just for slaveowners, though not for slaves. In general, the worry is whether all domination can be condemned as unjust without qualification, or whether any conception of justice that licenses it can be rejected on non-arbitrary grounds that apply to all, not merely to the dominated. This is something I think that we, in modern liberal democracies, want to maintain in reflecting equilibrium. Can we do so?

Fisk says not. In regimes of domination, Fisk thinks, three things will hold as a matter of sociological fact. First, group interests will conflict: dominant groups will seek to maintain their dominance; subordinate groups, to limit or end domination. We may call the goal of such resistance *emancipation*,⁶¹ where that means the restriction or abolition of unnecessarily unequal constraints on satisfaction of group interests. Second, this antagonism will tend to produce conflicting conceptions of justice. The 'official justice' of the dominant group will assert, and the 'radical justice' of the subordinate groups deny, the justice of domination. Third, each conception will express demands unacceptable to the other, and there is no middle way. Fisk concludes that relativism is unavoidable.

60. Fisk uses the term but does not explicitly define it. See Milton Fisk *Ethics and Society*, pp 41–53 (1980). My account is derived from the Frankfurt School's notion of *Herrschaft*, discussed in Raymond Geuss *The Idea of a Critical Theory*, (1981) pp 15–18. Geuss construes *Herrschaft* as the power to repress preferences rather than interests. In this change I think I am closer to Fisk's meaning. Domination may but need not involve the intention to impose unnecessary unequal frustration of interests; it may simply have that effect. For present purposes we may understand the idea of one group, S, benefiting at the expense of another, S', as Roemer suggests, in terms of S being worse off and S' better off were S' to withdraw from cooperation with S, ie as the possibility of a better alternative for S', in the sense of offering greater satisfaction of its interests. See John Roemer *A General Theory of Exploitation and Class* (1982) pp 194–195.

61. My term, not Fisk's. Emancipation is a matter of degree: a group may have an interest in resisting some forms or degrees of domination but not others (see n 107).

3.1 JUSTICE AS LIMITS, OFFICIAL AND RADICAL

Some explanation is needed of these two conceptions and the account of justice that informs them. For Fisk, a conception of justice is not a set of ideal principles derived by ratiocination but a pattern of limits on benefits enjoyed or losses suffered by different social groups.⁶² The pattern emerges from the actual practice of the government, including the judiciary, in the making and enforcement of law. To determine what justice is in a particular society, we look less to grand statements of purpose glossing the law (to 'promote the general welfare') or even to general legal principles (to 'compensate the victims of wrongdoing') than to the actual distribution of burdens and benefits to individuals as members of groups advantaged or disadvantaged by the operation of the law. The function of justice so conceived is to enable the state to maintain stable rule by reducing social dissatisfaction. Such a pattern becomes binding when the demands and concessions of every group attain an equilibrium point. This will vary with time and place, and, in divided societies, with what dominant groups can safely impose and subordinate groups tolerate. So there is no one correct conception of justice. A 'correct' pattern is one in the range tolerable under given circumstances.

Fisk accounts for the moral force of justice by pointing to its explanatory role in making governance possible. Why respect its claims? Fisk's reply is that we *do* in fact respect them,⁶³ and that we *must* respect them to have stable rule. If no limits are placed on the advantages some can enjoy while others suffer, the resulting discontent will make society ungovernable, and the advantaged will be unable to continue to enjoy their benefits. There is no transcendental reason beyond that, no answer to Thrasymachus–Plato's interlocutor in *The Republic* who challenges Socrates to say why justice is anything more than the will of the stronger.⁶⁴ Fisk only purports to tell us what it is to be just, assuming that we want to be. He has nothing to say to those who do not. This is typical of reflective equilibrium accounts. Rawls himself can appeal in the end only to what we accept as fair conditions for deciding on a conception of justice: if Thrasymachus does not agree that those are the fair conditions, or does not care about fairness, then argument is at an end.⁶⁵ Such accounts tend to agree with Mill that the 'sanction', binding force, or obligatoriness of morality is only 'the conscientious feelings of mankind',⁶⁶ and will say about those who 'do not possess the feelings it appeals to' that for them '...morality of any kind has no hold but through external sanctions'.⁶⁷

Fisk's, although not so advertised, is a reflective equilibrium account. Reconciling as far as possible competing group interests to enable stable rule involves balancing various considerations in the way called for by reflective equilibrium. Both Fisk and Rawlsian procedures encompass interests as well

62. Milton Fisk *The State and Justice 2* (1989) p 2 *passim*.

63. *Ibid* at 72.

64. Plato *The Republic* (G M A Grube, trans 1974) i 338c.

65. Rawls admits this in replying to Sandel, when he restricts the applicability of his theory of justice to modern liberal democratic societies. See John Rawls 'Justice as Fairness: Political Not Metaphysical', *14 Phil and Public Affairs* 223 (1985) as well as Rawls, above n 24.

66. Mill, above n 37, at 281.

67. *Ibid* pp 281–282.

as judgments and principles, although the former incorporates thickly described actual interests, including those that Rawls hides behind the veil of ignorance, while the latter incorporates only thin general interests in the primary social goods. Moreover, the Rawlsian procedure is theoretical, hypothetical, and individualistic while Fisk's is political, historical, and social. But if Fiskean political bargaining is to win acceptance of its results as justified, it requires the reflection and revision characteristic of reflective equilibrium. In actual societies, this is carried out, most notably, in political discussion of legislation and juridical interpretations of law. The evolution of the common and constitutional law and the development of statutory and administrative law in response to political pressures and subject to methodological constraints such as theories of, eg, statutory construction or judicial restraint are the public embodiments of reflective equilibrium.

In divided societies, at least two conflicting conceptions of justice tend to arise. The *official justice* is the set of limits acceptable to the dominant group and enforced by the state.⁶⁸ This justice mainly expresses the interests of, but is not dictated by, the dominant group. As the product of struggle and compromise, it incorporates subordinate group interests, though to a lesser extent. Otherwise, the state 'would provoke too much opposition to win it the widespread if not universal acceptance needed to govern.'⁶⁹ The arms production that brought the Nazis empire gave the workers jobs.⁷⁰ American slaves could not be exploited without limit or ruled by mere force: the 'peculiar institution' of slavery required consideration for their interests.⁷¹ As these examples indicate, the official justice need not give subordinate group interests non-instrumental or equal consideration. It need merely take them into account enough to gain acquiescence to governance exercised on behalf of the dominant group.

The official justice is therefore roughly coextensive with the law itself—the law in action rather than the law in books, to invoke Roscoe Pound's famous distinction. The relation is one of rough coextension rather than identity because even the official justice is the outcome of conflict. Actual law may in particular circumstances fail to coincide with what is functionally necessary for stable rule and state legitimacy, either because the dominant group may demand more than subordinate groups can be induced to accept or vice versa. Should this non-coincidence be generalized and persistent rather than local and temporary, the state and the entire regime of domination will be destabilized. The gap between the official justice and the law itself is crucially important, because it permits ethical appraisal of the law from the perspective of the official justice. Without the possibility of such appraisal Fisk's account of official justice would collapse

68. Fisk, above n 62, at 71.

69. *Ibid* at 93.

70. *Ibid* at 67–72.

71. Eugene Genovese *Roll, Jordan, Roll* (1974). Genovese's thesis that masters imposed a hegemonic systemic of paternalistic relationships in which there were mutual if highly asymmetrical obligations has been widely disputed, eg, by Jones, above n 39, at 204–205, largely because it is felt that this point underestimates the role of force and coercion in maintaining slavery. But the views are complementary, not inconsistent. Gramsci, on whom Genovese relies in formulating his theory, argues that stable rule requires a mixture of consent and coercion in which, if a society is to be stable, consent must be dominant element. Antonio Gramsci *Selections from the Prison Notebooks* 12, 80n, 161, 239, 242n, 267. *passim* (O Hoare & G Nowell Smith, eds and trans 1971).

into crude legal positivism and drain all moral content from the law. The law can also be ethically appraised from the perspective of radical justice.

Radical justice is the set of limits subordinate groups would be likely to institute if they were to become the ruling groups,⁷² to exercise hegemonic political and social power. It is roughly coextensive with the counterfactual law of a projected emancipatory order, or at least with the principles of jurisprudence that would inform such law. Similar considerations about the non-identity of law and justice apply here, *mutatis mutandis*; see section 4.2. Radical justice too involves compromise between group interests. It does not express the interests of one group merely.⁷³ Since it mainly expresses the interests of subordinate groups, however, if these are antagonistic to the interests of the dominant group, it may have no place for those interests. This will be so if the limits a subordinate group could accept were it the ruling group prohibited the activities that make the dominant group dominant. The radical justice of slaves would not merely limit the burdens and ameliorate the status of slaves but would abolish slavery itself, and thus slaveowners as a group.⁷⁴ As the 19th century Abolitionist Richard Hildreth wrote in *Despotism in America*, 'the only cure for slavery...[is] freedom.'⁷⁵

Radical justice arises, when it does, as the positive expression of moral outrage when subordinate group interests are trampled by official justice.⁷⁶ Since these groups are subordinate, that justice is more compromising to their basic interests, and they are more likely to be harmed by it. Sometimes a subordinate group responds to harm with outrage.⁷⁷ But if the harm is just by the standard of an official justice, such a group must express the wrong it feels in terms of an alternative justice. Otherwise it is hard for the group to say that it has been wronged rather than just harmed, to be more than just another 'special interest'. Whether the outrage thus given voice expresses a claim of justice depends on solidarity, a recognition of common interests the outraged group has with other subordinate groups. That is what makes the claim one of justice, not merely of narrow group interest.

