

NOMOS VI—JUSTICE
(ED. FRIEDRICH AND CHAPMAN)

Reviewed by
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NOMOS VI — JUSTICE. Yearbook of the American Society for Political and Legal Philosophy. Edited by Carl J. Friedrich and John W. Chapman. New York: Atherton Press, 1963. Pp. x, 325. \$6.00.

This volume contains fifteen essays of which ten are theoretical and five historical in approach. The contributors are almost without exception specialists familiar both with the historical development of the idea of justice and with the many contemporary works on the subject.

At the head of the series — doubtless so placed in order to point up the usefulness of a certain amount of specialized knowledge to those who deal with this topic — is Professor Frank H. Knight's essay "On the Meaning of Justice." Knight, an economist at the University of Chicago, shows both cultivation and openness of mind; he appears, however, to be an amateur philosopher, not well versed in either the classical or the contemporary works devoted to the analysis of the idea of justice. He bases his entire approach on a fundamental opposition between the old idea of an authoritarian law, established once for all and fixed in its primitive state, and the modern idea of a body of law continually developing in the context of a liberal and egalitarian democracy. The authoritarian view of law he equates with a stress on conformity to established usages: "the scholastic writers were in accord with the facts of the time in holding the notion of an unjust law to be self-contradictory." (p. 2) In their society, what was not an established usage could be neither law nor justice; what was an established usage must be both. For Knight, it is only a democratic society that poses the problem of justice in terms of guiding the development and interpretation of a changing body of law.

This rather superficial dichotomy, which sets up authoritarian law of divine origin against democratic law expressive of societal aspirations toward justice, fails to take account of a basic problem confronting authoritarian law. The problem arises in the existence of merely human authorities who act as tyrants and who may create unjust laws (cf. Sophocles' *Antigone*) or violate the unwritten laws common to all peoples (cf. Aristotle's *Rhetoric* I, 1368^b). To be sure, natural law — supernaturally given law — cannot, by definition, be unjust; but for this very reason it serves as a touchstone of justice to apply to human law. It limits the arbitrary exercise of power by condemning as unjust those mandates of human authority that transgress its rules.¹ It is not the old authoritarian view of law but rather the modern school of legal positivism which tends so to identify

1. THOMAS AQUINAS, SUMMA THEOLOGICA IIa, IIae 57, 2.

justice with conformity to law as to negate all consideration of the problem of unjust laws.²

Knight reduces his entire discussion of justice to the problem of the just law. This involves him in a curiously contradictory conclusion:

One who wishes to speak or write about justice should be clear and make it clear to others that he is not dealing with any general and positive ideal, but with the law, either as it is or as it might be if some rather specific *injustice* were removed or alleviated. (p. 23)

I am entirely in accord with the motive behind this conclusion, which is to avoid luxuriating in generalities; but I would very much like to know how Knight would explain in what "the specific injustice of a particular situation" consists since he refuses to apply the term *just* to anything but laws. One wonders too whether he would be certain to refuse to term unjust a clearly partisan judicial decision.³

Professor Carl Friedrich's essay "Justice, The Just Political Act" is conceived on a quite different level. The author limits his analysis to this question:

What particular act or complex of acts and/or events, recurrent in all politics, what concrete political experience is meant when people speak of justice and injustice? (p. 25)

He insists that what is involved in this context is not a purely subjective feeling but an objective quality: "Justice expresses a political relation of persons and things and as such has a function in political situations." (p. 26) He goes on to define more precisely the nature of this relation:

An action — and hence likewise a rule, a judgment, or a decision — may be said to be just when it involves a comparative evaluation of the persons affected by the action and when that comparison accords with the values and beliefs of the political community. This is the point of Aristotle's *isotes*, which is politically relevant and which can be summed up in the statement that equals should be treated equally. For the alleged equality can become a standard only when the values and beliefs relevant to a determination of equality are concretely stated. (pp. 27-28)

Thus, giving special protection to women and children — rescuing them before men, for example from a burning theater — will seem just to us because it reflects the values of our community. What seems just to us, then, is not absolute equality, but rather a kind of inequality or partiality which is not arbitrary, because it is based on the aspirations of the community. In this schema of

2. Cf. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 262 (Hart ed., 1954): "By the epithet *just* we mean that a given object to which we apply the epithet accords with the law to which we refer it as a test."

