DEMOCRATIC JUSTICE IN TRANSITION

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DEMOCRATIC JUSTICE. By *Ian Shapiro*. New Haven: Yale University Press. 1999. Pp. xiii, 333. $29.95.

TRANSITIONAL JUSTICE. By *Ruti G. Teitel*. New York: Oxford University Press. 2000. Pp. ix, 292. $35.

Ruti Teitel's[1] *Transitional Justice* and Ian Shapiro's[2] *Democratic Justice* come out of very different academic traditions. But they both develop a view of justice that might loosely be called pragmatic by virtue of its treatment of justice as a value that is simultaneously grounded in practice and powerful in bringing about social and political change. Moreover, they both use this shared pragmatic view of justice to provide us with two things that are of great importance to the study of transitional justice and democracy in general. The first is an explanatory framework for understanding how legal institutions and claims about justice function during periods of transition from authoritarianism to democracy. The second is a normative framework for generating principles of justice that can be used to democratize practices in all spheres of life: personal, social, economic, and political.

Teitel and Shapiro's general view of justice is very compelling on its own terms and particularly well suited to the efforts of those who want to think about justice practically without degrading it or treating it as merely superstructural. The pragmatic view of justice they develop does not, like its transcendental counterparts, force us to locate a universal moral principle called justice. Nor does it, like its more cynical realist counterparts, force us to accept the status quo or to resign ourselves to a world where justice is considered to be no more than a mere mask for power politics and economic interest. Instead, it allows us to treat our moral and legal values, including justice, as both historically situated constructs and powerful tools for bringing about social and political change.

While the pragmatic view of justice that Teitel and Shapiro develop is potentially more realistic and more useful than its transcendental and Marxist counterparts, it is not all that easy to substantiate

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in particular cases. Indeed, it is very difficult to substantiate in particular cases, since it requires us to view particular notions of justice as grounded in particular social and political practices and to show how these notions shape, maintain, and change the particular communities of which they are a part. Not surprisingly, very few of those legal and political theorists who now call themselves pragmatists actually get around to the required level of historical interpretation and empirical analysis, and those who do tend to focus on values that are obviously institutional in nature, such as property, rather than on those values such as justice that, while in dire need of contextualization, appear too far removed from practice to be grasped as anything other than universal truths.[3]

Indeed, outside of John Rawls' recent avowal of pragmatism in his revised theory of justice,[4] very few of those now writing on justice attempt to understand justice as both grounded in, and powerful over, social and political practice. Instead, they generally fall back on either an idealist notion of justice, according to which justice is above, albeit applicable to, politics, or a realist notion of justice, according to which justice is so steeped in politics that it has no power to shape, maintain or change social and political institutions. In other words, they generally fall back on the very realist/idealist divide that Dewey and other pragmatists spent so much effort on putting to rest.

Both the realist and the idealist notions of justice have, admittedly, the advantages of simplicity in most of their many guises — advantages that pragmatists can only envy from afar, since their own analyses are necessarily messy. But neither of these two notions of justice is as attractive as its adherents suggest that it is. The realistic notion of justice — or at least that which treats justice as politics — appears to be empirically sound. But it is too flat in its determinism to grasp the various ways in which justice as an ideal exerts power over the social and political practices of which it is a part. Hence, while it manages to avoid the traps of idealism, it does not in the end live up to the very standards of realism that its advocates rightly place at the center of our attention.

The idealist notion of justice is, in its most abstract formulation, coherent. But it cannot as so formulated help us to figure out what justice looks like in particular contexts. Nor can it show us how to balance justice claims with the practical constraints of institutional life. For, to do so, it would have to incorporate into itself both the details of particular spheres of life and the rules according to which particular social and political institutions are now governed. In other words, it would have to allow itself to be determined, if only in part, by the very

3. *See, e.g.*, MARGARET RADIN, REINTERPRETING PROPERTY (1993).

4. JOHN RAWLS, POLITICAL LIBERALISM (1996).

contingencies of social and political practice that it is supposed to be free of as a transcendental value.

Interestingly enough, those idealist notions of justice that now appear to have a great deal of substance do so because those who articulate them assume as givens a variety of historically and culturally particular institutions and practices. Rawls himself acknowledges the dependence of his own principles of justice on the historically and culturally particular practices of Western democracy: liberal individualism, market economics and secularism. But he does not provide concrete connections between his two principles of justice, on the one hand, and these particular practices, on the other. Nor does he tell us how they operate together. Hence, in the end, he confronts the same dilemmas of application that other idealists face in their efforts to develop normative theories of justice that are practical.