Radical justice has the same sort of indeterminacy as official justice. Different subordinate groups may propose various radical justices. Given the disadvantaged circumstances of subordinate groups, a radical justice may prove quite difficult to formulate in practical way that actually grips and motivates the subordinate groups. Formulating and disseminating a radical justice requires resources, of which such groups have far less than dominant groups. Moreover,

72. Fisk, above n 62, at 71.

73. *Ibid* at 95.

74. What the specific interests of the subordinate group are matters. I assume that these are in fact emancipatory, but they need not be so in principle. Fisk's argument, but not mine, will apply in any cases where these interests are such that the justice of that group merely involves a reversal of the positions of the dominant and subordinate groups—eg the former slaves enslaving their former masters.

75. Richard Hildreth *Despotism in America* (1840) p 82, quoted in Jones, above n 39, at 10.

76. *Ibid* at 93–95.

77. For the circumstances in which groups and individuals are likely to respond with outrage rather than acquiescence, see Barrington Moore *Injustice: The Social Basis of Obedience and Revolt* (1978) pp 81–103.

the appeal of any such justice presupposes that a subordinate group has sufficient cohesion, sense of identity, and solidarity for it to recognize and acknowledge its interests as such and their justice. These considerations help to explain why such challenges are not more common or successful, a point to which I will return. For simplicity's sake I consider the case of one such group which opposes its justice, which we will suppose to be formulated, to an official justice.

3.2 THE CHOICE PROBLEM: WHICH SIDE AM I ON?

Which conception, if either, is correct? Can domination be justified or condemned as unjust? Fisk rejects 'ideal justice', whether this presupposes that the ends of each can all be furthered without compromise of basic interests or whether it invokes an abstraction from sources of conflict.⁷⁸ In divided societies, that is, Fisk denies the effectiveness of the sense of justice, if that means a motivation that might lead a dominant group to end domination or subordinate groups in the long run to accept it. Thus far Fisk and I agree on the critique of the Rawlsian approach.⁷⁹ But Fisk argues from dissension in divided societies to relativism.⁸⁰ For Fisk, *each justice is correct* for its associated group. Domination is unjust for subordinate groups, but just for the dominant one. There is no perspective from which all could agree on a conception of justice that would also motivate everyone, no non-arbitrary basis for choice that applies to all, no 'norm that transcends [group] differences'.⁸¹

Oliver Wendell Holmes, Jr for one, saw clearly that such fundamental and irreconcilable disagreement is inevitable in matters of law, a point that is vitally important because the law embodies the official justice. Rejecting the idea that a theory of government could 'establish its limits once and for all by logical deduction' because '...this presupposes an identity of interest which does not exist in fact,' Holmes wrote of legislation:

78. Fisk above n 62, at 67–68. The first version of ideal justice mentioned is utilitarian or, more broadly, consequentialist, and is Fisk's main target because it is less ideal (and so, he thinks, more plausible). He argues that consequentialist views of ideal justice fail for reasons like those I have advanced against Rawls. *Ibid.* at 72–79. Neither Fisk nor I consider natural rights theories like Dworkin's, see above n 16, but these too can be critiqued in the same way: claims of natural right, like those of contractarian or consequentialist justice, that violate the basic interests of some group will, by the interest thesis, be rejected by that group, and cannot provide a stable basis for social cooperation.

79. See Fisk 'History and Reason in Rawls', *Moral Theory*, in *Reading Rawls*, above n 4, at 53.

80. Fisk's own meta-ethical argument for this conclusion is based on a controversial ethical naturalism, on which ethical facts are just facts about human beings, their nature, and their environment. See *ibid.* and Fisk, above n 60, at 15–27. But relativism is also supported by the argument from reflective equilibrium, whose premises are perhaps less contentious.

81. Fisk argues too quickly that such conflict must end in 'resort to force'. *Ibid.* at 32. This often happens. But between agreement in principle and resort to force there is the large domain of politics, where basic disagreements are contested without overt violence or threat of its use. War is after all the continuation of politics by other means.

'Whatever body possesses supreme power for the moment is certain to have interests inconsistent with others who have competed unsuccessfully. The most powerful interests must be more or less reflected in legislation ... It is no sufficient condemnation of legislation that it favors one class at the expense of another, for all legislation does that.... The fact is that legislation in this country, as well as elsewhere, is... necessarily a means by which a body, having the power, puts burdens which are disagreeable to them onto the shoulders of somebody else.'⁸²

Dismissing the notion that judicial dissent was due to 'one side or another not doing their sums right' such that 'if they would take more trouble, agreement would inevitably come', Holmes wrote that the differing weights given to competing grounds in judicial decision derive from:

'...some belief as to the practice of the community or of a class... Such matters really are the battle grounds where the means do not exist for determinations that shall be good for all time and where decision can do no more than embody the preference of a given body in a given time and place.'⁸³

This is not merely a matter of community views varying with time and place, but, as Holmes' references to 'class' views and the law as a 'battle ground' indicate, to conflicting views due to antagonistic interests within a community at a time. Holmes noted that in workers' compensation cases judges tend to favor the defendant and juries the plaintiff and, he remarked, which view is right is 'a question of legislative policy ... that ... can[not] be settled deductively, or once and for all.'⁸⁴ Holmes reviewed several pro-business decisions in cases involving conflicts between labour and capital and raised 'doubt whether judges with different economic sympathies might not have decided such a case differently when brought face to face with the issue.'⁸⁵

Mere disagreement does not imply relativism, as Fisk knows, since either or both of the diverging parties may be wrong. But, Fisk would insist, a rational resolution of such disagreement, something that would count as a reason for one party to accept that she is wrong, cannot beg the question against her. And reflective equilibrium puts the hopes of such a resolution at risk where interests conflict in an antagonistic way. Any argument like Rawls' from 'widely accepted but weak premises to more specific conclusions' will fail.⁸⁶ If the 'more specific conclusions' violate the basic interests of some group, the premises turn out to be not so weak after all, and that group will tend to reject such premises on the unexceptionable grounds that one person's deductively correct argument to a certain conclusion will mean, for another, that premises implying such a conclusion must be wrong. Rawlsian argument from acceptance of initially attractive procedures to legitimate outcomes will not work if the outcomes are

82. Oliver Wendell Holmes, Jr 'Masters and Men'; *The Gas-Stokers' Strike*, in *The Mind and Faith of Justice Holmes* (M Lerner, ed 1943) pp 50–51, reprinted from 7 *Am L Rev* 582 (1873).

83. Holmes 'The Path of the Law', in *The Mind and Faith of Justice Holmes*, above n 82, at 79–80, reprinted from 10 *Harv L Rev* 457 (1897).

84. *Ibid.*

85. Holmes 'Privilege, Malice, and Intent', in *Collected Legal Papers* (1920) p 128.

86. Rawls, above n 6, at 18.

sufficiently unattractive, as violations of basic group interests would be. Procedures that produce such outcomes will be discarded on reflection in favour of procedures that produce better outcomes for one's group. Fisk then ends where Rawls starts, with competing justices undetermined by all the morally relevant data.

Since Fisk wishes to deny that domination is just, he must do so from the perspective of the subordinate groups. But why choose that perspective? This is *the choice problem*. A merely existential choice—'I go with the slaves'—is arbitrary. Fisk's emphasis on interest-motivated behaviour suggests a different reply. We do not *choose*: we simply *have* some interests; we *find* ourselves with them.⁸⁷ But first, that does not (by our own lights) make them morally acceptable. If I have a slaveowner's interests may I, within the limits of official justice, dominate my slaves? A view about justice that has this consequence is not, *prima facie*, in reflective equilibrium for us. For slaveowners the matter is otherwise, but we want to say that domination (especially slavery) is unjust without qualification.

Second, on the 'self-discovery' reply, individual autonomy, the capacity to choose or criticize ends,⁸⁸ goes by the board. If criticism of ends is limited by a perspective based in particular group interests, how can Fisk explain the judgment of Thomas Jefferson, a slaveowner, that slavery was unjust? 'I tremble for my country when I reflect that God is just; that his justice cannot sleep forever,' Jefferson wrote. Do we want to say that he was *wrong* to so judge? Or do we applaud his choice to judge against his interests, and regret that he did not go further? For Fisk, Jefferson was right from the slaves' perspective, but wrong from his own. That we *can* choose, however, is the point of saying that a choice problem exists at all.

