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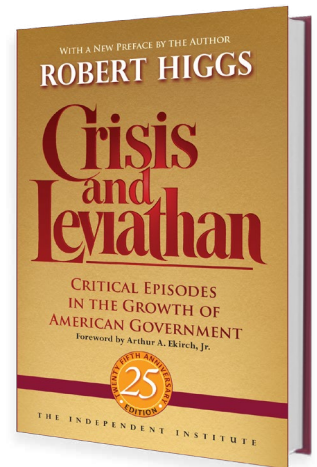
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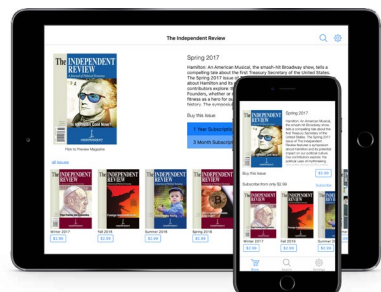
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The Mantle of Justice

— ◆ —
ADAM G. MARTIN

FA. Hayek famously argues that the concept of social justice is incoherent (1976, chap. 9). His argument is inseparable from his theory of spontaneous order. Spontaneous orders are distinct from planned organizations in that they lack central direction and have no coherent set of goals (Hayek 1973, chap. 2). Individuals and individual business firms can act toward a given end. Justice applies to the conduct of these individuals and organizations. If the word *social*, when appended to *justice*, means “interpersonal,” it is redundant (Hayek 1967, 242). Justice is always social in this sense. But the “catallaxy,” or market order, is a process of individuals and groups who frequently have incompatible goals and motivations interacting with one another. If the word *social* refers to the outcomes of this sort of spontaneous process, *social justice* becomes meaningless.

Because economic distributions are not products of human design, they can be neither just nor unjust. Justice and injustice apply to conduct. Any given distribution of economic rewards or resources is the result of a multitude of both just and unjust actions. No one controls the distribution of rewards or resources in a market economy. So claiming that a distribution is unjust is problematic because no identifiable individual or group can be said to have caused the purportedly unjust outcome. The concept of social justice “does not belong to the category of error but to that of nonsense, like the term ‘a moral stone’” (Hayek 1976, 78).

Hayek’s attempt to cut the legs out from under social justice talk has spectacularly failed. Academic institutions have become centers of social justice talk through curricula and other student services. Harvard, for example, offers a graduate certificate in social

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Table 1
Justice Creep

Adjective + <i>Justice</i>	Number of Google Scholar Citations
<i>social justice</i>	1,960,000
<i>environmental justice</i>	155,000
<i>economic justice</i>	105,000
<i>global justice</i>	75,600
<i>racial justice</i>	53,800
<i>gender justice</i>	35,300
<i>climate justice</i>	17,700
<i>international justice</i>	14,000
<i>health justice</i>	11,100
<i>food justice</i>	9,300
<i>spatial justice</i>	8,260
<i>ecological justice</i>	7,570

¹ Excludes the word *court* so as not to count articles about the International Court of Justice.

justice. In reaction to some of these trends, *social justice warrior* has become a pejorative reference to activists concerned with inequality. Over time, however, social justice has come to mean more than merely fairness in economic distributions. Modern social justice talk is broader, addressing issues of race, gender, and sexuality and discussing forms of social inequality beyond distributions of wealth, income, and other resources (see Martin 2017).

We might refer to this phenomenon as “justice creep”: the language of justice is applied to an ever-expanding universe of moral evaluations. Table 1 reports a list of adjectives appended to the noun *justice*, each of which returns at least five thousand hits on Google Scholar.¹ The term *social justice* is still king, with more than 1.9 million hits in the scholarly literature. And a cursory examination of any of this literature makes it clear that these other justices are typically treated as species of social justice: they focus on the outcomes of social systems rather than on the justice of individual conduct. So although Hayek’s critique has failed to substantially shift scholarly opinion, if he is right, his claims are more relevant than ever.