All of this suggests that both the purely idealistic and the purely realist notions of justice have serious drawbacks. The purely idealist notion cannot be translated into practice without smuggling historically and culturally particular norms and institutions into itself. These norms and institutions call out for justification and undermine the transcendental and universal identity of justice itself. The purely realist notion, on the other hand, cannot cope with the fact that justice is itself a governing practice that has power over the very institutions of which it is a part. Nor can it make sense of practical ideals in general.

Not surprisingly, these drawbacks become particularly obvious, and troublesome, in cases of transitional justice — for example, in cases where a particular regime is trying to move from authoritarianism to democracy, or in cases where efforts are being made to correct injustices within existing institutions. In these cases, justice cannot possibly be viewed as transcendental or universal, since it is, at least in its worldly guises, constantly in flux. Nor can it be viewed as a mere reflection of the status quo or of prevailing power relations, since it is frequently a powerful ideal in altering prevailing power relations and in democratizing institutions and practices that were in the past undemocratic.

In these cases, we would appear to be in need of a notion of justice that not only bridges the idealism/realism divide, but that treats justice in the following ways: first, as part of institutional life, rather than as an ideal imposed from above; second, as infused with the practicalities of institutional life, rather than as tainted by them; third, as manifested differently at various stages of history and within distinct social and political institutions; and fourth, as a powerful tool for bringing about social and political change. In other words, we would appear to be in need of a notion of justice that views justice realistically while preserving its standing as a powerful ideal — a notion of justice we might call pragmatic.

How might we articulate such a notion of justice? How might we use it to explain and to argue normatively about justice in transitional regimes and in cases where we wish to move beyond the status quo within existing institutions? Ruti Teitel and Ian Shapiro provide us with intelligent, creative, and compelling answers to these questions, first by developing a notion of justice that is both realistic and normatively powerful, and then by using this notion of justice within their own richly detailed studies. Teitel focuses on the nature and functions of transitional justice in various democratizing regimes of Eastern Europe, Africa, and Latin America. Shapiro develops a principle of democratic justice that is both grounded in various spheres of life, both public and private, and powerful in rendering these spheres of life more democratic than they are now.

I. TRANSITIONAL JUSTICE IN PRACTICE

Teitel begins *Transitional Justice* by making clear that in cases of transitional justice, like in cases of "ordinary" justice, law does not determine politics. Nor does politics determine law. Instead, the two shape each other within a dialectal relationship that is mutually constructive. Hence, we cannot view law in transitional contexts as a mere product of economic interests or political circumstances in the way that, say, critical legal theorists do. Nor can we, like idealists, view law as outside the boundaries of transitional politics. Instead, we have to view law as produced by, and powerful over, both transitional politics itself and the more particular norms ostensibly associated with it. How can we do so? What does transitional justice look like in such a dialectical framework?

According to Teitel, while transitional justice shares many of the characteristics of other legal systems, including its valuation of the rule of law and its emphasis on regularity, it takes on special transitional qualities by virtue of its role in structuring the normative and institutional transformation of a political community from one regime to another. Not surprisingly, many of these characteristics are analogous to the transitional process itself. In other words, they lead us to view justice in transitional contexts as in flux, partly determined by the flow of events, straddled between different sets of norms, and effective in bringing about social and political change.

Teitel treats her conception of transitional justice as controversial and as a major contribution to the study of transitional regimes both past and present:

> The thesis of this book is that the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. The conception of justice that emerges is contextualized and partial: What is deemed just is contingent and informed by prior injustice. [p. 6]

Since transitional justice is always situated between at least two legal and political orders, it implies paradigm shifts in the conception of justice itself and, as such, is considerably less stable and cohesive than "ordinary" kinds of justice. According to Teitel, in "ordinary" social contexts, law provides order, stability, and continuity. But in extraordinary periods of political upheaval, law provides all of these things *and* acts as an agent of transformation by, among other things, developing hyperpoliticized forms of adjudication and providing frameworks for discovering and airing the ugly truths of the past. In other words, it manages to take on two functions that remain constantly in tension with each other.

