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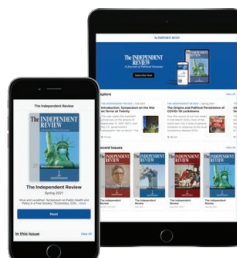
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Hayekian Social Justice

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Despite F. A. Hayek’s apparent rejection of the very idea of social justice, this essay develops a theory of social justice *from entirely Hayekian components*. Hayek recognizes two concepts of social justice—local and holistic. Local social justice identifies principles that can be used to judge the justice of certain specific economic outcomes. Hayek rejects this conception of social justice on the grounds that specific economic outcomes are not created by moral agents, such that social justice judgments are a category mistake, like the idea of a “moral stone” (Hayek 1978, 78). But if one understands social justice as the principles that ought to govern the social order as a whole, as John Rawls ([1971] 1999) did, then Hayek is on board. Hayek agrees with Rawls that we cannot use contractarian principles to evaluate particular economic outcomes, and he supports Rawls’s attempt to identify the general principles that should govern social systems (Hayek 1978, 100).¹

I argue that Hayek can be understood as adopting a principle of social justice that Rawls respected but rejected—namely, the principle of restricted utility (Rawls 2001, 120). Restricted utility combines increasing a society’s average utility with establishing a utility floor below which no one will fall. So the Hayekian principle of social justice is this:

Society should be governed by the system of general rules that we can predict will maximize average utility with a utility floor.

Hayek does not seek to restructure all of a society’s rules at once, however, so Hayekian social justice does not license us to reconstruct society from the ground up.

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1. The reference is not to *A Theory of Justice* (Rawls 1971), but to “Constitutional Liberty and the Concept of Justice”(Rawls 1963, 102).

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Rather, the principle is a guide for engaging in “immanent criticism” of particular rules (Hayek 1973, 94–123). We should improve on our present order by asking whether particular rules are ones that we can predict will maximize average utility with a floor. So the application of Hayekian restricted utility is much more limited than the application of Rawls’s justice as fairness. Yet it has considerable merit as a principle for just social reform. Hayek’s commitment to immanent criticism thus leads to the following principle of reform:

Social and legal rules should be reformed by asking whether a new rule will predictably increase average utility and/or secure a utility floor for all members of the public.²

Restricted utility thereby provides a principled basis for feasible social improvement, which we can use to approach, but perhaps never reach, a fully socially just society.

I begin by reviewing Hayek’s critique of social justice to identify the form of social justice he embraces. I examine some passages in Hayek’s corpus that suggest a contractarian framework for selecting principles of justice. I then advance a Hayekian contractarian argument for restricted utility and address a tension between the principle of restricted utility and Hayek’s commitment to immanent criticism. I end by examining which political and economic institutions are socially just. Hayek’s arguments for liberal constitutional rights, free-market capitalism, constitutionally limited democracy, and a modest welfare state help to show that these four institutions satisfy a principle of restricted utility. Thus, Hayekian contractors should endorse them. This means that Hayekian social justice requires liberal democratic welfare-state capitalism, and we should accordingly reform social and legal rules with the aim of establishing that politicoeconomic regime.

Hayekian Social Justice

Principles of social justice, Hayek argues, are meant to evaluate particular economic outcomes as just or unjust. But evaluating outcomes as just or unjust implies that these outcomes are produced by moral agency, either exercised well or poorly. Valid principles of social justice therefore imply that we can judge, say, particular distributions of income as just or unjust *because* one or more moral agents deliberately ordained the outcome. However, if, as Hayek thought, particular economic outcomes are not deliberately produced by moral agents, but rather by spontaneous order, then particular economic outcomes cannot be evaluated as just or unjust *in principle*. Such evaluations of justice and injustice are incoherent, like evaluating a stone as moral or immoral. The notion of a “moral stone” is absurd because a stone can be neither moral nor immoral (Hayek 1978, 78).