Hayek’s rejection of social justice has also received substantial pushback or qualification in recent years from friendly thinkers who (at least nominally) embrace his concept of spontaneous order. In my reading of this literature, these responses take three primary forms:

1. All searches conducted December 10, 2018.

- *Planned Spontaneity*: Spontaneous orders can be created and modified intentionally and so are subject to complaints about injustice.
- *Specific Complaints*: A theory of social justice can ground complaints about particular rules within a broader system of rules.
- *Mere Semantics*: Social justice is a normative standard all its own and need not have any relation to justice as Hayek conceives of it.

This essay explores these challenges to Hayek’s argument in order to determine which are successful. Although I do provide examples, I focus on the types of claims rather than on specific texts for two main reasons. First, there are common themes across different arguments. Second, there is no apparent agreement among Hayek’s friendly critics about the substance of social justice. What matters—and what makes Hayek still relevant—is that social justice concerns the outcomes of spontaneous processes. For each of these responses, I ask (*a*) whether the response gets Hayek’s view of spontaneous order correct and (*b*) whether it successfully identifies a source of *injustice*. Ultimately, I defend the contemporary relevance of Hayek’s arguments, in part on the grounds he endorses but also in part on Smithian grounds about the nature of justice.

Planned Spontaneity

In the preface to *The Mirage of Social Justice*, volume 2 of *Law, Legislation, and Liberty*—the very book in which Hayek mounts his full assault on social justice—Hayek states suggestively that his own thought has some affinity with that of John Rawls (1976, xiii). The Planned Spontaneity response takes this ball and runs with it. This response accepts that central planning of economic activity is undesirable or impossible or both. But the *institutions* that govern economic activity *can* be designed. Institutions include the rules that constitute markets such as property rights and contract law. Social justice is an evaluative standard for judging the design of such institutions. Do these institutions, in their current form, adhere to principles of justice?

John Tomasi articulates this view most directly. He refers to spontaneous order as a “strategy for social construction” (2012, 155). Because individual rules can be constructed, so can “*whole systems of rules*” (158, emphasis added). Tomasi goes so far as to claim that *all* political societies manifest this sort of intentionality in the design of their institutions (153). In doing so, he attempts to fully wed Hayek to Rawls, who famously claims that “society is a cooperative venture for mutual advantage” (1971, 4). Economists typically ask whether such rules are efficient. But it is also perfectly coherent to ask whether the rules of such a venture are fair or unfair, just or unjust. Social justice is the justice of the system of rules itself.

This response misunderstands the relationship between society and state. The state is an organization—or a network of organizations—that exists within society (Hayek

1973, 46). It does not sit outside the social order, passing edicts from above. Political institutions are nested within and entangled with social, cultural, and economic institutions that influence how they operate. Hayek distinguishes bottom-up *law* from top-down *legislation* to make precisely this point (1973, chap. 4). To be sure, the state is a “big player” in society that often has a decisive impact. But to point out that political institutions can be designed as a way of salvaging a distributive view of social justice is to ignore that institutions always interact with other institutions as well as with ecological and psychological factors.

Society is *not*, contra Rawls, a cooperative venture. The system Rawls lays out might make sense for such a venture, but the logic he applies is that of an organization rather than an order. It resembles a worker cooperative rather than a Hayekian catallaxy. Society is an ecology of enterprises (Wagner 2010), joint ventures that may be political or economic, religious or philanthropic, and that relate to each other in both competitive and cooperative ways. The state is a part of this ecology, not separate from it. It does not sit outside the social order with access to some Archimedean lever with which to implement social goals, even in an indirect fashion. The man of spontaneous system is still a man of system and makes the same error.

Specific Complaints

The Specific Complaints response tries to avoid this problem. Rather than claiming that social justice can be used to critique an entire system of institutions, it focuses on reforming particular rules or bundles of rules. Gerald Gaus articulates this sort of view. He recognizes that Hayek’s critique of social justice is inseparable from his concept of spontaneous order and that such extended orders operate through the interaction of rules that have various sources (2018, 38–39). Gaus argues that although the complexity of a spontaneous order creates a problem for arguments about the justice of distributions, there is less of a problem when discussing the justice of particular institutions. This view seems to be much closer to Hayek’s original intention than the Planned Spontaneity response (see Hayek 1976, 100).