Teitel treats as a paradox the fact that justice during transitional periods functions both to provide stability, order, and continuity, on the one hand, and normative and institutional change on the other. "Transitions imply paradigm shifts in the conception of justice; thus, law's function is deeply and inherently paradoxical" (p. 6). Likewise, she claims that such paradigm shifts render transitional justice radically different from "ordinary" justice. "[I]n transition, the ordinary intuitions and predicates about law simply do not apply" (p. 6). Hence, she concludes that we need to develop a completely new framework for analyzing transitional justice or, in her terms, a "paradigm of transformative law" (p. 6).

Teitel, in the end, probably overstates her case in claiming the existence of a radical disjuncture between transitional justice and "ordinary" justice, since "ordinary" justice shares many of the characteristics that she describes here as "extraordinary." (She concedes later in her analysis that transitional justice has "affinities to law in nontransitional circumstances" and that "one might think of transitional jurisprudence as exaggerated instantiations that vivify conflicts and compromises otherwise latent in the law, and, in particular, illuminate law's relation to politics" (p. 228).) Moreover, she confuses matters somewhat when she talks about the tensions that are created by transitional justice's dual functions of stability and change as a "paradox," since these tensions reflect, not a disjuncture between intentions and consequences, but rather the complicated nature of law itself.

The model of transitional justice that she develops, however, is comprehensive, very useful, and grounded in a great deal of empirical evidence. According to the model, all instances of transitional justice share four general qualities. First, they situate themselves between at least two different regimes whose normative basis is strikingly different — e.g., authoritarianism and democracy. Hence, they inevitably embrace a mixed bag of principles. Second, they are designed not only to create stability in transition, but also to move the community in question from one regime (whose norms are bad) to another regime (whose norms are good), and so to correct past injustices. As such, they are both associated with a set of positive goals — e.g., democracy

— and structured by the nature of the particular evils that they try to overcome.

Third, unlike "ordinary" cases of justice, cases of transitional justice do not pretend to be apolitical or uncreative. Instead, they are designed to realize a particular set of political goals and to lay the foundations of political transformation by redistributing power and wealth, constructing new legal orders, and shaping new collective identities. Finally, in doing all of these things, cases of transitional justice often find it necessary to infuse legal judgments themselves with political considerations of a very worldly — and sometimes obviously partisan — sort.

Since transitional societies differ greatly with respect to both culture and history, these four features of transitional justice take on very different forms within particular transitional contexts, as well as in particular spheres of legal justice: criminal, reparatory, administrative, constitutional and "historical." Likewise, they function very differently in particular communities and have significantly different consequences — both positive and negative — across particular cases. How are they manifested in particular spheres of justice? What is their function in the transitional process? What consequences follow from them for the community in transition?

In the context of criminal law, transitional justice takes the form, not only of punishment, but also of amnesty and clemency, in association with past crimes and acts of regime violence. It also functions to keep order, to draw a line between regimes (in cases of punishment), to heal wounds in the community (in cases of amnesty and clemency), and (in all cases) to reinforce the norms and values of transition. Moreover, it does so with an eye to the political consequences of these measures in particular contexts. Hence, it is, as we might expect, less regularized than "ordinary" criminal justice.

Since it is self-consciously practical, flexible with respect to the standards and criteria that it employs within particular cases, and keenly aware of the political consequences of its judgments, criminal justice in transitional contexts is inevitably more effective and politically useful to those in power than criminal justice in many other contexts. But it is for these same reasons open to abuse. Indeed, as Teitel nicely demonstrates, its very flexibility and openness to politics threatens to undermine the legitimacy of law itself and to raise the specter of criminal justice as a series of political show trials. How, if at all, can such abuse of criminal justice be prevented in transitional contexts?

In one of the most well thought out and fruitful sections of the book, Teitel argues that many of the worst abuses that we might expect of criminal justice in transitional contexts can be prevented by using international systems of justice, which, she claims, divorce questions of punishment from national politics. According to Teitel, international systems of justice provide standardized grounds for account-

ability and hence greatly reduce the possibility of political show trials, even though they might not, as Teitel suggests, eliminate the dilemmas of successor justice altogether.[5]

Transitional justice is equally political and powerful, as well as open to political abuse, in cases of reparatory law. In these cases, transitional justice repairs the economic damage from earlier periods by redistributing wealth, instituting new rights, and restoring victims' dignity through the legal recognition of the wrongs they suffered. Admittedly, the state often pursues reparatory justice in these cases for the sake of economic development and political stability. But it also uses reparatory justice to reconstitute the political community it represents by giving individuals an economic stake in community membership.