3. Cf. Ch. Perelman, *The Three Aspects of Justice*, in *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 62-67 (London, 1963).

justice any norm which requires the impossible seems arbitrary and can therefore be ruled out as unjust: "*ultra posse nemo obligatur.*"

Elsewhere in his article Friedrich opposes, albeit not by name, the thesis of Rawls, which identifies the ideal of justice, conceived in political and social terms, with the absolute equality of all citizens, and allows no deviations from equality except those which can be justified in terms of common consent, special contribution, or particular necessity. Friedrich finds that one of these three elements, the consent of the parties involved, does not by any means always assure an agreement we consider just. Even if all three elements are relevant criteria, it is not "very satisfactory, however, from a political standpoint, to erect an unreal standard — absolute numerical equality — as the norm and then to treat all real situations involving justice as deviations from it." (p. 29) Rawls' theory does indeed impose a norm of justice which is demonstrably external to the values and ideals of a political community; this is presumably what Friedrich means by an "unreal standard." Friedrich, on the other hand, propounds a conception of justice defined by relation to the aspirations of the community, a communal relativism taking into account the conflicts of value within the community. This conception leads to the possibility of acts being more or less just. "The most just act is the act which is compatible with the largest number of values and beliefs, allowance also being made for their intensity." (p. 31) It is as a consequence of the existence of value conflicts that the ideas of *authority* and of *legitimacy* take on so much importance (pp. 33-39); they compensate for the lack of techniques which would create a unanimous consensus in a dynamic and changing society:

A just act is required to produce the legitimate ruler, whereas the legitimacy of the ruler helps render his actions just by providing them with an authority which bare or brute power does not possess. (p 37)

To be just, in Friedrich's view, a political decision must not only avoid the arbitrary and not demand the impossible; it must also not be based on false data; at least such data must not have been "crucial for arriving at the decision to act in that way." (p. 38) I assent to this ruling, provided that it does not exclude the possibility of having recourse to certain juridical fictions which present a deliberate negation of fact for the sake of a superior administration of justice. For example, in Belgium in a recent dramatic trial of the persons guilty of the death of a deformed child, the jury, having pity on the mother and the doctor involved, judged against all the facts that the accused did not commit murder, in order to allow the acquittal desired by public opinion.

Friedrich's penetrating analysis, written from the perspective of democratic political theory, equates the justice of a political act, as we have noted, with its conformity to community desires and values. It does not concern itself with the moral worth of these social aspirations, nor does it take up the basic question of whether there exists some basis other than that of brute force for adjudication, in the name of justice, of claims involving communities whose aims are totally incompatible.

Let us suppose (as a hypothesis) that the National-Socialist regime was

legitimate in the eyes of the German people and that the decisions of its leaders conformed to the aims and ideals of the majority of Germans; let us also assume that the institution of the Nuremberg tribunal and its manner of judging the leaders of defeated Germany were conformable to the aspirations of the Allies. Must we conclude that it was only brute power rather than principles of universal application which could lend prevailing strength to one or the other concept of justice? Or that the quest for ideals and values which will be acceptable to all mankind — merely because such a quest is not yet politically organized — is not the province of the political philosopher? Does an act become politically just simply by being conformable to the values and norms of a society, values and norms which themselves evade entirely the strictures of political justice through the use of the maxim *Vox populi, vox Dei*?