Interaction effects between rules are complex but do not defy any prediction whatsoever (Gaus 2018, 44–47). This means that deliberate changes in the rules—although possibly fraught with peril—can in principle improve the functioning of a spontaneous order. These sorts of specific changes are also sometimes within the state’s power. Reforms to particular rules can be pursued purposefully, and the state is a big enough player to effect many such changes. Gaus mentions social justice only in passing, but this approach could ground a promising conception of the idea: social justice is a normative criterion applied to institutions themselves. It grounds complaints against particular institutions.

“An unjust law is no law at all.” This ancient motto captures the force of this response. Most hold, against some of Hayek’s stronger statements, that laws themselves can be unjust. One popular view is that a law is unjust if it contradicts some higher law:

natural law, human rights, or divine law. A consistently Hayekian view on law has a hard time taking these sorts of claims at face value because Hayek takes on the views of David Hume and Adam Smith in thinking that law is a product of human action (Hayek 1976, chap. 8). If law is a creation of human beings and justice means conformity to laws, what does it mean for a law to be unjust? Hayek does passingly offer one answer to this question:

It is sometimes said that, in addition to being general and equal, the law of the rule of law must also be just. But though there can be no doubt that, in order to be effective, it must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality—unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated. ([1960] 2011, 318)

An unjust law, in Hayek's view, is one that violates the principles that make for good law: equality and generality. Laws that establish legal hierarchies or discriminate between individuals can be called unjust. Maybe, then, a Hayekian could accept *social justice* as a sort of metaphor for justice in conduct, applied specifically to unjust laws. But this step might not be necessary. In the case of unjust legislation, an identifiable group of individuals has clearly acted unjustly—namely, the legislators. A clear example of such a law is the Fugitive Slave Act of 1850. I do not single out this act because it is the most harmful aspect of the slave system (far from it), but because it is an obvious case of a single, specific law that caused harm. By making it easier for the institution of slavery to be upheld, this legislation—even on top of the complex of rules that made slavery possible—distinctively impeded the realization of legal equality. But in this case *injustice* is not a metaphor. The Fugitive Slave Act was unjust *simpliciter*. So what does *social* add to *justice* here? Plain old justice will do.

We can push this line of reasoning a bit further. What about a law that is spontaneous in origin rather than the result of legislation? Laws that emerge from the bottom up can also create legal hierarchies or involve discriminatory treatment. Customary legal systems often include status distinctions such as slaves and masters. The practice of slavery typically involved a body of related laws that did not have a clear legislative body as their author. Where there are no legislators, who has acted unjustly in the spontaneous creation of such laws? I posit that there is at least one identifiable group in many cases: law enforcers. Whether judges, constables, or vigilantes, those who enforce unjust laws can be said to have acted unjustly.

Even though there are many laws that propped up slave systems, altering them individually or as a bundle does not require reinventing society from the ground up. Again, it is unclear in this case what work the modifier *social* is doing. Principles of justice in conduct, combined with appeals to principles of legal equality and generality, can already cover these cases. How big can a bundle of rules get before Hayek's critique kicks back in? I do not aim to answer that question here. But clearly at some point there

is no identifiable group of agents that can pull the rug out from under a bad set of rules. Because large-scale social systems are unplanned and unplannable, justice simply does not apply.

Thinking about enforcement raises the question of a more difficult case: social norms. Social norms are rules that do not have defined enforcers (Crawford and Ostrom 1995). But norms may disadvantage some groups. As noted earlier, pointing out such norms is the growth market in the world of social justice. Who has acted unjustly in the generation of such norms? If the answer is “anyone who acts on them,” then we are back to justice in conduct. But social justice advocates typically claim that the norms themselves or their distributive results are unjust. I do not claim to have a definite or satisfactory answer to this question. A Hayekian may simply bite the bullet and argue that these norms are simply not matters of justice. This assertion does *not* imply that divergent social outcomes or discriminatory norms are immune from normative evaluation and critique. Rather, it simply raises the possibility that justice may not be the right normative standard for making such claims. This leads us to the last response to Hayek.