2. I understand social rules as social norms and legal norms and legal rules as laws. Hayek appeals to both in his work.

Let's assume for the rest of the essay that this critique of social justice succeeds. Interestingly, even if the critique succeeds, Hayek allows that we can morally evaluate the justice of rules that govern society as a whole. As John Tomasi notes, Hayek thinks "[a] commitment to the ideal of a free society as a spontaneous order is compatible with the affirmation of some external standard of *holistic* evaluation, including a standard that expresses distributional concerns" (2012, 160, my emphasis). To illustrate, consider Hayek's assessment of Rawls's approach to identifying principles of justice:

[T]here *unquestionably* . . . exists a genuine problem of justice in connection with the deliberate design of political institutions. . . . I have no basic quarrel with an author who . . . acknowledges that the task of selecting specific systems or distributions of desired things as just must be "abandoned as mistaken in principle, and it is, in any case, not capable of a definite answer. Rather, the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least as not unjust)." This is more or less what I have been trying to argue. (1978, 100, my emphasis, quoting Rawls 1963, 102)

Hayek is explicit that we can make justice judgments about the rules governing the system as a whole. That is *unquestionable*. My aim here, then, is to develop a Hayekian conception of *holistic* social justice rather than *particularistic* social justice.

I should caution that Hayek rejects the Rawlsian approach to deliberately designing political institutions, as discussed later in this essay. Holistic social justice furnishes a method of improving the rules of social systems piece by piece, but it is social justice all the same.³

Hayek's Contractarianism

In this section, I explain Hayek's contractarian basis for adopting a principle of holistic social justice. Hayek is not a utilitarian or even a consequentialist. In fact, he rejects consequentialisms because he rejects any demand for justification where "our morality is justified just to the extent, say, that it is directed toward the production of, or striving after, some specific goal such as happiness" ([1988] 1991, 69). Gerald Gaus argues that, for Hayek, utilitarianism manifests "a constructivist delusion that we can have adequate knowledge of the overall consequences of our actions and so can design systems to optimize good consequences" (2018, 35). So if we are trying to determine which moral theory Hayek can use to formulate a principle of social justice, we cannot appeal to utilitarianism as the most fundamental criterion of normative evaluation.

3. There are those, however, who interpret Rawls along these reformist lines. See, for example, James 2005.

Hayek adopts a variant of Kantian contractarianism in *The Mirage of Social Justice* (1978), despite the fact that in *The Constitution of Liberty* ([1960] 2011) he criticizes the social contract tradition as rationalistic, claiming that civil society was not “formed by some wise original legislator or an original ‘social contract’” (112). Contractarian approaches do not have to construct society from scratch based on an original agreement; they can instead be used to evaluate rules piecemeal. And this is what we see in Hayek. He claims that legal rules are legitimate when they “command general assent” (1978, 15). They must survive Immanuel Kant’s test, which we employ by “asking whether we can ‘want’ or ‘will’ that such a rule be generally applied” (Hayek 1978, 28). Hayek thought that consistently applying the test of Kantian assent will “amount to a test of compatibility [of a rule] with the whole system of accepted rules,” so Kantian contractarianism furnishes the best test for aligning social rules with each other and organizing them into a hierarchy (1978, 24, 29).

Robert Sugden (1993) has argued that Hayek is a contractarian based on several passages in *The Mirage of Social Justice* where Hayek emphasizes the moral importance of agreement. For instance, Hayek points out that although in the Great Society people “do not know each other” and so have “no agreement on the relative importance of their respective ends,” they can agree “on means which are capable of serving a great variety of purposes and which each hopes will assist him in the pursuit of his own purposes” (1978, 3). Similarly, he stresses that people can agree to use “multi-purpose instruments” to assist each other in pursuing their own ends (3). He sells liberal institutions as a basis for agreement and mutual benefit but rarely claims that we should have certain institutions because they maximize some aggregate good. This is the language of contractarianism, not of utilitarianism.⁴

Hayek never fleshes out the details of his Kantian contractarianism. It does appear, however, that he thinks the social contract is formulated from behind a modest veil of ignorance that, following Rawls, denies contractors information that would lead them to adopted biased or socially inefficient arrangements. However, according to Hayek, the veil of ignorance is not imposed as a moral constraint, as it is according to Rawls, but by the fact that we cannot predict the outcomes of the rules we choose and so cannot bias them in our favor. In choosing holistic social systems, we cannot predict what “the share of each will be” (1978, 122), which means that we should generally seek to increase the share of wealth and liberty available to each. And, again, we should select rules as though we “knew that our initial position in it would be decided purely by chance” (1978, 132). In this way, Hayek’s view better resembles the veil-of-ignorance device adopted by James Buchanan and Gordon Tullock (1962, 78).⁵