Can we thus attribute to the principle of majority rule an ultimate value in which content plays no part? Any voluntarist theory raises important difficulties, even when the will to which ultimate value is attached is that of God. In another of the essays in this volume, Professor David Granfield points out some of these difficulties in the course of an interesting comparison of the doctrines of Thomas Aquinas and William of Occam ("The Scholastic Dispute on Justice: Aquinas versus Ockham"). He shows the difficulties which voluntarist theologians such as Occam, working from a concept of justice as whatever God decides, encounter when they come to deal with natural law. But these theologians can at least found their arguments on the perfection and the oneness of God. How much more justified are Granfield's criticisms when we apply them to a similar voluntarist conception, but one in which the ultimate will is not that of God, but that of certain political entities, opposed to one another and obviously fallible? Must political philosophy give up a role traditional since the time of Plato, and like a vote-getting politician bow before mass opinion, rather than seek to inform and purify such opinion, by introducing conceptions more reasonable, more philosophically capable of inspiring the various human communities?

Although it is unquestionably true, as Professor Arnold Brecht's essay "The Ultimate Standard of Justice" clearly demonstrates, that the ideas of justice thus elaborated cannot be scientifically proved and do not form part of the "*scientia transmissibilis*" — despite the past and present opinion of many partisans of natural law — nonetheless there is still no dearth of attempts to give philosophical form to the ideal of a just society and to work out reasonable criteria for judging the value of positive law on some basis other than that of its conformity to the wishes of the majority. At least four of the essays in this volume represent such efforts: the philosophical analyses by Rawls and Jenkins and the historical expositions of the utilitarians by Bedau and of Marx by Tucker. It is true, I concede, that there is grave danger of wishing to impose debatable philosophical views by force. For this reason I would unhesitatingly set aside any recourse to the rule of a philosopher-king, who would inevitably become a more or less enlightened despot. The danger justifies the contention, made by Professor Clarence Morris in his essay on "Law, Justice and the Public Aspirations," that the legislator or judge in exercising his functions should think of himself as the instrument of the public, seeking to realize the aspirations of the latter and not his own private

aspirations. But the role of the philosopher as such is not to work through legislative or judicial channels or to use political authority to impose his ideas. He must content himself with setting forth and justifying his ideas, acting through the nonpolitical medium of philosophical discourse upon the aspirations and values of his hearers. If, as Morris shows, the role of political authority is to express in laws and judgments the aspirations of the community which he represents, the philosopher's role is to be the educator of the same community, the one who leads it toward a fuller justice and a greater rationality. There is a philosophical connection between the two roles: if the political justification of a law or judgment consists in showing its conformity with the aspirations of the public, the philosopher must judge these aspirations in the light of standards which he asserts are valid for all reasonable humanity. It is not by chance if the specific character of all philosophical thought is a self-development in relation to ideas and aspirations — like the real, the true, and all the values called absolute — which are acceptable by a universal audience.⁴ If philosophical efforts do not furnish a demonstrable knowledge, there is yet no reason to deny all rationality to philosophical argument and to take from philosophy all moral and political significance.

Professor McKeon in his scrupulously clear study "Justice and Equality" stresses that:

The equality of justice was never set forth as an equality of persons and natural abilities. It was always proportionate equality established between persons and things or circumstances. The basic ratio is between person and person, and that ratio, which might be established as a ratio of ability, knowledge, or virtue in the utopian state, is measured in all actual communities by two interrelated ratios—the ratio of honor, wealth, or other external assets at the disposition of the community and the ratio of law, custom, and opinion by which the community is ruled. (p. 53)

As he demonstrates, the different measuring standards invoking equality seem acceptable when set forth separately, but involve one in almost insurmountable conflicts when applied simultaneously:

We recognize the claim that equality in the satisfaction of basic needs is justice, and we raise no question concerning equality under an impartial rule of law as justice. But the combination of the two in social justice is new, and the results of the combination are difficult to understand and difficult to put into action: the rights of the eighteenth century — the freedoms of worship, speech, and assembly — required political institutions to protect individual action; the rights of the twentieth century — the freedom from want, fear, and discrimination — require social education to form new communities of feelings and cooperative action to achieve new ends. (p. 60)

The two perspectives, liberal and social, are spelled out in mutually hostile terms, the liberal view demanding protection for individual enterprises, and

4. On the idea of universal audience, cf. CH. PERELMAN & L. OLBRECHTS-TYTEGA, *TRAITÉ DE L'ARGUMENTATION* sec. 6-9 (Paris, 1958).

thus allowing free play to existing natural and social inequalities, whereas the social view summons the state to reduce such inequalities, watching over and spurring on by all manner of techniques of intervention the equalization of its citizens and even of all mankind. Such an antinomy raises problems which cannot be resolved by referring to the sole idea of equality.