Since so many of the schemes of reparatory justice instituted during transitional periods are intended to give citizens an *economic* stake in the community, they tend to create a new class of property holders, whose activities as property holders have very important consequences for transitional politics. In some cases, members of the new class contribute in important ways to the development of liberal democratic institutions. In other cases, they tear the community apart, prevent a smooth transition to democracy, and reintroduce authoritarianism. In both kinds of cases, reparatory justice grows out of the need to check past abuses and plays an important role in the development of new political paradigms, even though these new paradigms of politics may not always be as liberal or as democratic as originally intended.

Not all cases of reparatory justice, of course, involve individuals or members of classes as the focal point of attention. Indeed, some of the most interesting cases of reparatory justice involve the state as both the perpetrator of abuses and the provider of reparations. In many of these cases, the issue is whether a present state should assume the debts of its predecessor. Not surprisingly, such cases are often resolved on the basis of economic considerations. But they also involve considerations about the state's identity through time and have important consequences for identity formation among both individuals and state actors.

As Teitel cogently argues, a state's willingness to assume the debts of its predecessor is often a sign of intended continuity between regimes and, if backed up with concrete acts of reparation, can lead to the development of an historically inclusive identity.[6] Conversely, a state's unwillingness to pay reparations to the victims of its predecessor regime, which occurred most obviously in post-Civil War America,

5. "Within the international legal system," she writes, "the dilemmas of successor justice fall away." P. 33.

6. This was the case, Teitel argues, in post-World War II Germany, although even in this case the inclusive identity created through reparations involved rejecting much of the older regime.

signals the desire of such a state not only to distance itself from the abuses of the previous regime, but also to exclude the previous regime from national identity — that is, to start anew with respect to national self-consciousness.

What about administrative and constitutional law? Both kinds of law, as it turns out, take on very peculiar — or distinctly transitional — characteristics during transitional periods because of their role in transitional politics, and because of the tension that develops between this role and the more conventional stabilizing functions of law. Administrative law is most strikingly different in transitional periods because of its participation in the purges that exclude former leaders and bureaucrats from power. Transitional constitutional law differs most obviously from its "ordinary" counterparts in that it is frequently, although not always, designed as a set of interim measures, rather than as a permanent fixture of the regime.

Since transitional justice in both administrative and constitutional law is by nature more flexible, activist, and political than administrative and constitutional justice in "ordinary" contexts, it is potentially more effective in bringing about social and political change and in transforming the norms of the regime itself. But it is also potentially more damaging to the regime, especially in cases where the norms in question are those of liberal democracy. In these cases, the hyperpolitical nature of law creates a "tension of illiberal means directed to liberal forward-looking ends" (p. 163). As such, it threatens the process of liberalization itself, and possibly even the meaningfulness of democracy as espoused by the transitional regime.

Teitel admits that such a threat is serious, and that transitional justice is also found in places that appear to have lost sight of their original liberal democratic goals. But she argues that neither the threat posed to liberalization by transitional administrative and criminal justice nor the fact that transitional justice appears to exist in regimes in the process of moving backward creates a fundamental problem for her analysis. She explains, in a passage that is bound to be controversial, that transitional justice is often self-correcting and capable of checking its own power. "Post-war purges lasted only a short while," she writes, and "[t]ransitional constitutions . . . transcend political arrangements" (pp. 163, 210).

In the end, Teitel does not include acts of backsliding in her model of transitional justice itself. But she does present other aspects of transitional justice in great detail and organizes them together into a coherent whole that should be very useful to all those concerned about both the legal institutions of transitional justice and transitional movements in the particular geographical areas that she covers. Moreover, she does so with a keen sense for the differences that exist across regimes and through time. Hence, she manages not only to provide us with a model of transitional justice that is valuable to legal

scholars and area specialists but to contribute in important ways to the comparative study of transitional law, both past and present.

While Teitel's model of transitional justice goes very far in articulating the institutional mechanisms of transitional law, it does not, as it turns out, tell us a great deal about the *ideals* of justice that guide the transitional process in particular cases. Nor does it explore the connections between these ideals and the institutional mechanisms of transitional law that it does articulate. Instead, it takes these ideals, which are largely liberal and democratic, for granted and focuses on transitional *law* as the subject matter of transitional *justice.*

Presumably, if Teitel had focused attention on the liberal and democratic ideals of justice that she cites as manifest in the legal institutions of transitional justice, she would be forced to confront a set of very sticky questions that she does not now address, questions such as: What if the legal institutions of transitional justice in place fail to move us towards those goals of liberalism and democracy that we associate with justice? Can we still talk about these institutions as just? Do we in these cases have to distinguish between two different notions of transitional justice: one normative, the other legal? If so, what is the normative notion of justice at work in cases of transitional justice?