The best objection to interpreting Hayek as a contractarian is that contractarianism requires that we select entire social systems based on a comparison of their

4. Hayek also does not opt for alternative approaches, such as virtue ethics or natural rights.

5. Buchanan and Tullock (1962) may have influenced Hayek’s position.

overall results and then have contractors agree to abide by the rules of the social systems that have the best results. But Hayek says that such comparisons are generally impossible. It is for this reason I believe he developed the standard of evaluation that he calls “immanent criticism” (1973, 94–123): “The test by which we can judge the appropriateness of a particular rule will always be some other rule which for the purposes on hand we regard as unquestioned” (1978, 25). We evaluate social and legal rules by taking some rules as given and looking for ways to improve others piecemeal. Hayek illustrates the concept of “immanent criticism” by appealing to judicial reasoning, which aims to make the common law coherent through metarules governing judicial decision making. Common-law judges do not legislate from scratch but rather modify and improve existing practices through a method of gradual reform.

Hayek motivates the need for immanent criticism as follows:

The effects of any person’s action will depend on the various rules which govern the actions of his fellows. The “consequences of one’s actions” are not simply a physical fact independent of the rules prevailing in a given society, but depend very largely on the rules which the other members of society obey; and even where it is possible for one to discover a new rule which, if generally adopted, might be more beneficial for all, the rules which the others in fact follow must be among the data from which he will have to derive his belief in the more beneficial character of the new rules which he proposes. (1978, 32)

We face general informational limitations in predicting the consequences of general rules. We must therefore evaluate them by how well they fit with other rules in the system that we take as fixed in the course of evaluation.

The Principle of Restricted Utility

It seems as though Hayek selects principles of holistic social justice through a Kantian contractarian procedure for immanent criticism. On this basis, perhaps we can determine which principle of holistic social justice he adopts or at least might have adopted. It is clear enough that Hayek thinks social justice involves doing all we can to increase the chances of a person selected at random, but there is some evidence that he would conjoin that imperative with providing a floor below which no one can fall. This suggests he accepts what Rawls calls the “principle of restricted utility,” where average resources are maximized subject to a floor.⁶ Let’s review the passages in Hayek’s work

6. In *Justice as Fairness* (2001), Rawls defines the principle of restricted utility, though he includes in the definition that average utility is maximized first by guaranteeing “equal basic liberties (including their fair value) and fair equality of opportunity” (120). I use the idea of “restricted utility” simply to refer to maximizing average utility with a utility floor. Hayek’s view seems closer to the earlier contractarian approach advanced by John Harsanyi (1955).

that support my claim. First, he argues that “[a] policy of using the spontaneously ordering forces therefore cannot aim at a known maximum of particular results, but must aim at increasing, for any person picked out at random, the prospects that the overall effect of all changes required by that order will be to increase his chances of attaining his ends” (1978, 114). Here Hayek says that policy should not and cannot aim at a *known* maximum but should still increase as much as possible each person’s prospects in achieving his or her ends. We should evaluate rules by their utility, but carefully and incrementally toward an unknown maximum. Second, when Hayek speaks of choosing a person at random, he is arguably advocating that we increase *average* utility because random selection should sample representative persons over time. “[T]he rules of just conduct can affect only the chances of success of the efforts of men, the aim in altering and developing them should be to improve as much as possible the chances of anyone selected at random” (1978, 129). Here Hayek says that *justice* requires greatly improving, if not maximizing, the chances of a person selected at random. That sounds a great deal like an average-utility principle extended over time. Hayek also seems to think that we establish fairness by focusing on a person selected at random. The system of rules in this case cannot be rigged because “it must be unknown who will benefit by such an abstract rule and how much different persons will benefit” (1978, 130). Hayek even says that we will achieve “the best results if we abide by a rule which, if consistently applied, is likely to increase everyone’s chances” by encouraging people to follow rules of conduct so “as to make as large as possible the aggregate product of which they will get an unpredicted share” (1978, 122).