McKeon discerns a similar problem of resolution in the domain of constitutional law:

. . . we recognize that equality of participation in common decisions is justice, and we raise no question concerning equality of man in dignity and in accomplishment as justice. But the combination of the two seems to involve an obvious contradiction, since the premature participation in decisions may provide no ground for a sense of getting somewhere in the accomplishment of values. (p. 60)

The equal exercise of political rights — a basic democratic phenomenon — cannot be enjoyed unless there is first present in the community one essential constitutive factor of any democratic regime — a common assent to the concept of the dignity of the person, which we express by the idea of the rights of man and of citizen. Without this common belief, the conditions justifying the inauguration of a democratic regime are cruelly lacking.

McKeon says in conclusion that as the antinomies he mentions make rational agreement on desirable ends impossible, the justice and rationality of political action can be determined only through a long process of adjustment of ideas and aspirations:

The function of reason in human actions is not to lay down a master plan for imposition on all as the common interest, nor is its function to design a strategy for execution by some to secure private interests. Justice is the adjustment by rational means of the use of reason to secure material goods to the use of reason to establish a common treatment of men in the community. Justice is the adjustment by rational means of the use of one's own reason in making decisions to the use of common reason and consensus to analyze truths and to achieve goods. (p. 61)

I find it difficult to oppose such conclusions. But to be fully useful they ought to be accompanied by some indication of what reason is and what we are to understand by "the use of reason" and "adjustment by rational means" in the context of concrete problems of action, choice, and decision.

The object of Professor Feinberg's study "Justice and Personal Desert" is to show how the aspirations toward justice represented in the idea of personal desert are linked with the idea of rationality. With this point in mind he takes up the notion of desert, distinguishing it from such related ideas as "eligibility" or "entitlement" and showing that it correlates not with formally stipulated conditions but with conditions which are not specified in either fundamental or procedural rules:

If a person is deserving of some sort of treatment he must, necessarily, be so *in virtue of* some characteristic or prior activity. It is because no one can deserve anything unless there is some basis or ostensible occasion for the desert that judgments of desert carry with them a commitment to the giving of reasons. (p. 72)

We must not identify the notion of desert with that of social utility. To treat someone in a particular way for reasons of social utility is in no way the same as to treat a person as he deserves. We have only to remember all the situations in which "reasons of State" have led to injustice. Moreover, a utilitarian standard is too speculative in nature to be a really useful criterion for judging even ordinary cases. If we are concerned to appraise a student's knowledge of mathematics, a "math exam" would surely be more useful for the purpose than a direct appeal to "utility."

One cannot always employ the standard of desert, however, because the judges' individual assessment of worth would thereby become too influential a factor in determining cases. It is clearly necessary that formal criteria of desert be elaborated in order to provide a safeguard against arbitrary judgments and to eliminate insecurity each time that subjective evaluation of merits risks producing injustice and conflict. Accordingly,

Desert is always an important consideration in deciding how we are to treat persons, especially when we are not constrained by rules or where rules give us some discretion; but it is not the only consideration and is rarely a sufficient one. (p. 94-95)

To see the proper limitations of the idea of desert one should contrast it with the idea of "entitlement." Entitlement emanates from the law and its regulations; on the contrary,

desert is a *moral* concept in the sense that it is logically prior to and independent of public institutions and their rules, not in the sense that it is an instrument of an ethereal "moral" counterpart of our public institutions. (p. 97)

Professor Rawls, whose conception of justice as "fairness" has been developed in several remarkable studies, is represented here by an essay "Constitutional Liberty and the Concept of Justice." He applies a conception of justice as reciprocity to the determination of what constitutes a just constitution and deduces in this way the principle of freedom of conscience:

When applied to an institution (or a system of institutions), justice requires the elimination of arbitrary distinctions and the establishment within its structure of a proper balance or equilibrium between competing claims. (p. 99) An institution is just or fair, then, when it satisfies the principle which those who participate in it could propose to one another for mutual acceptance in an original position of equal liberty. (p. 103)

What then are the standards governing the establishment of just institutions of this kind? For Rawls there are two principles:

. . . first, each person participating in an institution or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all; and, second, inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage and provided that the positions and offices to which they attach or from which they may be gained are open to all. (p. 100)

It follows that no departure from complete equality in the enjoyment of liberty can be accepted without some definite justification. On the other hand, any such departure can be accepted if, by meeting the conditions of general advantage and equal access, it can be shown to be not arbitrary and therefore not unjust.

As Rawls points out, it is not enough to prove that the constitution as structured will realize the maximum of social utility, because the demands of justice will not thereby be satisfied:

The concept of justice is distinct from that of social utility in that justice takes the plurality of persons as fundamental, whereas the notion of social utility does not. This latter seeks to maximize some one thing, it being indifferent in which way it is shared among persons except insofar as it affects this one thing itself. (p. 124)

Rawls' hypothesis, as he indicates (p. 100, note 1), recalls the idea of the social contract. He recognizes, however, that the institutions under consideration need not be newly formed as the social contract theory presupposes; since they are already effectively functioning when we come to consider them, the only reasonable approach is to see if there is room to modify them in order to respond to the legitimate complaints of interested persons. With this end in mind, he formulates three rules for considering such complaints:

It is understood (1) that, if the principles one proposes are accepted, the complaints of others will be similarly tried; (2) that no one's complaints will be heard until everyone is roughly of one mind as to how complaints are to be judged; and (3) that the principles proposed and acknowledged on any one occasion are binding, failing special circumstances, on all future occasions. (p. 104)

All the foregoing conditions seem acceptable and might even be followed to the letter if we were dealing with nothing more than a game, with rules set up to provide equal chances to all players. Actually in such an artificial situation there is no need to take account of the past, since the institution of the game rules constitutes an absolute beginning; similarly one can anticipate the future, predict all the possible results of the game and the conditions in which they will develop. But we have nothing of the sort confronting us when we deal with political institutions.

Let us suppose that our ancestors drew up a contract of the type proposed and agreed on a group of ground rules and rules of procedure. To what extent

are we bound by their provisions, by the precedents they established and the situations to which such precedents gave rise? Have we the right to call in question anew the institutions which they set up and their methods of revision? Can we escape the burden of the past, by force if necessary, in order to fashion a new social contract more just than the old one, more responsive to our convictions and aspirations? If at times it becomes necessary to resort to such violence and revolution to effect a change in institutions, this is because all those whose interests are affected will not always be unanimous in agreeing to adopt the changes recommended by some. And who would claim that justice is always on the side of either traditionalists or reformers? Each side will ordinarily be able to advance arguments for its viewpoint. Although the force of such arguments may incline us to favor one or the other faction, we could not justify our judgment without having recourse to criteria which in their turn can be questioned: practical judgment never leads to self-evident or demonstrable conclusions.

How far, then, should we conform to tradition, and to what extent depart from it for the sake of a better administration of justice? Even a cursory examination of the theory of American case law in areas where it is not affected by legislation reveals how delicate is the adjustment between the burden of the past and the pressures of the present.⁵ For example, in order to assure an equal start for all citizens, as Rawls would wish, must we abolish the right of inheritance? Would we perhaps not have to limit or even abolish a man's right to dispose of his property during his lifetime if we propose to bestow on the coming generations a perfect freedom from the burdens of the past? But if we take account of the disadvantages in assimilating the functioning of political institutions to the rules of a game, because of the extreme instability thereby introduced, if we decide to take the past into consideration in some measure in the evaluations of social inequalities, then the question of what is just or unjust in the functioning of institutions will be decided by compromise, by adjustment to the needs and aspirations of the community.