Fisk might reply by invoking my own notion of sociological impossibility against this argument. Individuals like Jefferson may be able to choose, but the interest thesis, (2), tells us that social groups cannot, and since effective motivation on the group level is what matters, the problem of individual choice is irrelevant to concerns about social justice, whatever its bearing on personal morality. But the choice problem is important not merely for the sociologically negligible cases of members of dominant groups choosing (or, as with Jefferson, judging) against their interests, but also, and more crucially, for the cases where members of subordinate groups choose to reject acquiescence and voice outrage instead. Unless we think, against the evidence, that suffering and diminishment by themselves automatically provoke resistance, autonomy and moral choice

will be crucial in forming a radical justice. Such oppression does generate a motivation to resist. However, as Barrington Moore argues, 'pain can be anesthetized' or accepted if resistance is seen as futile. He underlines the sociological importance of 'iron in the soul', or the moral autonomy of a few individuals in generating a core of support for more widespread resistance to domination.⁸⁹ Without this it is hard to see how subordinate groups could have a radical justice to oppose to the official justice at all.

Third, the reply cuts off discussion too soon. The Abolitionist William Lloyd Garrison says, 'I go with the slaves'. The South Carolina Senator John C Calhoun says, 'I don't'. Now they fight. Perhaps they must fight, as they did. But if it comes to that—*especially* if it comes to that—it would be nice to have more to say about why. Even given world enough and time it is unlikely that Garrison could convince Calhoun, but Garrison should be able to justify his choice to himself. An appeal to interest will not do, at least if the choice is to be in any interesting sense moral and not merely prudential.

Fourth, Garrison was a minister, Calhoun a politician; neither were clearly members of dominant or subordinate groups.⁹⁰ Many people in divided societies occupy such intermediate positions, including Fisk, a professor, as well as most lawyers and many judges. What does the 'self-discovery' reply tell *them* about which side they are on? For those who do not belong to a group with unambiguous interests in domination or emancipation there is no fact of the matter about what justice demands, or more precisely, about which justice is demanded. We are back with the arbitrary existential choice.

4. REFLECTIVE ACCEPTABILITY AND STABLE REALIZABILITY

We need a way to rule out some conceptions of justice without abstracting from actual group interests or begging the question by appealing to considerations acceptable only to one sort of group. Two things must be shown. One, we must find some considerations each can accept, taking into account their interests, which provide some non-arbitrary basis for choice, such that the dominant group has a reason on its own terms to prefer the radical justice. Second, because on the interest thesis that group will not act on such a reason, or accept it as such, we need to locate an effective motivation to realize the radical justice in some other source. I propose as that source the interest of the subordinate groups in emancipation. Five remarks are in order by way of preface.

90. Moore, above n 77, at 90. Moore understands by moral autonomy three capacities: moral courage to stand up to oppressive or destructive rules, intellectual capacity to see that they are oppressive, and moral inventiveness to propose alternatives on the basis of which to critique such rules. Ibid at 91. This analysis makes clear why moral autonomy is absolutely crucial for subordinate groups.

91. I use Calhoun as my example because of his recognizability, but he was in fact a slaveowner. A case might be made that his primary identification was as a politician, but if he is not the best example one might use instead any of the little-known non-slaveowning Southern farmers who fought for the Confederacy without themselves having any interest in the preservation of the peculiar institution.

87. Fisk writes, '...[T]o decide [whether one is going to place oneself in a group] one would have to have adopted principles and values that it would be possible to have only through being part of some group already'. Fisk 'Intellectuals, Values, and Society', 15 *Phil and Social Criticism* 151, 161 (1989). As Fisk acknowledges, he here comes close to the communitarian views of Sandel. See Sandel, above n 4, at 153, *passim*. Where Fisk diverges from communitarianism is in his emphasis on social divisions and the efficacy of real interests over shared conceptions of the good.

88. See Rawls 'Kantian Constructivism', above n 8, at 544 and Rawls, above n 24, at 72–88.

89. Thomas Jefferson *Notes on the State of Virginia*, quoted in Derrick Bell *And We Are Not Saved* 28 (1987).

First, we need not produce actual agreement of a sort that would motivate everyone, or show that this would attend upon understanding of the issues. Few dominant groups in history changed their minds. The collapse of Communism is not typical.⁹² Slavery and Nazism had to be ended by force. What must be shown rather is that dominant groups *should* change their minds by their own lights, that their own standards demand this. If so, we—and they—have reason to condemn domination. People often do not do what they have reason to do, but if they have reason to do it, the choice problem will be thus far resolved and the relativism under consideration fail. Dominant groups will deny that they have reason to do it, but they need not accept that they do to have such reason. What their standards demand is an objective matter, determined by the content of those standards and not what they are imagined to demand.⁹³ In the face of denial, the question naturally arises whether these groups have changed their standards. I address this below.

Second, therefore, the argument should appeal to deep and general facts about justice and not to relatively superficial facts about particular conceptions that license domination. Otherwise the case against domination would be a piecemeal affair, addressed to views that might be defended by dropping the internal considerations that rule out domination. We want a consideration that cannot easily be dropped when it is grasped that it is inconsistent with domination. I argue that the notion of *realizability* on which the Rawlsian approach came to grief provides such a basis.

Third, the concern with motivation, with what people will in fact do rather than merely with what they ought to do, must carry over into the solution, or we will be left merely with one more version of an ideal justice. An argument only that dominant groups do have a deep internal reason on their own terms to prefer radical justice, even one that they cannot easily abandon or evade, is futile if no one will act on this reason. I locate the motivation to attain radical justice in the subordinate groups' interest in emancipation. The interplay between the reason that the dominant group has but on which it will not act and the motivation that the subordinate group has but the dominant group does not is necessary to establish the non-arbitrary character of the choice of radical justice. Because the dominant group has reason on its own terms to prefer that justice, but subordinate groups have no such reason to adopt the official justice, it is not question-begging

92. Another possible example is the end of European colonialism. But this is less clean and uncontroversial than the collapse of Communism. The latter met serious repression only in Romania, and only briefly. The former included not only the relatively pacific devolution in British India (closest to the Communist case) but also the lengthy and brutal conflicts in, e.g. Malaysia, Kenya, or Indochina. The end of apartheid in South Africa appears to be between these extremes of dominant group surrender and violent opposition. Even in cases where dominant groups did change their minds, as with Communism, it is doubtful that this explains the diminution or abolition of the form of domination their justices legitimated. The collapse of Communism or British colonialism is probably better explained in terms of their economic unsustainability than the rulers' change of mind.

93. Thus if I accept the principle of noncontradiction, but in the course of reasoning produce a contradiction, I am obligated by my own standards to reject at least one of the contradictory claims, even if I do not see the contradiction or think it gives me a reason to reject one or the other of them.

to invoke radical justice against domination. Because radical justice is grounded in the effective motivational of the subordinate group to bring it about, it is potentially sociologically possible, so not merely utopian or ideal, even from within the divided society that its realization would transform.

Fourth, for my purposes we need not eliminate all the indeterminacy. What makes the choice problem pressing is the concern that domination might be just, e.g. that from some perspective slavery might be morally acceptable as long as it was constrained in ways that permit it to continue. If we can rule out domination as unjust, the remaining arbitrariness among emancipatory conceptions seems harmless. At any rate, to rule out conceptions that license domination would be progress, and that is all I claim for my argument, if it works.

Finally, to what extent the argument works depends on contentious empirical hypotheses about history and human nature. If these hold, a strong version obtains and we can condemn domination as unjust without qualification (section 4.5). If not, only a weaker version can be maintained, which would thus rule it out, but only for 'us' (section 4.6). I first set out the core argument common to both versions, then explore its presuppositions and defensibility.

4.1 THE CORE ARGUMENT

The argument appeals to the fact that some interests, if their nature is generally recognized, can be largely satisfied, but others will tend to be frustrated by resistance to the harm that they cause. That is why dominant groups express their interests in fine language. They speak of divine right, natural law, equal opportunity. If they talked plainly of brute power, their days would be numbered. Such justifications work best if believed by the rulers as well as the ruled, and they generally are so believed. But for stable realizability, they must be accepted by the ruled. We may say that:

- (3) An interest is *reflectively acceptable* if and only if publicly acknowledging it would not in the long run tend to significantly frustrate its satisfaction.

The term is due to Raymond Geuss,⁹⁴ but my sense is different. For Geuss, a normative *belief* is reflectively acceptable for an individual if she can retain it after knowing how it was produced. For me, *group interests* rather than individual beliefs are the primary object of reflectively acceptable. Any such interests are reflectively acceptable if and only if public acknowledgment—to others, not mainly to oneself—would not thus frustrate those interests by creating resistance to their fulfillment. If public acknowledgment would thus frustrate their satisfaction, they are reflectively unacceptable. Normative beliefs, such as conceptions of justice, may be reflectively (un)acceptable in a derivative sense, insofar as they support interests that are thus (un)acceptable.