In the latter passage, Hayek speaks of maximizing an aggregate product, which makes him look as if he is utilitarian *and* as if he is claiming that we know what a maximum aggregate looks like and how to achieve it. But, as we have seen, utilitarianism is not the moral theory most consistent with Hayek’s thought; contractarianism is. Further, given that the limitations of our cognition is a central theme in Hayek’s work, he does not think we are in a position to realize the utilitarian principle, nor can we know how to maximize aggregate utility, nor do we know what society would look like if we did. Hayek thinks instead that the rules of justice are those that our best social science tells us will tend to increase the life prospects of society as a whole, where the selection of a random person is a proxy for average utility. The aggregate is not foreordained or foreknown but rather discovered and approached gradually over time.

The principle of restricted utility includes average utility *and* a floor. Although Hayek says much less about the floor than about average utility, he seems to embrace a floor in his argument for a basic minimum income. Here is a central passage: “[T]he assurance of a certain minimum income for everyone, or a sort of floor below which nobody need fall even when he is unable to provide for himself, appears not only to be a wholly legitimate protection against a risk common to all, but a necessary part of the Great Society in which the individual no longer has specific claims on the members of the particular small group into which he was born” (1979, 55). Hayek’s use of the term *legitimacy* is imprecise and may only somewhat overlap with the use of the term in

contemporary political philosophy (see Peter 2017), but it looks as though he is saying that welfare-state measures are legitimate in the sense that governments are morally permitted, if not morally required, to pursue those measures to maintain a free society. We should pursue poverty relief not only because it is beneficial and welfare increasing but also because it is just. Thus, it looks as though Hayek thinks we commit injustice if we maximize average utility but ignore those whose prospects are poor. He thinks that a minimum income may be a *necessary* part of the Great Society because it helps to achieve basic minimum of ends satisfaction through poverty reduction. A minimum income also helps to secure something like equality of opportunity, which we can infer from Hayek's claim that persons should not have to depend on their small group for social advantage. So, again, Hayekian social justice seems to include some kind of minimum-utility floor below which no one should fall.

The restricted-utility principle raises a puzzle about how to trade off maximizing average utility and maintaining a floor when the two priorities conflict. Hayek never addressed this question in print, as far as I know, probably because he thought that a free society satisfies both parts of the principle.

Restricted Utility as Immanent Criticism of an Evolved Order

My proposal in this essay is that Hayek in effect offers a contractarian argument that restricted utility is the prime principle of holistic social justice. But my proposal reveals a puzzle in Hayek's thought. Hayek both endorses holistic social justice and insists that we review particular parts of our social order through immanent criticism. But how can we use a standard of *immanent* criticism to evaluate a social system as a whole? And how do we use a holistic principle to evaluate and improve particular social rules? The holistic principle requires that we evaluate the system as a whole, whereas immanent criticism requires evaluating particular rules.

Here is one way to resolve the tension. When someone calls a particular social rule into question, we can evaluate that rule according to whether it *contributes* to maximizing average utility or to maintaining a utility floor or to both. We do not have to assess the whole social system's average utility or its provision of a utility floor. We can instead assess particular rules by their social scientifically predicted impact on restricted utility. That determination is going to be very difficult in some cases, but we can nonetheless experiment with new rules to figure out how to make improvements. Hayek does think, however, that we can make rough estimates of the effects of modest social reform, even given our cognitive limitations. Thus, if the change has surprising negative effects that we can identify, further reform is called for. Restricted utility thereby serves as a standard of immanent criticism. This approach is better than adopting no principle of social justice, which would effectively abandon the development of any principled basis for evaluating social and legal rules. Thus, contractors should adopt restricted utility as the foundation of immanent criticism.

Liberal Democratic Welfare-State Capitalism Is Socially Just

Now we must determine which institutions realize Hayekian social justice. In this section, I review Hayek's preferred political and economic institutions and explain why contractors might embrace those institutions after they use a principle of restricted utility to evaluate them. We will see that Hayek's familiar arguments for liberal constitutional rights, free-market capitalism, constitutional democracy, and a modest welfare state explain how these institutions satisfy the restricted-utility principle. The generic rationale is that these four institutional forms help people use their knowledge to satisfy each other's ends and make new discoveries about how to live together. Each of us alone is too ignorant of the many factors "on which the achievement of our ends and welfare depends" (Hayek [1960] 2011, 29; also see Caldwell 2004, 347). As a consequence, our institutions should encourage each person to "make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place" (Hayek [1960] 2011, 156–57).