Looked at in another way, the consensual system Rawls sets up depends on rules which all those participating in the functioning of the institutions will regard as just, and therefore acceptable, and which will be predictable in their practical consequences. Such a system fails to take sufficient note of the disillusionment which experience is apt to bring. In pursuing this point, we can profitably consider a distinction between two sorts of consent offered by Professor Charles Fried in his essay "Justice and Liberty." One kind of consent, which Fried calls "first order consensual practice," is found in cases where a man's rights and duties arise from express undertakings he has entered into — undertakings of whose scope he is fully aware, and which he must keep on the principle "*pacta sunt servanda*." The other sort of consent, which Fried calls "second order practice," is that consensus which exists in a community with regard to the functioning of its institutions, such as the criminal law, or the draft, "where it is the practice itself which defines the sacrifices to be made." As Fried shows, if we

5. Cf. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1961).

envisage the justice of institutions on the model of contractual justice, we are using a type of "first order practice" to characterize what are actually "second order practices."

Fried goes on to make another point that can profitably be set against Rawls' system. Given the lack of consensus among the members of a community concerning fundamental questions on what we might call "questions of conscience" — can we characterize as just such institutions as compulsory education within a particular religious or ideological framework, even if they raise no question of unequal distribution? Can the founders past or present of such institutions argue that they alone know what is the true good of the community and of each of its members? In approaching this problem, Fried points out the possibility of an antinomy between rationality and liberty, and states his preference for liberty:

But, if these conditions of rationality, and particularly the condition of knowing one's own interest, were taken at full value as necessary conditions of a situation of justice, it would be otiose to add, as I think we must, a notion of liberty as being one of several interests which individuals do in fact have. Furthermore, these conditions would render the concept of justice inapplicable in many important situations, for in many situations precisely what is claimed is that the "victim" does not know his own interests and hence is not rational. If we were to exclude situations where such claims could be made, the applicability of the concept would be drastically reduced. That is why justice must include the liberty to define — even incorrectly — one's own interests. (p. 145)

It is because we have imperfect knowledge, because the institutions which we create can have unforeseen and even unforeseeable consequences, that, as Professor John Chapman points out in his essay "Justice and Fairness," the idea of "fairness," as Rawls conceives it, cannot afford an adequate definition of justice. For justice must concern itself equally with the needs of men and with the efficacy of concrete functioning institutions in actually meeting those needs. Here, according to Chapman, the doctrines of the utilitarians are superior to those of such men as Locke, who also focus on the "fair" functioning of institutions:

When I say that Locke appears to have been concerned with what we should call fairness, I mean simply that he thought that, if the competition for wealth was conducted fairly, there was nothing more to be said on the matter. The outcome of the competition could not be challenged on the ground of justice. It is the way in which the competition is carried on, not its results, that counts for Locke. This concern with the process of competition is most aptly described, in my opinion, as a concern for fairness, and it avoids or evades recognition of the claims of need. It is these claims which are recognized by utilitarianism.

Historically, I think utilitarianism is best viewed as ambiguous with respect to contractualism. On the one hand, there is a loss of grasp on the principles of the plurality and moral autonomy of persons; on the other, there is an advance on contractualist thought, whether this advance be interpreted as an enlargement of the meaning and scope of

justice or as a shift in meaning from justice as fairness to justice as equality. On either interpretation, justice is seen as something more than reciprocity and fair play, and this something more involves recognition of the claims of need. (p. 153)

We can apply the idea of justice in a procedural sense to those institutional forms and processes whereby human relationships are governed; we can also apply it in a substantive sense to a state of affairs, a distribution of goods, a particular treatment. The considerations applicable to the substantive state of affairs become more important as procedural devices become attenuated in the course of time, as inequalities spring up out of the functioning of institutions, as the results of a given process of decision become less and less foreseeable, as the consent that validates the institutions becomes more and more a fiction. Therefore, we cannot limit our concern with the role of justice in the life of political institutions to the critical assessment of the rules for their functioning; we must also consider the justice of end results in the light of a sought individual and social ideal.