This suggests a case against the reflective acceptability of interests in domination and the adequacy of conceptions of justice based thereon. In outline it goes as follows:

- (i) A conception that is not reflectively acceptable cannot be maintained in the long run: it is not stably realizable;

94. Geuss, above n (6), at 62.

- (ii) but a conception not thus stably realizable is inadequate; and
- (iii) no conception that licenses domination, however limited, is reflectively acceptable.
- (iv) So, a conception that licenses domination is less adequate than one that does not.

To spell out the argument in more detail:

- (i) For any conception of justice to be stable and realizable, it must be reflectively acceptable. Call this the reflective acceptability condition:

- (4) Reflective acceptability is necessary for stable realizability.

This is not Rawls' 'publicity condition.' That is a 'formal' moral constraint to the effect that the principles that regulate a society should be known to all and known to be universally accepted.⁹⁵ By contrast, (4) is a non-moral claim that if the interests promoted by a conception of justice are reflectively unacceptable, they will generate resistance that frustrates their satisfaction—roughly, because enough of the people cannot be fooled enough of the time. This is a corollary of the interest thesis, (2). A conception of justice that violates a group's basic interests will tend to be rejected by its members as inadequate. Whether this is true depends on human nature and history, and is highly contentious, at least for subordinate groups. If enough people can in general or in some circumstances be fooled enough of the time, or if their resistance is not in the long run effective, an argument based on reflective acceptability is vitiated or weakened (sections 4.5–4.6).

Here I remark only that those harmed by the promotion of such interests have an interest in changing their situation. The claim may be more plausible if understood precisely. It is not that:

- (4.1) If the interests promoted by a reflectively unacceptable conception of justice were publicly acknowledged, they *would* be effectively resisted.

That must hold. But an argument that depended on (4.1) alone would fall to Dworkin's sort of objection. The reflective unacceptability of the underlying interests might not be thus acknowledged, and generally will not be. If it is not, that the conception would be so resisted were it to be acknowledged would be a merely hypothetical feature. Rather the claim is that:

- (4.2) If (4.1) is true, those interests *will* be thus resisted.

A conception with this feature will create opposition even if its promotion of such interests is not publicly acknowledged by the dominant group or indeed recognized under a correct description by the subordinate groups. The harm it licenses will tend to cause those harmed to resist in any event. As noted, this will not be automatic. Resistance will typically require a few individuals with moral autonomy to get it off the ground. Effective resistance does not, however, require any sophisticated social theory nor depend on ideal knowledge or full information either about the subordinate group's situation or its own motivations. The subordinate groups' grasp of the interests that harm them may be crude,

simplistic, or even inaccurate as long as it produces the outrage that frustrates the satisfaction of those interests.⁹⁶ What is necessary for reflective unacceptability is that those interests tend to be frustrated by resistance to the harm they cause. As long as those harmed resist effectively, their understanding of why they resist hardly matters. Better understandings may of course promote more effective resistance and the harm endured by subordinate groups does give them a motivation to understand its causes.⁹⁷

(ii) Both dominant and subordinate groups will accept the realizability condition, (1), that an adequate conception must be able to motivate us. All will agree that no principles of justice can bind us if we cannot in the long run abide by them. The modality is that of sociological (im)possibility. The issue is whether a system embodying a conception of justice can be stable, not whether an individual can respect that conception. Even had Jefferson freed his slaves, as he could have done—manumission was legal and not uncommon in America until the early 19th century—it would not have threatened the institution of slavery. If a regime cannot be maintained without significant modification or replacement of its conception of justice, however, it is sociologically impossible and its conception of justice is not stably realizable. The key point here for the core argument is that (1) is not relative to the interests of just one particular group, specifically the subordinate group. Stable realizability is in the interests of both, including the dominant group.

What matters here is not that (1) is shared but that the dominant group accepts (1) and cannot satisfy it if its justice is reflectively unacceptable, while the subordinate group does and can if its justice is thus acceptable. Sharing *per se* does no work in the argument. What does the work is the asymmetry. The two groups happen to share (1), but even if they shared no principles we would have reason to prefer a conception that does not fail by its own standards over one does. The point of the core argument is that the official justice is of the former sort and the radical justice the latter.

A dominant group might try to save a reflectively unacceptable conception of justice by giving up the realizability condition. Why, it might say, should long-run survival be a desideratum? Perhaps a good social order, like an intense pleasure, cannot be sustained. Realizability, however, would be a lot to give up. This move would concede that a just order would provoke such resistance that it could not in the long run survive. That must be implausible even for a committed defender of official justice. This is because what is at issue here is *justice* and not some other value, such as virtue, honour, or civilization. Whatever else justice involves, it requires Rawls' 'genuine reconciliation of interests'. No regime that generates enough resistance to threaten its survival has attained this, whatever other excellences it may, however briefly, embody. This makes the point that the official justice is inadequate.⁹⁸ And were the dominant group to

96. For example the harm may be understood in religious terms, as it often was for slaves. See Genovese, above n 71. Some religious terms may be correct, but since religious doctrines conflict, not all of them can be correct together.

97. See Schwartz 'The Paradox of Ideology', above n 13.

98. This raises the question about whether effective resistance by dominant groups shows that the radical justice of the subordinate ones is inadequate. I take this up in section 4.2.

95. Rawls, above n 6, at 133.

justify its rule on other grounds, it would be stuck with the awkward conclusion that the good society would not have an adequate justice.

Still, the dominant group might accept, with Plato, that a good order will not last forever,⁹⁹ but may be content that it lasts for centuries. Centuries, it might be said, are stable realizability in practical terms, and evidence that the official justice is as reflectively acceptable as necessary. Here why the regime survives is relevant. If it fails to provoke resistance, that is evidence (not conclusive) that it is reflectively acceptable and indeed just (see section 4.3). Resistance, however, raises a *prima facie* doubt about its justice, which is all the sharper if a feasible alternative would not provoke such resistance. If what explains the regime's survival in the face of resistance is merely superior force, that creates a justificatory problem by dominant group standards—and a threat to its stability. To admit that a regime rests on force rather than justice is to abandon the claim to exercise normative rather than brute power. I do not assume that the latter is immoral, but appeal to the fact that dominant groups typically, and wisely, want to say they rule by right, not merely by might. If they rule by mere might, their regime's survival does not count, by their own lights, in favor of its justice *vis à vis* a less contested feasible alternative. Even a regime that does rule by mere might, therefore, will not care to admit it.

(iii) It follows from (4) and (1) that only a conception of justice that is reflectively acceptable is stably realizable, thus adequate. But interests in domination, and conceptions of justice that promote them by licensing it, are reflectively unacceptable. If these were publicly acknowledged, subordinate groups would resist their fulfillment and reject a conception of justice that depends upon and promotes such interests. This is the strong nondomination claim:

(5) Domination is not reflectively acceptable.

Why should (5) be so if domination is not yet a moralized notion? Its ethical status, after all, depends in part on whether it is unjust, which is the issue here. The answer is that its reflective unacceptability turns on the factual claim that it involves unnecessary harm to subordinate group interests, which gives those groups a motivation to reject it—a corollary of the interest thesis. Moreover, if subordinate groups can invoke a radical justice, they will condemn domination on its basis, and this will, as a matter of fact, stiffen their resistance. The satisfaction of interests in domination, therefore, requires that these interests be concealed. A regime of domination must represent itself as necessary, natural, and in the general interest. But this picture is false if the regime is based on domination, *i.e.* involves unnecessarily unequal frustration of group interests, as was the case with slavery.

The sort of justifications offered by historical regimes of domination is strong support for (5). Slaveowners could not admit that slavery was based on domination without creating mass outrage. Like Calhoun, they had to argue that slavery, 'instead of an evil...is a positive good.'¹⁰⁰ Its defenders maintained that slavery did not involve domination but gave full and proper consideration to the interests of slaves as members of a 'subordinate and inferior class of beings,' as

Chief Justice Taney put it in the notorious case of *Dred Scott v Sandford*.¹⁰¹ A South Carolina Appeals Court said in 1837:

'The slave ought to be fully aware that his master is to him what the best administered government is to the good citizen, a perfect security from injury. When this is the case, the relation of master and servant becomes little short of that of parent and child—it commences in the weakness of one and the strength of the other. Its benefits produce the corresponding consequences of deep and abiding grateful attachments from the slave to the master...'¹⁰²

That slavery involved subordination was obvious and incontestable,¹⁰³ but slaveowners held that this subordination was necessary and mutually beneficial, so not domination. Theories about racial inferiority must be specious to ground a claim of domination, but the point here not that they are false, which of course they are, but that dominant groups have felt impelled to make them, to deny that their power involved domination, as Plato recognizes in his notion of the 'noble lie'.¹⁰⁴ This is evidence that domination is reflectively unacceptable.