Since Teitel has taken on a largely explanatory, rather than conceptual or normative, project, she is under no obligation to answer the last question (although the first three questions would still seem to be within her purview). How might a normative political theorist answer this question? Presumably, she or he would have to take a step back and ask: How might we bring justice and democracy (or liberalism) together into a democratic (or liberal) principle of justice? How might we ensure that such a principle is useful in bringing us closer to democracy (or liberalism) in transitional contexts? What might such a transitional principle of democratic (or liberal) justice look like?[7]

DEMOCRATIC JUSTICE

In *Democratic Justice*, Ian Shapiro provides an excellent example of what such a principle might look like. Shapiro, like Teitel, begins with a plea for pragmatism in formulating principles of justice in general, a plea that rejects transcendental ideals of justice and recognizes that justice is, at all levels of abstraction, part of particular social and political practices. But Shapiro, unlike Teitel, is a normative political theorist. Hence, he does not set out to explain what justice looks like in particular contexts, although he does manage to incorporate a great deal of empirical knowledge into his arguments. Instead, he sets out to

5. I do not think that it is important to treat liberalism and democracy as analytically separate here, since, while they might in the end be compatible, they are clearly in tension at points.

develop a political — as distinct from a distributive — principle of justice that will enable us to move beyond the status quo and democratize existing social and political institutions.

Shapiro calls his principle of democratic justice a "semicontextual ideal" to underscore that while it is both grounded in practice and manifested differently within particular institutions, it is not merely a reinforcement of present convention. Instead, it is a guiding principle that, though "forged out of reactive struggles" (p. 2), is also powerful in furthering democratic purposes by virtue of its ability to criticize the relationships of hierarchy and domination that pervade various spheres of public and private life. His ideal, in other words, is historical in origin, meaningful only within particular contexts, never realized perfectly, and corrective by nature — i.e. "designed to remedy evils experienced in consequence of prior political institutions" (p. 2):

> [D]emocratic justice is a semicontextual ideal. It engenders certain constraints on and possibilities for human interaction, but these work themselves out differently in different domains of human activity, depending on peoples' beliefs and aspirations, the causal impact of activities in one domain for others, the availability of resources within domains, and a variety of related contingent factors. [p. 5]

Shapiro makes clear that his principle of democratic justice is designed to straddle the extremes of realism and idealism and, in doing so, to incorporate the best of both theoretical frameworks. "Democratic justice as a semicontextual ideal mediates between the extremes of Rawlsian idealism and MacIntyre's attachment to social practices now in place and avoids the drawbacks of both theories" (p. 13).

What is the substance of democratic justice? What is its status in social and political criticism? How does it help us to democratize existing social and political institutions? According to Shapiro, democratic justice is first and foremost a political, as distinct from an economic or a moral, concept. As such, it does not focus primarily on distributions of wealth or on respect for moral rights, although it might well take these two things seriously in the process of achieving justice. Instead, it focuses largely on relationships of power — relationships that constitute politics broadly understood by Shapiro within the spheres of family, work, and politics.

Democratic justice is for Shapiro a matter of applying two key values or aspirations of democracy to these power relationships as they are manifest in all spheres of life in an effort to ensure that our social and political institutions are as democratic as possible. The first of these two values or aspirations is equality, which is most usefully understood from Shapiro's perspective as equal participation in governance and the absence of hierarchy and domination. The second is that of opposition within governance. "[D]emocracy is as much about opposition to the arbitrary exercise of power as it is about collective self-government" (p. 30).