Professor Iredell Jenkins' contribution, "Justice as Ideal and Ideology," is of special interest because it challenges the basic orientation with which most contemporary writers approach the problems of legal and political philosophy. This orientation is characterized by a mistrust of metaphysical or utopian constructs, and a tendency to look for the positive content of justice in the aspirations of a community, the individual's sense of justice, "fair" rules of procedure, or a combination of these. This way of proceeding is noted by Jenkins in special reference to the essay by Morris, but the same orientation is to be found in the contributions of Knight, Friedrich, McKeon, and Rawls. Here is Jenkins' statement of the grounds of his objection to theories of this kind:

In their very natures they leave unsettled what must always be the central issue, namely, the final values on which the society is grounded, the ideal ends it seeks to promote, the conditions it means to realize. To the extent that this issue is left vague and tentative, the entire quest for justice is unguided. As we have seen, the sense of justice speaks unequivocally and compellingly in particular cases; but its disclosures are neither generalized nor systematic, so they cannot offer the coherent direction that purposive action requires. In a word, the sense of justice is largely retrospective and corrective; the deficiencies it identifies can be finally repaired only by a body of doctrine that is prospective and creative. The procedural or operational approach suffers in a similar way; it must necessarily accept from elsewhere the substance, or contents, of justice, that is, the values that it is to recognize and the conditions that it seeks to further. Procedural justice is concerned with developing an apparatus that will serve as a fair and impartial means to the attainment of ends that it does not itself determine. (p. 197)

But the solutions that have been offered to this fundamental problem of how to determine the ends of a society, and what the law must be if it is to implement these ends, have been subject, Jenkins tells us, to two mutually opposed criticisms:

the ideals thus proposed have been considered either too debatable to be given general scope or too vague to be given concrete effect. He notes that these objections have both been made on genuine grounds; we can meet them only if we situate our proposed ideals within a framework in which "ideal" and "ideology" are carefully distinguished. The *ideal* of justice, conceived as the "fundamental constitutive idea of social organization and the ultimate regulative idea of legal and political action" (p. 195) should serve merely to provide a basic theoretical outline, an outline which the different *ideologies* of justice should fill in, each in its own way.⁶

According to Jenkins, "law must shape aspirations, not merely actualize them." (p. 199) Such aspirations may indeed be unjust if we define justice in terms of "fairness, equity, concern, interest, and altruism." (p. 199) If legal philosophy is to fulfill its function, "sooner or later, implicitly or explicitly, the concept of justice must be given an intrinsic meaning and an objective reference that can control the private intuitions and the public procedures of men." (p. 200)

In working out the answer to this fundamental problem, Jenkins uses a "genetic and functional approach." (p. 205) Law has a task to perform. What is it? It is the realization of a certain kind of working order:

The concept of order embodies pure discovery of pattern and regularity, of stability and continuity, in our surroundings. It refers to the web of relations that we find connecting discrete objects and occurrences. Order indicates similarities among things and uniformities of sequence among events. To say that "order holds" is to say that we are in the presence of distinct entities that follow established courses and hang together as a whole, so as to compose a systematic structure. . . . I think it is apparent that the concept of order entails reference to four basic elements: a plurality of distinct entities that exhibit stable group characteristics; the organization of these into a series of higher-order entities; activities engaged in by these entities and energy exchanged among them; and all of this taking place in a regular and coherent manner. I shall identify these items respectively as "the many," "the one," "process," and "pattern . . ." (p. 204-205)

As soon as we begin to think of law as the principle of a just order, we will have to treat it as at once descriptive and prescriptive:

In the human context, order appears as a goal as well as a fact; it is something to be created as much as something given. . . . law is a principle that not merely reflects an order that it inherits, but must also define and guarantee an order that could not exist without it. (p. 206)

Jenkins goes on to give us four objectives which a just order should realize. They correspond to the four basic elements he regards as inhering in the general notion of order:

- 1) With respect to individuals ("the many"), the objective should be "cul-

6. Cf. Iredell Jenkins, *The Matrix of Positive Law*, 6 NATURAL LAW FORUM 1-50 (1961).

tivation." "Cultivation must pass on a tradition and produce a coherent population while preserving the integrity of individuals." (p. 215) It must work against both indifferentism and indoctrination.

2) As regards the unity of the system ("the one"), the objective should be to create and maintain an authority that is at once effective, limited, and legitimate.