(iv) The conclusion of the core argument is that no conception of justice that permits domination can be adequate. If some regime, like slavery, involves domination, the reflective unacceptability of the interests underlying its official justice will be a long-run source of instability. Whatever new justifications its defenders develop, whatever concessions are forced on the state, domination compromises basic subordinate group interests. This cannot be admitted without risk to the governability of the state. Even if domination is not admitted, it gives subordinate groups a standing disposition to reject the official justice that permits it. This disposition may be manifested only intermittently and under special conditions, but it will persist. In sections 4.4–4.6, I discuss whether and to what extent this is enough to undermine the stable realizability of official justice.

If it is, the official justice is inadequate because it demands a sociologically impossible state of affairs. The inadequacy is not perspectival. Subordinate groups have at least two reasons to reject such a conception: first, its harm to their interests, and second, its unrealizability. The dominant group can accept only the second, but that is enough. In condemning domination as unjust the subordinate groups need not question-beggingly appeal to their particular interests nor abstract the

101. 60 US 393, 404 (1857) (a slave who has been taken to a free state is not a citizen of the United States and has no right to sue in federal court). Taney, however, stated that Blacks were 'so far inferior, that they had no rights which the white man was bound to respect' so that 'the Negro might justly and lawfully be reduced to slavery for his [the white man's] benefit'. *Ibid.* at 407. The benefit of the slave apparently did not figure in the matter for Taney. If the argument of this paper is correct, Taney's sort of view cannot be the official basis for any lasting relations between dominant and subordinate groups. The weight of scholarship is that it was not. Jones says that the official ideology of the slaveocracy was that 'enslavers were benevolent patriarchs who cared for, protected, and cherished their slaves. In return, supposedly loyal and grateful servants labored happily and diligently to please their beloved masters'. Jones, above n 39, at 27.

102. *Tennent v Dendy*, 23 SCL (Dud.) 83, 86 (1837). This way of thinking involved a good deal of wishful thinking, as Jones comments, drawing attention to the conditionals in this passage. Jones, above n 39, at 197.

103. Unlike some other forms of domination, for example, wage labor. That this involves subordination is not obvious, even if, as socialists contend, it is a form of domination.

104. Plato, above n 64, at iii 414a ff.

99. Plato, above n 64, at viii 546a–b.

100. John C. Calhoun, quoted in Richard Hofstadter *The American Political Tradition* (1948) p 79.

groups involved from their actual interests. They can appeal to stable realizability, which the dominant group accepts. The dominant group need not share the emancipatory interests that destabilize official justice to recognize their efficacy, or to stand condemned by its own standards if it does not. If it accepts the realizability constraint, it has reason to reject the justice of domination. It will be unlikely to agree, but if it does not, it will be wrong by its own lights.

That the dominant group will not agree, nor be motivated by its own standards, does not generate the utopianism that besets the Rawlsian account. That problem arises because the Rawlsian needs a consensual motivation, unavailable in a divided society, to abide by Rawlsian justice or to justify a transition to the well-ordered society. But the present proposal avoids utopianism because in it justification and consensus come apart. The justification of radical justice is that unlike official justice, it is stably realizable, a condition of adequacy the dominant group will grant. Radical justice therefore begs no question against that group. But since the dominant group will not be motivated by this justice, the motivation for the transition to an order where this justice can be realized is not consensual. It is given by the emancipatory interests of the subordinate groups.

Because the dominant group cannot be expected to agree, the solution is not liberal. If 'neutral principles' are ones that command assent from all rational beings, such principles are practically unavailable in a divided society. The principles of radical justice are not neutral. They reflect the perspective of the subordinate groups and spring from the interests of these groups. Insofar as these interests preclude domination, the justice which rationalizes them would abolish the dominant group as such, proscribing the preconditions of its dominance, and depriving it of the benefits of domination. This justice would thus deeply violate the most basic interests of the dominant group, which therefore will rationally reject it, even though it ought not do so, on its own terms, insofar as its commitment to stable rule requires that it invoke a justice purportedly embodying Rawls' 'genuine reconciliation of interests'. Since its own interests in domination preclude such a reconciliation, it cannot actually accept such a justice, and its official justice will be inadequate.

A liberal might try to save neutrality by granting the argument but charging the dominant group with irrationality in upholding a justice inadequate on its own terms. All *rational* people, the liberal might say, will accept some radical justice because of its greater adequacy. But appeal to consensus by all rational people, so understood, as the justification of radical justice, is simply a version of the Rawlsian abstraction from the actual interests which guarantees its 'irrational' rejection by those whose interests it harms. That rejection is indeed in a sense irrational, in that the greater adequacy of radical justice gives even dominant groups a reason to accept it, although they will not. If it were not so, we would be back with relativism. But the core argument precludes the consensus on justice liberals seek. It locates the justification of the preferred conception not in a hypothetical consensus, which will not motivate in a divided society, but in the genuine reconciliation of interests possible only in an emancipatory order without domination, which underwrites the stable realizability of that order and the greater adequacy of its justice. It locates the practical possibility of that justice, the motivational grounds for bringing it about, in the emancipatory interests of the subordinate groups, interests which are not shared by the dominant groups.

Thus we can respond to the relativist challenge within the framework of a reflective equilibrium account. If domination is reflectively unacceptable, it is unjust from the perspective of both the dominant and the subordinate groups.

Non-arbitrary choice among conceptions of justice is possible even in a divided society. The relativist challenge seems to be defeated. But the core argument faces at least three major objections. Two of these can be answered, but the third requires important qualifications that significantly reduce the strength with which its conclusion can be maintained.

4.2 SYMMETRY

First, the argument depends on an asymmetry between conceptions that permit domination and ones that do not. Fisk denies that this exists.¹⁰⁵ Openness about domination would undermine the dominant group's ability to retain power, but openness about emancipation would reduce subordinate groups' chances to end domination. Radical justice must outrage the dominant group as an illegitimate claim of special interest, for official justice licenses domination as well as limits it. The more strongly subordinate groups adhere to a radical justice, the more violently the dominant group will reject it. Slave and serf revolts were ruthlessly put down; worker resistance faced great repression; men have opposed women's self-assertion.¹⁰⁶ These facts pose a grave practical problem for any emancipatory program and seem, theoretically, to put both sorts of justice on a par.

Still, the asymmetry remains. How to make a subordinate group the ruling one is a different concern from whether, once it is the ruling group, its justice permits stable rule. Fisk addresses the first, the problem of transition. Here there is no question of maintaining stable rule, for if the appeal of radical justice is strong enough to provoke such a violent response, official justice has failed to ensure stable rule. It has shown itself to be not stably realizable. If justice is a set of limits necessary for rule, a challenge that puts in doubt who rules, at least if based on an alternative justice, is a standing refutation of the justice in question.

Would radical justice permit stable rule? If the subordinate groups' struggles succeed, they will create a society free from domination.¹⁰⁷ This society may include groups with divergent or conflicting interests, and so would require

105. Fisk, above n 59, at 240-241, responding to an earlier version of this criticism in Schwartz 'Revolution and Justice', above n 13.

106. Some feminists would dispute that the violence against women's resistance has been less, citing sanctioned misogynist violence in many cultures (footbinding in China, clitorrectomy in Africa, witch-burning in early modern Europe), and unofficial but widely practiced rape or spousal abuse in our own. Pervasive violence against women is real, but my point concerns organized suppression of organized resistance. There has been little of the latter until recently, and it has not met the kind of suppression faced by, say, Nat Turner. Why that might be is an interesting question on which I cannot speculate. But it suffices that even modern feminist movements have faced an uphill battle against masculine privilege.

107. A subordinate group may have an interest only in emancipation from a particular kind of domination (see above n 61). Women's emancipation may not require that of slaves. (The early women's suffrage movement, however, was strongly Abolitionist.) I suppress this qualification for the sake of simplicity. But if a radical justice opposes some form of domination but licenses other forms, its greater adequacy will be only comparative. It may be more adequate than the official justice it opposes, because it would abolish the forms of domination that justice permits, but still itself inadequate because it permits some forms of domination. Only a justice that does not permit domination at all can be fully adequate.

justice to establish limits on benefits and losses. But the conflicts would not be antagonistic or admit of no ultimate compromise. None of them would be based on domination. The interests promoted by the radical justice of an emancipatory order could be announced to all the groups in society without provoking outrage. Since domination would be abolished, no dominant group would exist to be outraged. So dominant group resistance would not destabilize radical justice. Such resistance is only an issue in the transition.¹⁰⁸ Once established, radical justice would be stably realizable in a way that the official justice of a regime of domination is not.