Both values are crucial to the realization of democracy in public and private life. But they do not exist as trumps for Shapiro in the way that they do for many other democratic theorists. Instead, they exist as "justice-promoting" ideals — i.e., ideals that help us to achieve other ends in life in a democratic way. Shapiro calls the more general notion of democracy that he associates with these ideals a "subordinate foundational good," rather than either *the* foundational good or a primary good. And he makes clear that democracy, while very important to justice, is not an end in itself or a substitute for justice per se:

> [We need] an account of justice that accords a central place to democratic ways of doing things, and a conception of democracy that can be justice-promoting rather than justice-undermining. To this end, my contention is that we should think of democracy as a subordinate foundational good, designed to shape the power dimensions of collective activities without subverting their legitimate purposes. [p. 18]

Democratic justice, then, governs the relationships of power that exist between individuals in particular spheres of life according to the principles of equality/non-domination and opposition. But it does not determine which activities are appropriate within these spheres of life. Nor does it have anything to say about what the legitimate purposes of these spheres should be. Instead, it takes for granted the activities and purposes that now exist within our various spheres of life — in much the same way as Michael Walzer's *Spheres of Justice*[8] does — and asks us to focus our attention on the relationships of power in which these activities and purposes are carried out and realized.

Moreover, democratic justice insists on practical grounds that we begin with existing practices and institutions, rather than try to invent new ones. "The goal is to take social relations as we find them and discover ways to democratize them as we reproduce them. Democratic justice thus has a Burkean dimension, but this is tempered by the aspiration to create a more democratic world over time" (p. 36).

How do we apply the principle of democratic justice to existing institutions? First of all, we have to focus on particular spheres of life and discern both the particular activities and the particular purposes associated with them, as well as the nature of the relationships of power that exist in them and the institutions within which these relationships take place. Second, we have to ask: How far can we go in democratizing these relationships of power without undermining the purposes of the activities associated with them? How much opposition can we allow without destroying the spheres of life in question?

Shapiro realizes that we can never do away with all hierarchical relationships; we can only aspire to do away with many of them. While all hierarchical relationships are suspect — "[t]he reason being that

8. MICHAEL WALZER, SPHERES OF JUSTICE (1983).

they contain both power inequalities and truncated opportunities for opposition" (p. 42) — not all can be eliminated without the loss of basic goods. Indeed, some of these hierarchical relationships, such as the parent-child bond, appear to be necessary to the well-being of those who find themselves subordinated.

While such a concession might appear to backtrack on democracy, it does not, for many of the hierarchical relationships that we now construe as necessary are not at all necessary, and may even be detrimental to the realization of basic goods. "Too often avoidable hierarchies masquerade as unavoidable ones, involuntary subordination is shrouded in the language of agreement, unnecessary hierarchies are held to be essential to the pursuit of common goals, and fixed hierarchies are cloaked in myths about their fluidity" (p. 42).

We need to ask in particular cases: Is hierarchical relationship *X*, *Y*, or *Z* necessary? Is it appropriately hierarchical? (Is it more hierarchical than it needs to be?) Might it be redesigned so that it becomes less hierarchical in the future? Is it a voluntary hierarchical relationship, or is it imposed on individuals? Can individuals opt out of it, or is it permanent? Does it create the need for more or fewer hierarchical relationships of other kinds? Does it create the need for more or fewer hierarchical relationships of the same kind?

All of these questions grow out of a sense — absolutely crucial to the principle of democratic justice — that while hierarchical relationships are bad in general, some are less bad than others. Presumably, fluid and temporary hierarchies are more acceptable than ossified and permanent ones, since the domination within these relationships is less than it would be in its more rigid counterparts. Voluntary hierarchies are presumably more acceptable than imposed ones, since freedom is possible in the former, and since consent is a value in any case. Unnecessary hierarchies are presumably always out. So, too, are hierarchical relationships that require the development of other kinds of hierarchical relationships or that debilitate individuals to the extent that they cannot do without hierarchy altogether.

As it turns out, one has to know a great deal about both the particular spheres of activity in question, as well as about the hierarchical relationships in them, to figure out how to apply Shapiro's principle of democratic justice in practice. Indeed, one has to have a firm grasp not only of how power is wielded in each sphere, but of how the institutions of family, civil society, politics, and the market function separately and together in particular regimes. In this sense, Shapiro's theory of democratic justice imposes very stiff empirical knowledge requirements on those who want to employ it, requirements that Shapiro himself meets very nicely in his own application of the principle to particular cases.

Shapiro's substantive arguments about democratic justice, where he applies his principle of democratic justice to practice, are extremely

rich in detail and complex in ways required by a theory that purports to bring about democracy from within existing institutions. Moreover, these arguments cover an expansive territory, including issues of democratic justice in childhood, marriage, work, retirement and life's end. Hence, I cannot in this space possibly treat them in any depth or detail. Nor can I cover them all. Instead, I can only mention a few of them to flesh out what it means according to Shapiro to democratize power relationships within particular institutional contexts.