Mere Semantics

If a social norm disadvantages some individuals through no fault of their own, perhaps we cannot identify a culprit. So what? The norm is still a bad one. This is the essence of the Mere Semantics response to Hayek. One way of rescuing the idea of social justice is to accept that it has no direct relation to justice as Hayek understands it. Social justice is simply different in kind from what Hayek thinks of as justice. That difference does not make social justice incoherent; it simply makes social justice different.

Jason Brennan provides the best example of this sort of argument, largely by omission (2012, 279–89).² He does not discuss the relationship between justice in action and social justice, nor does he meditate on the importance of spontaneous order for such claims. He instead argues that social justice is simply a standard by which institutions are judged. He focuses on whether institutions are justified, not whether any identifiable group has acted unjustly. He does not attempt here to square this idea with Hayek’s Smithian view of justice in action. To deny the coherence of social justice so defined would thus be a definitional mistake because social justice is different in kind from justice in action. As long as institutions can be evaluated according to some normative principle, then social justice has a clear meaning.

This argument is decisive in one important way. It is perfectly coherent to think that we should judge social institutions according to their results. This is true whether they are spontaneous in origin or not. If we are willing either (*a*) to expand the concept of justice well beyond what Hume, Smith, and Hayek placed within it or (*b*) to deny that

2. Note that I am not claiming that Brennan holds this view, only that this view is compatible with the argument as presented.

social justice is a species of justice, Hayek's argument is irrelevant. He could be right or could be wrong about the relationship between justice in conduct and social justice, but his claim has no force to anyone who does not want to ground evaluations of outcomes or institutions in his definition of justice.

Russell Hardin (1988) makes this point more explicitly when he analyzes the strategic structure of different moral problems. Hardin's goal is to examine how interactions between individually choosing agents create moral dilemmas and to assess how various institutions and norms address those dilemmas. Some moral dilemmas are defined by small-number, face-to-face interactions, whereas others come into play with large numbers of agents. When Hardin models distributive justice, he explicitly scales up his model of beneficence (38–41). That is, distributive justice—concern for how well off the disadvantaged are—is simply beneficence on a large scale. The problem that institutionalizing beneficence solves is different in kind from the problem that “justice as order” (Hayek's rules of just conduct) solves. The point is not that duties of beneficence are unimportant or should not involve institutional solutions, but only that the problems solved by distributive justice on the one hand and justice and conduct on the other are different in kind.

If social justice is different in kind than justice in conduct, why not use the language of beneficence? Or mercy? Do the semantics matter? On one level, the answer is no. In strictly academic communication, when words and phrases are carefully defined and terms of art abound, it probably does not matter whether we describe our standards for institutions in terms of justice or beneficence. The term *justice* has taken on innumerable meanings in the history of political philosophy, probably because it serves as a sort of moral trump card. We can hold people morally blameworthy for failures to be kind or to moderate their passions, but we cannot compel them to act unless it is a matter of justice (Smith [1759] 1982, II.ii.I.5). To say that a problem is not a matter of justice seems to indicate that it is less important.

But social life is not an academic seminar. I want to raise two concerns with the Mere Semantics response to Hayek. First, justice creep comes at the cost of nuance in our moral language, obfuscating important distinctions between moral concerns. Second, justice talk in particular relies on and instigates resentment. These two concerns are rooted in a hypothesis: moral talk matters. It affects our understanding of both moral problems and appropriate solutions and thus exerts some influence on the quality of our social morality. This hypothesis may be incorrect—it may be that moral talk merely mirrors our underlying moral sentiments and judgments—but there are good reasons to consider it plausible. The language we use to make demands on one another or to understand our own responsibilities touches virtually all aspects of our social morality. Language is the medium through which moral praise and blame are assigned (Smith [1759] 1982, III.II). Words constitute social rules, which express which actions are permitted, forbidden, or required (Crawford and Ostrom 1995). And language is clearly important for developing and communicating moral theories, which may modify those practices (Gaus 2018).