Things may not be so simple. Even without domination, radical justice may provoke resistance. Any justice involves winners and losers. Rectifying past injustices, for instance, might call for preferential treatment of historically disadvantaged groups, like descendants of slaves. Members of formerly dominant groups would be deprived of benefits to which they are not entitled under a radical justice. They would tend to resist this harm. If the resistance were severe, this might destabilize the radical justice. They need not project a restoration of their dominance; theirs might be an alternative radical justice, calling for strict equality of opportunity as opposed to affirmative action. But the realization of *that* justice would be destabilized by resistance from the formerly subordinate groups, which would be harmed by strictly equal treatment. If either radical justice is to be more adequate than an official justice, domination must produce greater harm and more resistance than any radical justice that eliminates domination. No domination means no group consistently loses, so this is not implausible. Should it be otherwise, Fisk's objection stands. Even if not, a radical justice that provokes such opposition can claim only greater, not absolute, adequacy on grounds of stability.

Even if radical justice would be stable, Fisk says, the problem is precisely the present and not the future. Here and now, pointing to 'a future society in which equal power can be affirmed publicly as a social good...has no tendency to validate' a radical justice, which will be unjust by the lights of the dominant group. 'Only if [official justice] were ruled invalid in advance could such a goal lend absolute validity to the radical justice.'¹⁰⁹ Fisk raises against me my own objection to the Rawlsian appeal to a well-ordered society. The justice of such a society will not motivate in a divided society, and it begs the question against the official justice to appeal to radical justice to support emancipation.

But I do not appeal, question-beggingly, to radical justice to justify emancipation, but to a principle of official justice to undermine the justice of domination. The principle is (1), the realizability condition, which even the

¹⁰⁸ Suppose, though, that a dominant group exterminates a subordinate one, as the Nazis attempted to do with the Jews. Must we say that such extreme domination is not unjust if it is successful? No, first, because extermination is incompatible with the reconciliation of interests necessary for justice. Abolishing the possibility of resistance in this manner is the apotheosis of rule by brute force. Second, the objection presupposes that domination can be condemned only by the subordinate group that it affects. It is the argument of this paper, of course, that domination is unjust for everyone because justice is objective in the sense specified. The argument, if valid, does not require that any particular group actually draw the conclusions called for by their own premises. Nazis should but will not acknowledge that the Holocaust was immoral, but if I am right, their moral blindness does not undermine the judgment that it was immoral even for them.

¹⁰⁹ Fisk, above n 59, at 241.

dominant group will accept. If domination cannot be stable because it is reflectively unacceptable, the official justice stands condemned by its own lights, and so is indeed ruled invalid in advance. If the dominant group denies this, the destabilization produced by resistance to domination will prove it wrong. The struggle for emancipation refutes the official justice on its own terms. The radical justice must be reflectively acceptable and more stable to be preferable, but we have seen that it probably would be.

This reply captures what is right in the Rawlsian appeal to a well-ordered society. Its justice is more adequate than that of a divided society because it satisfies (1). But the Rawlsian needs the sociologically impossible demand that the dominant group be consistently motivated by its own standards, which include (1). The appeal presupposes a shared motivation that can only be created in a well-ordered society. I do not justify emancipation by appeal to such a motivation. I appeal only to the fact that the dominant group accepts (1), and thus has a reason (on which it is quite unlikely to act) to support emancipation. That a dominant group, unlike subordinate ones, cannot live up to its own standards counts not against my proposal but against the official justice.

4.3 BRAVE NEW WORLD

The transition problem is serious, however, though not for reasons of symmetry. *Some* groups must be effectively motivated—and not merely have reason—to resist domination. My account depends crucially on the strong resistance thesis:

- (6) Subordinate groups have a standing disposition to resist domination.

This empirical claim follows from (5), the strong non-domination claim, and (4), the reflective acceptability condition. If domination is reflectively unacceptable and stable realizability requires reflective acceptability, domination will not be stably realizable. It will provoke resistance. A plausible psychological generalization supports (6). If group interest is a more effective motivation than any sense of justice—the interest thesis, (2)—then the harm due to domination gives subordinate groups a motivation to resist which will generally be stronger than appeals to sacrifice for the 'common good' expressed in terms of an official justice. That the sacrifice is unnecessary makes the motivation all the stronger. Resistance, then, is to be expected.

Moreover, resistance is observed. Regimes of domination were often riven with strife that threatened their survival and forced modification of their conceptions of justice. American slavery lasted over 300 years, but slaveowners lived in the shadow of rebellion for the entire period.¹¹⁰ This forced such limitations as abolition of the slave trade. '[O]pposition to the slave trade in the planting colonies,' says W E B DuBois, 'was based principally on the political fear of insurrection.'¹¹¹ More common lesser resistance required paternalistic

¹¹⁰ See Herbert Aptheker 'Negro Slave Revolts in the United States' in *Essays in the History of the American Negro* (1945) pp 60–70.

¹¹¹ W E B DuBois *The Suppression of the African Slave-Trade* 1, 23, in *Writings* (N Huggins, ed 1986).

accommodation as well as repression in response.¹¹² Such lesser resistance ranged from persistent shirking and appropriation through escape to epidemics of arson and even killings of brutal overseers and masters.¹¹³ Insofar as the history of all hitherto existing societies is the history of subordinate group struggles, that is support for (6).¹¹⁴

Even if (6) is true, however, should the injustice of domination depend on whether people happen to be disposed to resist it? In Huxley's *Brave New World* or in Orwell's *1984*, where pervasive domination provokes no resistance, the official justice is not inadequate because not stably realizable. It is *ex hypothesi* stably realizable. Yet surely the kindly manipulations of Huxley's Fordism or, worse, Orwell's 'boot stamping on a human face, forever' are unjust, whether or not they are resisted! Absent a disposition to resist, it seems, domination could not be condemned on the grounds that I urge. But this cannot be right: injustice is injustice, whether or not it is resisted. This is the second main objection to my proposal.

The uncomfortable conclusion that there is no injustice without resistance must be qualified. I argue that domination is unjust if people are disposed to resist it, not that it is just if they are not. A disposition to resist is evidence that the reconciliation of interests necessary for justice does not exist. Lack of such a disposition is evidence that it does, but is not constitutive of such a reconciliation. Stability maintained in the face of resistance by merely superior force fails to legitimate a regime as just—see section 4.1 (ii); likewise, absence of even a disposition to resist, if due merely to superior force, does not establish a reconciliation of interests and thus justice. Mere acquiescence is insufficient for justice.

In 1984, a new language must be imposed to make resistance unthinkable; in *Brave New World*, people are chemically pacified. These are forms of rule by merely superior force. Both states of affairs are compatible with the subordinate groups having interests which domination violates but on which they cannot form a disposition to act. This does not appeal to an ideal justice arrived at by invocation of hypothetical non-coercive circumstances. Rather the point is that if a claim to rule by right is made on the basis of a reconciliation of interests, the need for linguistic 'reform' and chemical intervention is evidence that no such reconciliation exists. In these cases, there is no actual resistance to support a charge of injustice. But the explanation for this lack of (even a disposition for) resistance blocks any claim that its absence, and attendant stability, is due to justice.

But suppose no such coercive measures are needed. Such a regime would in fact be just on my account. This may not, however, be so implausible. The justice of social arrangements depends deeply on what people happen to be like. We can see this if we consider how mere facts are relevant to the justice of some practices in a context distinct from, though related to, the present claim. As noted, defences of domination often appeal to purported facts about natural inequalities, and critiques of domination require attacks on such justifications. Were black people as they are presented in racist fantasies, enslaving them would arguably

be just, assuming no lesser degree of subordination were possible for people like that. (Any greater subordination than necessary would provoke destabilizing resistance, and thus fail to satisfy stable realizability.) The racist supposition is false, but its falsity is crucial to the injustice of racially-based slavery. And were people so constituted that they did not mind subordination, without coercion being required to maintain this state, that would be evidence that it did not violate their interests in an objectionable way, and so was just.

4.4 THE GRAND INQUISITOR

This reply raises a third, deeper worry: that the hypothetical situation envisaged is actual, that we live in a *Brave New World*. Dostoevsky's Grand Inquisitor claims that history shows that domination accords with human nature. Most societies have been regimes of domination. Many survived for millennia. Slavery or serfdom has been the lot of perhaps most humans in recorded history. If capitalism is such a regime, as Fisk thinks, it seems quite stable, having outlived Soviet Communism. The acquiescence of subordinate groups in pre-modern societies is no less striking. Women have endured male domination time out of mind. Does not all this show that regimes of domination can be stable and their official justices adequate in my sense? If so, then the reflective acceptability condition is false.

We may account for acquiescence in terms of subordinate group ignorance of their interests or alternatives, or of adaptive preference formation in a context of domination.¹¹⁵ In the alternative we may argue that such submission is rational given subordinate group capacities and alternatives.¹¹⁶ The dynamics located by both explanations contribute to the observed stability of regimes of domination. However, if they can be stable, as the Grand Inquisitor claims, conceptions of justice that license such domination are reflectively acceptable. If their stability is due to coercion, as might be argued if one or both of the sorts of explanations bruted was correct, that stability would not support the justice of the regimes in question. But to have confidence that such an explanation rather than the Grand Inquisitor's was correct, we would need evidence. If indirect and theoretical evidence were all we had, eg, that the groups involved were indeed ignorant of their interests, that alternatives existed of which they were unaware, that their capacities for resistance were weak, or that their values and desires were affected by subordination, then we might have to settle for such a case. But the strongest argument against the Grand Inquisitor would be reality of effective resistance.