As we might expect, parent-child relationships pose some of the most difficult challenges to democratic justice, since hierarchies of some kind are probably always going to be necessary, especially in the case of young children. But according to Shapiro, we can do much better than we now do in providing children with democratic beginnings. Parent-child hierarchies do not have to be prolonged forever, nor must they pervade all aspects of a child's life. Instead, they can be kept to a minimum and shaped according to the principle of democratic justice to the extent that the only ones allowed to stay in place are those that are

> pertinent to their legitimate purposes [of care] . . . constrained to operate in the interests of the children on whom they are imposed . . . designed to prepare children to leave them in a timely fashion, and, where possible . . . structured so as to reinforce — and certainly not to undermine — democratic practices in the broader polity. [pp. 69-70]

While Shapiro's democratic principle of justice cannot eliminate all of the hierarchical relationships of power in the lives of children, it can go far in eliminating such relationships in the institution of marriage. Here Shapiro focuses on patriarchal marriage and shows how virtually all of its hierarchical aspects, including its asymmetrical nature, its permanence, its insulation, and its nonvoluntary structure, are unnecessary to the basic goals of intimacy and freedom associated with marriage and hence are in violation of the principle of democratic justice.

> [P]atriarchal marriage runs afoul of every presumption against hierarchy discussed above. It is evidently unnecessary, as demonstrated by the existence of [many] alternatives. . . . Its hierarchy is asymmetrical: matriarchy is not only not available, but frowned on in patriarchal cultures . . . . It can be said to be chosen only in the highly constrained sense that people can opt for it or not, often knowing that the latter choice will come at a considerable economic and social price. [pp. 116-17]

How, though, can we institutionalize nonpatriarchal marriage? How can we set up and legally enforce marriage contracts that are as nonhierarchical as they can be given the values of both intimacy and freedom? Shapiro rejects Susan Okin's proposal for mandating the equal splitting of wages between husbands and wives[9] on the grounds

9. SUSAN OKIN, JUSTICE, GENDER, AND THE FAMILY 139-169 (1989).

that to do so interferes with the ability of individuals to design their relationships according to their own particular needs, personalities, and values. According to Shapiro, "[g]overnments do better . . . to enable consenting adults to operate their own domestic arrangements in ways that do not undermine the possibility of effective opposition" (p. 122).

But Shapiro does not jettison a role for the state in marriage altogether. Indeed, he insists on grounds of democratic justice that the state enforce no-fault divorce laws and outlaw designer marriages and prenuptial agreements that restrict the freedom of partners to exit the marriage and to share in its benefits. Likewise, he insists that women possess an absolute right to control their own reproductive functions; otherwise they would not be free from the domination of male partners or the state, nor could they exercise their oppositional powers against other oppressive practices in society.

Democratic justice in the workplace and marketplace is somewhat more complicated as an issue than democratic justice in other spheres of life, not only because the various institutions associated with it are so complex and causally related in complicated ways, but because the question, "Is hierarchical relationship *X*, *Y*, or *Z* necessary to production or to the maintenance of the workplace itself?" is normally answered by participants in such relationships (managers and workers) in a highly interested and partisan fashion. But, Shapiro argues, we can nevertheless use the principle of democratic justice to render the institutions of work, as well as those of the market, much more democratic than they now are. How so?

Here again the task is to figure out how far we can go in eliminating hierarchy and domination from, in this case, the workplace, without undermining the basic good that it supplies — namely, material well-being for individuals and the community as a whole. Among other things, Shapiro argues, we can provide freedom for workers from domination by managers by setting rules of termination on the basis of statute, as in Norway, Sweden, Spain, and the United Kingdom, or by developing a statute-bargaining hybrid such as that which now prevails in Germany. In other words, we can use the state to cut down on the power of managers in the realm of exit.