3) As regards the forms of interaction ("process"), with the concomitant notion of responsibility, the objective should be to draw the line between what is permitted and what is not; this line must be worked out in terms of a body of rights and duties.

4) To maintain the social milieu in which individuals act ("pattern"), the objective should be to preserve a certain continuity: "The task of continuity is to both respect and integrate the separated careers of men, preventing alike their isolation from and their submergence in the total group enterprise." (p. 216)

What are we to think of this prospectus which Jenkins offers for the work of legal philosophy? Does his schema escape, as it is intended to, the double reproach of being arbitrary and vague?

I think it is quite clear that the political philosopher must try to envision a model of the ideal society which men concerned in political affairs should be working to realize. But in doing this, is the philosopher seeking to realize within the society only *justice*, or is he seeking to realize *all* the qualities he thinks an ideal society should have? A political order should be not only just, but efficient and stable as well — it is not without reason that legal philosophers have seen as the goal of law not only justice but also security and the common good. It is worth noting that Rawls adopts as his thesis a limited conception of justice:

Justice is but one of many virtues of political and social institutions, for an institution may be antiquated, inefficient, degrading, or any number of other things without being unjust. (p. 98)

For Jenkins, on the other hand, the place of justice among the ideals of a society is in no way specific:

It makes little difference whether the covering name for these [the goals and the program of a society] is justice, the public interest, the general welfare, the common good, progress, democracy, communism, or the historic nexus. (pp. 202-203)

The trouble with such an approach as this is that in developing a general social ideal one is led to lose sight of the specific qualities associated with the idea of justice. Jenkins, for instance, does not treat at all the ideas of regularity, equality, proportion, and reciprocity which go to make up the element of rationality traditionally included in the concept of justice. It is significant that in the present volume objections similar to the foregoing are leveled against the utilitarians by Bedau (p. 289) and against Marx by Tucker (p. 318). If

the application of a human or social ideal within a system of law requires a global vision of man and society, it would seem wise not to present such a vision under the sole aegis of the idea of justice — unless we are to identify the thirst for justice with the quest for the Absolute Good.

Furthermore, I question whether the four elements which Jenkins isolates can serve as useful criteria for the elaboration of an ideal of human society. To be sure, they show the usefulness of drawing attention to certain elements which must be taken into account in elaborating an ideology. But these elements are subject to various interpretations, and in practice they have antinomical tendencies. How far should we limit the rights of the individual, how far the power of the authorities? How far can authority limit the autonomy of individual wills in their power to create obligations by mutual consent? To what extent can we constrain individuals in order to educate them? In what measure is it allowable for those in authority to work against societal traditions or individual values? It seems to me that the answers to such questions should be sought in debates and suggestions, but not imposed in the form of legal decrees except insofar as they conform to the aspirations of the bulk of the community. It may be the role of the philosopher to influence these aspirations, but the role of the modern legislator is limited to giving them effect.

The remaining essays in this volume are historical in nature. That of David Granfield, on the opposition between Thomas Aquinas and William of Occam, shows how effectively theological controversies can illuminate philosophical debates; the theological antithesis in this case relates to the two conceptions of law as justice and as commandment. (p. 230)

Locke's conception of justice is analyzed by Professor Cox in his "Justice as the Basis of Political Order in Locke" and by Professor Polin in his "Justice in Locke's Philosophy." The two presentations are widely divergent, because Cox deals only with those passages in Locke in which the word "justice" is specifically mentioned, whereas Polin takes note of anything which Locke might have considered relevant to natural law.

The very useful studies of Bedau (*Justice and Classical Utilitarianism*) and Robert Tucker (*Marx and Distributive Justice*) respectively examine the conceptions of justice held by the various utilitarians, and demonstrate the relatively subordinate position occupied by the idea of distributive justice in the thought of Marx.

This collection of essays, remarkable for its general level of competence and analytical penetration, as well as for its richness and diversity, provides a signal contribution to the analysis of the idea of justice — an idea difficult to grasp and formulate, but central nonetheless to moral, legal, and political philosophy.

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