I see two possible responses, neither of which seems to me entirely satisfactory. The *strong case* denies that the Grand Inquisitor is right about human nature. The *weak case* denies that he is right about 'our' nature. We can condemn the justice of domination without qualification if the former holds, but can only thus condemn it relative to 'us' if only the latter holds. I hope the strong case holds, but if not, we may have to settle for the weak case.

112. See Kenneth Stampp *The Peculiar Institution*. (1956) chapters 3–4. Genovese, above n 71, part 1. Jones above n 39, *passim*.

113. See Jones above n 39, chapter 1.

114. For modern societies see Barrington Moore Jr *Social Origins of Dictatorship and Democracy* (1966) and above n 77.

115. See Jon Elster *Sour Grapes* (1982).

116. See Joshua Cohen & Joel Rogers *On Democracy* (1980).

4.5 THE STRONG CASE

If domination is to be unjust without qualification on the grounds I suggest, it must be reflectively unacceptable to all (normal) people, and this must tend to undermine any regime of domination. Emancipation must be an effective motivation, not just a basic need. This motivation cannot be so effective that domination could not occur. But it must be effective enough so that domination cannot be stable. That does not mean that any such regime must be overturned by endogenously generated resistance. But it must face persistent if intermittent destabilizing pressure which tends to progressively limit the degree of domination permitted—and sometimes to abolish a form of domination altogether, as with slavery.

The strong case, then, requires a directionality in history towards emancipation, a long run tendency towards a state of affairs without domination. It commits us to a quasi-Hegelian strong progress claim to the effect that history is the progress of freedom.¹¹⁷

(7) In the long run, domination tends to decrease in degree and kind due to subordinate group resistance.

The claim is only quasi-Hegelian because it does not posit complete emancipation as a *telos* that pulls history in its train. The directionality is due to causal 'push' at each stage, by resistance to particular forms of domination. For Fisk, outrage may develop into a radical justice which effectively motivates. The strong case, though, requires such resistance. The emergence and success of resistance is contingent, but without it, the strong case fails.

That may seem like a lot to swallow. To establish anything like the strong progress claim would be a major project in comparative history and social psychology. All I can do here is to indicate why it might not be utterly implausible that resistance will in the long run succeed, that despite fluctuations emancipation is cumulative and progressive. We might argue that subordinate groups are unlikely to easily surrender gains they have won. If resistance ever succeeds, it produces gains for subordinate groups, and they will come to regard these as something like a matter of right. They will be outraged if their hard-won benefits are compromised. Each gain in emancipation will build upon previous gains, and domination will be progressively limited in kind and degree. Compromises can be forced on subordinate groups; that is why fluctuations may (and do) occur. Regressions may be sharp, as with the 'second serfdom' of the European peasantry or the rise of Jim Crow in the American South. But is it so implausible that unwillingness to surrender gains provides a basis for a general tendency towards greater emancipation?

A facile optimism about the inevitability of progress is unwarranted. But so is a facile pessimism about its improbability. Much of the superficial plausibility of the Grand Inquisitor's argument rests on what C. Wright Mills called 'crackpot realism,' the presumption that a gloomy outlook is warranted simply because it is gloomy. Resistance to domination is both expectable and pervasive. Sometimes, moreover, it is successful either in forcing concessions on dominant groups and modifying the official justice in an emancipatory direction or, less frequently, in abolishing a form of domination altogether. That is not enough for the strong case,

which requires that the overall trajectory of history be towards reduced domination and increased emancipation.¹¹⁸ I have not shown that this holds, but I hope I have indicated why it might be reasonable to hold it as a working hypothesis.

I wish I found the strong case more satisfactory or that I could produce better evidence for it. It must be qualified to avoid any suggestion that complete emancipation is inevitable, that history has any necessary sequence of stages, or that reversions to previously abolished kinds or degrees of domination are impossible. But even thus qualified it would commit us to the claim that long run progress towards emancipation is probable and universal. It might be thought that the long run invoked here is too long and that the claim is itself implausible.

First, the 'long run' of the strong progress claim may be Keynes' long run, in which 'we are all dead.' If any emancipatory effects of resistance do not benefit any living generation, how can they support a condemnation of domination? What good is this justice if we must say with Kafka, 'There is an infinite amount of hope—but not for us'? With a Keynesian long run, are not regimes of domination stably realizable for practical purposes, and so immune from my critique? This objection, however, confuses an understandable doubt about the worth of such a critique to living people, if they will not benefit by the emancipatory tendencies that sustain it, with a scepticism that it works at all if domination can be stable for long periods. The latter I have addressed in section 4.1 (ii). If the critique works, the former is irrelevant, at least from a logical rather than an immediately practical point of view. That domination can be condemned as unjust without qualification may not benefit the dominated, but my question was whether it *can* be thus condemned. If resistance will ultimately succeed, domination can be condemned. But whether resistance will succeed, or indeed occur, is debatable.

Second, then, the strong progress claim may be over-optimistic and ethnocentric. In his study of the historical value of freedom, Patterson argues that while slavery was near-universal in the ancient world, and was paired with ideals of freedom, these 'never came to term' anywhere but in the West. Elsewhere, '[p]eople...resisted [their] gestation and institutionalization.'¹¹⁹ Now freedom is only one emancipatory value. Resistance to domination may take other forms. But Patterson's case that an effective demand for freedom depends on a constellation of local, particular, and contingent historical factors the coincidence of which is relatively improbable, and not on a universal human nature, could be generalized for other emancipatory motivations.

118. Mere resistance—even successful resistance—is too weak for the strong case, which requires (?), not just (6). Someone like Foucault might argue that such resistance merely replaces old forms of domination with new ones of equal severity. See Michel Foucault *Discipline and Punish* (A Sheridan, trans 1979). (Foucault's own notion of 'disciplinary power' does not involve unequal power to frustrate interests, but set that aside.) If so, the fact of domination would be stable even if no form of domination would be, and we could not, on my grounds, condemn as unjust domination as such. For the strong case, the Foucauldian must be wrong. Even if the Foucauldian is right, though, we could still say that each form of domination is unjust on my grounds, though domination as such would not be. Thus, if resistance to each such form is inevitable, as Foucault thinks, and is in the long run successful, we might have a 'moderately strong case'.

119. Orlando Patterson *Freedom*, vol 1 (1991) p 20.

117. G W F Hegel *Introduction to the Philosophy of History* (L Rauch, trans 1988) p 22.

4.6 THE WEAK CASE

Whether this is right I do not know. If it is, perhaps what is reflectively acceptable varies across epochs and cultures,²⁰ and domination may be thus acceptable in many circumstances. We might still say that domination is unacceptable to 'us', where the scope of that pronoun is somewhat vague, taking in perhaps the 'modern' world, since the 17th century, or even the 'Western' world—a cultural designation including those who accept Patterson's values of freedom. That might extend 'us' back to the Greeks. Then we could say that we at least have grounds for choosing conceptions of justice that preclude domination. The weak case depends on *our* emancipatory motivations tending to destabilize any regime of domination we face. It replaces the strong nondomination, resistance, and progress claims with relativized counterparts:

- (8) Domination is reflectively unacceptable to us;
 (9) In *our* societies subordinate groups have a standing disposition to resist domination; and
 (10) Given *our* motivations, culture, and history, in the long run, domination in *our* societies tends to decrease in degree and kind due to subordinate group resistance.

The weak progress claim, (10), says nothing about the general probability of progress. It admits that our intolerance for domination, stated in the weak resistance claim, (9), arose contingently. Given (8), the weak non-domination claim, the weak progress claim, avoids objectionable ethnocentrism.²¹

The weak case has less anti-relativist force than the strong case. It renders domination unjust *for us*, and would apply to dominant and subordinate groups in *our* societies. But it would leave us unable to condemn as unjust the regimes of previous epochs or other cultures where domination was reflectively acceptable. It might be unjust for capitalists, Communist bureaucrats, or antebellum slaveowners—but not, perhaps, for feudal lords or ancient slaveowners; or, depending on the scope of 'we', maybe for all of those, but not for T'ang warlords, Aztec rulers, or the *jinbanza* (freedom slaveowners) of the African Imbangala.