Shapiro acknowledges that the proper balance between statute and bargaining in this context, as well as the particular rights that should be ascribed to workers, will always be relative to the particular employment patterns in place. But we can come up with a rule of thumb for moving ourselves toward democratic justice in this arena:

> The rule of thumb should be that the closer an actual society is to a surfer's paradise, the lighter should be the quantum of proof that employers must bear in employment litigation, but that the burden should grow as society approaches a Dickensian nightmare. Such a rule would

> limit employers' freedom to take advantage of employees' necessity in setting terms and conditions of employment . . . . [p. 184]

Shapiro extends this rule of thumb in extremely interesting and useful ways into a whole host of employment and market mechanisms, and he thereby illuminates the wide range of relationships that must be balanced to keep hierarchy and domination to a minimum. Not surprisingly, he confronts a fairly large number of questions of distributive, as distinct from political, justice along the way, questions that remind us that political justice and distributive justice are always intertwined. While Shapiro acknowledges the interdependence of these two kinds of justice when talking about work and the market, he does not address the relationship between them directly. Instead, he concentrates on showing that, contrary to conventional wisdom, questions of distribution, such as those pertaining to one's access to goods and services, are also questions of political justice by virtue of their effects on one's relative power and vulnerability to the powers of others.

In the end, Shapiro manages to demonstrate, by his own example as a normative political theorist who takes empirical social science seriously, what a contextualized or pragmatic principle of justice should be and what it should do for us. "A compelling conception of justice" in these and all other contexts "should be flexible and context-sensitive . . . and remain faithful to their distinctive logics and purposes. . . . [It] must be sensitive to the contingencies of historical circumstance" (p. 25).

Moreover, it should work within existing institutions in such a way that these are able to effect a transition to democracy without sacrificing basic goods. "[D]emocratic justice is seldom about institutional design; usually it is about institutional *re*design. We are born into ongoing complexes of institutions and practices. The task is to democratize them as we reproduce them, not to design them anew" (p. 26).

How compelling is Shapiro's own democratic conception of justice? What can we do with it? Who is obliged to accept it? Shapiro claims at the outset that his conception of democratic justice should be accepted by everyone, since democracy is now implicated in justice — "valued by those who care about justice" (p. 19) — and since democracy is, from Shapiro's perspective, necessary to the ordering of any sphere of life. "[D]issensus is an essential ingredient to the just ordering of any domain of human interaction" (p. 14).

I suspect that Shapiro is right here that "democracy offers the most attractive political basis for ordering social relations justly" (p. 5) — and that many of our realms of human interaction would be more productive if they were organized democratically. But he can only claim that democracy is attractive to all as a basis of political justice if everyone values democracy. And he can only claim that democracy is necessary to the organization of all forms of human interaction if he can show this to be true in all spheres of life, including those, such as the

military, where many now find that dissensus hinders the realization of the basic goods supposedly promoted in these spheres.

Neither of these points challenges the substance of Shapiro's democratic principle of justice itself. Nor does it suggest that a conception of justice that is democratic is not attractive. (Indeed, I suspect that democrats of all kinds will find Shapiro's principle of justice very attractive.) But it does suggest that its attractiveness presupposes the attractiveness of democracy itself as a set of ideals. Hence, those who do not find democratic ideals attractive, or who would prefer to ground justice in other political values, are not obliged to accept the privileged place that Shapiro gives to democracy in justice (unless, of course, Shapiro can show that dissensus really does enhance all spheres of human interaction).

But once we state the project as articulating the best possible way to bring justice and democracy together, a project description that Shapiro himself employs in different parts of the book, his conception of democratic justice becomes very compelling, as well as very important, for three basic reasons. First, it does something that other political theories of justice should, but generally do not now do: it focuses attention on the justice of power relationships, as distinct from the justice of material distributions of wealth. In other words, it develops a distinctly political, rather than economic or moral, principle of justice, and it does so at a very high level of analysis.

Second, it shows what this principle of justice looks like in detail within particular institutions, both public and private, on the basis of a great deal of detailed knowledge about these institutions (and with a healthy sense that private domination is also political). Hence, it is not, like many conceptions of justice, overly abstract or incapable of being manifest in particular institutions without losing its standing as justice. Instead, it allows us to talk about justice in many different spheres of life on the basis of the rules according to which these spheres are themselves governed and with an eye to the empirical conditions under which justice itself will be manifest.

Finally, like Teitel's model of transitional justice, it forces us to acknowledge that justice as part of democracy is not a stagnant ideal or a set of standards that are to be imposed on democratic movements from above, but is instead a set of rule-based arrangements that evolve over time, that are never perfect, and that require constant reworking under new conditions. Not surprisingly, such arrangements are messy and in constant tension with other demands of democratization. But, as both Shapiro and Teitel show very elegantly, and with great success, any notion of justice that hopes to explain or argue normatively about justice in transitional periods of democratization must incorporate such contingencies into itself and be constantly open to their revision.