Liberal constitutional rights. Hayek was first and foremost a liberal committed to a constitutionally limited government that respected basic negative liberties in accord with general rules that apply equally to all ([1960] 2011, 156–57).⁷ We must keep coercive power in check by defining a protecting private sphere of individual activity and limiting state power (Caldwell 2004, 289). The rule of law is especially essential for preserving a free society. On Hayek's conception of the rule of law, all persons have a right to be treated as equals by the legal, administrative, and political institutions in their society. Failing to respect the rule of law and the freedom it secures can lead to tyranny, wherein professional administrators become "the main rulers of the people" ([1960] 2011, 193). When this occurs, restricted utility is limited because social discovery and improvement is limited. As a consequence, protecting negative liberties through the rule of law should greatly increase restricted utility over time. Recognizing this link, contractors should agree to constitutionally protect basic freedoms.

Free-market capitalism. Hayek's endorsement of constitutional liberties extends to the right of private property. Socialist regimes, those that violate private-property rights, will face many difficulties, primarily inefficiency (Hayek 1945), social conflict (Hayek 1997, 193; [1944] 2007, 109, 166), and abuses of power (Hayek 1978). The parties to a social contract, then, will choose capitalism to realize restricted utility because socialist systems will reduce utility for all and lead people to combat and control one another. These weaknesses are shared by quasi-socialist regimes as well, though to a lesser extent.

Constitutionally limited democracy. Hayek embraces democracy for instrumental reasons: "[T]he basic principles of democracy are the only effective method which we have yet discovered of making peaceful change possible" (1979, 13). Democracy serves

7. One might read Hayek as adopting a republican understanding of negative liberty, where we should protect persons from arbitrary interference; certain parts of *The Constitution of Liberty* ([1960] 2011) read this way.

as a “sanitary precaution protecting us against an abuse of power” because “it enables us to get rid of a government and try to replace it by a better one” (1979, 137). Democracy is, as such, “one of the most important safeguards of freedom” (1979, 5). Even so, Hayek is concerned that an unlimited democracy may undermine the rule of law and create tyranny ([1944] 2007, 111–12). The powers of any “temporary majority” must be limited to avoid giving too much power to administrators (Hayek [1960] 2011, 106, 116). On these grounds, constitutionally limited democracy should satisfy restricted utility. Democracy, so long as it is constitutionally limited, will preserve peace, check bad governments, and help to secure basic rights, providing both increases in well-being over time and protection of the vulnerable. Contractors should, therefore, adopt constitutionally limited democracy.

A modest welfare state. In *The Road to Serfdom* ([1944] 2007), Hayek defends a number of government activities, including monetary countercyclical policy, transportation infrastructure, and regulating commercial practices, such as limiting work hours, establishing health and safety regulations, restricting poisons, stopping deforestation, preventing harmful agricultural methods, and restricting noise and smoke pollution; government would also subject natural monopolies to price control, provide insurance for natural disasters and health care, and deliver a basic minimum income (22, 43, 44, 133–35, 217).⁸ In *The Constitution of Liberty* ([1960] 2011), Hayek explains that he wants government to prevent depressions, to protect unions, and to provide pensions, medical care, and finance public education, among other things (264, 276, 286, 294, 379). He stresses throughout his work that the “old formulae of *laissez faire* [*sic*] or non-intervention do not provide us with an adequate criterion for distinguishing between what is and what is not admissible in a free system” ([1960] 2011, 231).⁹ Free societies must have welfare states to avoid severe deprivations. Hayek does worry that a social safety net might get out of control (Caldwell 2004, 291), but a welfare state should nonetheless improve restricted utility, especially by establishing a utility floor.

There is a worry that redistribution required by the welfare state may reduce average utility by taxing richer citizens and so make production more costly. Contractors must therefore formulate some kind of trade-off rate between restricted utility’s two priorities and then embrace the policies that the trade-off rate requires.

In sum, then, Hayekian contractors will embrace a principle of restricted utility. Liberal constitutional rights, capitalism, constitutionally limited democracy, and a modest welfare state best satisfy that principle. Thus, when we engage in immanent criticism and seek to reform our society’s social and legal rules, our aim should be to reform our way in the direction of the liberal democratic capitalist welfare state. In doing so, we will establish Hayekian social justice.

8. See the discussion in Burgin 2012.

9. This was a consistent theme elsewhere in Hayek’s work. See Hayek 1973, 62; 1979, 41; and [1944] 2007, 71.

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