That may be enough. If the choice problem is *ours*, a problem for the present, as Fisk claims, we may not be too disturbed—or surprised—if our moral judgments fail to apply to others whose culture and history are so different that their motivations are alien to us. Geuss, arguing against Habermas' ahistorical, transcendental basis for a critique of domination, insists with Adorno that 'we must start from where we happen to be historically and culturally, from a particular kind of frustration or suffering experienced by human agents in their attempt realize some historically specific project of the "good life"'; our moral theories, even if "effective" and "true", are so only "relative to this particular historical situation."²²

120. Geuss, above n 60, at 66–67.

121. Strictly, the weaker claims need not be relativized to us, but they must be relativized to societies or cultures in which domination is reflectively unacceptable and for which subordinate group resistance promotes increased emancipation. The weakening is necessary if not all societies and cultures satisfy that description. I shall continue, however, to speak of relativization 'to us'. This way of talking does depend on the perhaps overoptimistic assumption that domination is unacceptable to us.

122. Geuss, above n 60, at 63.

The strong case is not transcendental, but its empirical basis is questionable. Rorty denies that 'human nature' is a useful moral concept.²³ It is, he thinks, delusive to comfort ourselves (as the strong case suggests) that 'even if the Orwellian bureaucrats of terror rule for a thousand years the achievements of the Western democracies will someday be duplicated by our remote descendants.'²⁴

But we neither need nor can have any 'demonstration of the superiority of our way of life over all other alternatives';²⁵ that it is ours is enough, and indeed all we can get. In real debate and politics, 'we must in practice privilege our own group, even though there can be no noncircular justification for doing so.'²⁶ Rorty disputes the label, but this is tantamount to relativism as I define the term.

Still, the relativism of the weak case is more limited than Fisk's. For him, no common basis exists within *our* divided society to choose between competing justices. The social divisions we face here and now, he thinks, are as deep as those between us and the Aztecs. But if the weak case is right, this is not so. We need not go as far as Rorty in denying that internal social divisions are deep enough to give rise to competing justices. But if in our societies domination is reflectively unacceptable, non-arbitrary grounds exist for choosing emancipatory conceptions, and relative to us, domination can be condemned as unjust without qualification.

From a legal point of view this should provide all the objectivity we could use in the choice of principles of justice applicable to interpreting or framing legislation or deciding cases. Or, since in a divided society the law and its application will tend to reflect the official justice, this should give us as much objectivity as we might want for the purpose of critiquing laws and decisions that reflect an inadequate justice and proposing laws and interpretations that reflect a more adequate one. The problems associated with societies far removed in time or radically different in culture have less legal than moral salience. Judges and legislators are not, after all, called on make or apply law for such societies, but for their own.²⁸

Yet if my objections to Fisk's relativism hold, the outcome of the weak case should disturb us at least theoretically. That case gives us only a version of the 'self-discovery' basis for choice, if choice indeed it is. That we have a certain

123. Rorty, above n 50, at 31. The strong case does not imply *this*, even if, as Rorty thinks, modern liberal democracy is the end of history. But the strong case does imply that Orwellian domination would eventually be reduced and then replaced by some more emancipatory order, if not necessarily the kind of liberal democracy that prevails in the late 20th century industrialized West.

124. *Ibid* at 34.

125. *Ibid* at 29.

126. In multicultural societies, particularly those which include premodern cultures or cultures with strong premodern elements, judges and legislators may be so called upon, and the problem of dealing with practices of domination in traditional cultures which are incorporated into modern societies may pose the relativist worry quite sharply for the weak view. The tension in India between the practical subordination of the Untouchables and the formal egalitarianism of the law is strong. Still, these cases, while important and hard to address, are somewhat marginal for practical legal purposes in more fully modern societies where remnants of premodern culture are slight. The moral questions remain pointed, however, insofar as we want a critique of the justice of, eg, sexism in conservative or fundamentalist Islam. Here the strong view provides a clear basis for critique apparently lacking in the weak view.

history and culture that has shaped us to resist domination is a contingent and arbitrary fact. Given who we are, thus shaped by that history and culture, we may have no choice but to resist domination. It is not clear that this gives us a reason to do so, in the sense of a justification of the legitimacy of the values we happen to have, and our capacity to choose our ends will be limited. Rorty and Gross might reply that our capacity is indeed limited, that no non-circular justification of those values is possible, and that the weak case is enough to defeat the most worrisome sort of relativism, on which we would have no grounds for condemning the domination of our own divided societies as unjust without qualification. Perhaps the weak case is the best case there is. I hope not.

5. CONCLUSION

Relativism is a problem if acceptability in reflective equilibrium is a constraint on any conception of justice. In divided societies, the official justice of the dominant group will conflict with the radical justice of subordinate ones. Each justice will tend to emerge as an expression of group interest limited by the requirements of ruling. Rawlsian abstraction from interests as sources of conflict leads to a conception of justice that is not stably realizable because a society cannot be organized on the supposition that people will act in opposition to their basic group interests. Liberal attempts to adjudicate conflicts between competing justices fail because the consensus liberalism needs is unavailable or merely hypothetical, so incapable of motivating. But Fiskean acceptance of competing justices as valid for their associated groups, endorsed or implied by some versions of Critical Legal Studies, leaves choice among conceptions arbitrary and requires us to say that domination is just for dominant groups. Liberal moral theory and jurisprudence is rightly reluctant to embrace such relativism.

The theory mooted here offers a non-liberal basis for objectivity about justice. A basis for choice that favors the justice of emancipation must be compatible with the actual interests people have, so that they can be motivated to act on it, while accepting the inevitability of interest-based dissension about justice in a divided society. Reflective acceptability provides such a basis if domination is either thus unacceptable without qualification (the strong case) or unacceptable to us (the weak case). In either case, domination will tend to be resisted, destabilizing the social order that embodies it and preventing the stable realization, in the long run, of an official justice that permits it. Insofar as both groups accept stable realizability as a condition of the adequacy of a conception of justice, both have reason to prefer a radical justice, although dominant groups will not act on this reason or indeed accept it as such. Nonetheless it is a reason they have to do so.

The strong case is based on contentious claims about the existence of an effective universal human interest in resisting domination, and implies a suspect view about the probability of progress. But the weak case applies only to our own situation, however we define who 'we' are. Moreover, it risks, to a somewhat lesser extent, the arbitrariness of Fiskean relativism, a problem more troubling for generally ethical rather than specifically legal concerns. Neither case escapes relativism altogether in the sense of indicating a unique favoured conception of justice, but both allow us to avoid the sort of relativism that deprives us of non-question-begging grounds for condemning domination—the weak case to a rather lesser extent. We need not, then, succumb to such relativism if we accept reflective equilibrium as a constraint on conceptions of justice.

The application of the 'broad principle of Hedley Byrne' as between parties to a contract

Simon Whittaker
Fellow, St John's College, Oxford

In *Henderson v Merrett Syndicates Ltd*¹ the House of Lords held, *inter alia*, that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with its express or implied terms. In doing so, it made clear (with respect, correctly) that the much-quoted passage in Lord Scarman's speech in *Tat Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*² should not be interpreted as assigning to contract an domain exclusive of tort and it thereby upheld the formerly predominant view which allowed concurrence of actions in tort and contract in principle.³ However, in finding a duty of care on which to base the plaintiffs' claims in tort, Lord Goff in *Henderson* relied on *Hedley Byrne* as establishing a very broad principle of liability in tort based on the defendants' 'assumption of responsibility' and this principle invites a radically different treatment of the relationship between the tort of negligence and contract between parties to contracts. For, as Professor Burrows has observed, the idea of 'assumption of responsibility' leads only too easily to the proposition that a person who owes a contractual obligation to do something for the other party should be held to have 'assumed responsibility' in respect of it, such an assumption, at least when coupled with special skill or knowledge on that person's part, leading to the imposition of a duty of care in the tort of negligence in respect of its accomplishment even where breach of this duty causes only pure economic loss.⁴ Such a very wide view of the basis of liability for 'assumption of responsibility' was recently accepted by the Court of Appeal in *Barclays Bank plc v Fairclough Building Ltd (No 2)*⁵, and this decision strikingly illustrates how it may circumvent established rules of contract law. This article will, therefore, first examine the impact of the principle of 'assumption of responsibility' as between parties to an agreement where that agreement relates to the subject-matter of the assumption of responsibility relied on to found a duty of care in tort.

However, in another recent decision of the Court of Appeal, *Holt v Payne Skillington*⁶ a further aspect of the relationship between liability in contract and

1. [1995] 2 AC 145.
2. [1986] AC 80, 107. For some of the cases in which this dictum has been cited, see *Chitty on Contracts* (27th edn, 1994) paras 1-048, 1-062-64 (S Whittaker).
3. This view was famously exposed and adopted by Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] 1 Ch 384. For earlier authority, see *Brown v Boorman* (1842) 3 QB 511, (1844) 11 Cl & Fin 1 and F Pollock *Torts* (1st edn, 1887) p 434 and see *Chitty on Contracts*, para 1-058.
4. A Burrows 'Solving the Problem of Concurrent Liability' (1995) CLP 103, 120-121.
5. [1995] 1 LRLR 605.
6. (1995) Times, 22 December (Lexis Transcript used).