Justice creep impoverishes our moral language. Morality is not reducible to justice, beneficence, utility, propriety, happiness, or any other singular and simplistic formula. Moral claims are heterogenous and interact in complex ways. Moral values often complement one another, but they also sometimes conflict. Justice and mercy can butt heads. Politeness and honesty can stand opposed. Moral pluralists, virtue ethicists, moral psychologists, and even economists recognize this basic insight. Equity or efficiency: on the margin, which should we side with? It depends. The norms and strategies we deploy to deal with one moral problem are different from those that are appropriate to another problem.

My aim here is not to argue for any particular list of virtues or moral principles. Rather, it is to point out that our varied moral language grows out of varied forms of interaction. Navigating these interactions thus requires a varied moral tool kit. It is probably no accident that empirical approaches to moral inquiry tend to be pluralist (e.g., Smith [1759] 1982; McCloskey 2006; Haidt 2012). Even Hardin (1988), who defends a straightforward utilitarian view of the *foundations* of morality, recognizes that differences across social contexts make social morality *effectively* pluralistic. Collapsing important distinctions between moral categories can lead us astray in a complex world.

One objection to my claim is this: social justice rhetoric is an established practice. So, by my own argument, isn't it ipso facto serving some important function? I agree that social justice rhetoric serves an important function for its practitioners, to which I return later. But Hayek's argument about social justice is in part based precisely on a rejection of this claim. As individuals, we never encounter system-level phenomena such as "capitalism" or "society" (Hayek 1942). These phenomena are mental reconstructions that allow us to better understand activities and information that we do have access to. Social justice talk—when it addresses system-level phenomena—is guided not by an experience of society-scale phenomena but primarily by its advocates' mental models.³ Talk about mental models can continue for decades or even centuries despite being mistaken, especially in academia. The moral talk that Adam Smith discusses, by contrast, concerns interactions that take place in everyday life. It is adapted to navigating human interaction in a situation of tight feedback and real consequences.

Smith's keen understanding of the varieties of moral judgment underwrites my second concern:

Resentment seems to have been given us by nature for defence, and for defence only. It is the safeguard of justice and the security of innocence. It prompts us to beat off the mischief which is attempted to be done to us, and to retaliate that which is already done, that the offender may be made to repent of his injustice, and that others, through fear of the like punishment, may be terrified from being guilty of the like offence. It must be reserved,

3. However, individuals do experience the articulation and enforcement of particular social rules. As argued earlier, there is nothing incoherent about calling such rules unjust on Hayekian grounds.

therefore, for these purposes, nor can the spectator ever go along with it when it is exerted for any other. ([1759] 1982, II.ii.I.4)

For Smith, justice is a virtue rooted in the emotion of resentment. It becomes a virtue when it is appropriately tempered in its degree and directed toward acts that harm others. Accusations of injustice are invitations to feel resentment. Modern evidence from experimental economics is consistent with Smith's point, which sees "altruistic punishment" as key to enforcing rules that enable cooperation (Fehr and Gächter 2002). More recent experiments conducted by Vernon Smith and Bart Wilson (2014) have more explicitly tested Smith's view of moral sentiments such as resentment, finding them largely on target.

Justice talk invites resentment into our moral lives. Resentment can easily blossom into feelings of anger or outright hatred. Sometimes anger is appropriate. Anger at Jim Crow laws and various rules propping up the slave trade are well placed. Smith argues that justice, rooted in resentment, is the *sine qua non* of civil society ([1759] 1982, II.ii.III). Society can carry on, albeit coldly, without beneficence, but it cannot function without widespread observation of rules of justice. But justice creep expands the range of issues over which we are supposed to feel resentment. It also explains why advocates of social justice sometimes treat calls for civility as a suspect form of "tone policing" (Kiel 2017; Bailey 2018). Civility is not an appropriate response to injustice.

The connection to our moral emotions reveals a functional reason to appeal to justice over and above its intellectual status as a moral trump card. Resentment and anger are powerful motivating forces for mobilizing collective action. This, I posit, is a plausible explanation of the power and ubiquity of justice talk. It is effective not because we directly experience large-scale social phenomena, but because it works to motivate individuals to protest, vote, and engage in other forms of collective action. This function is of course not limited to social justice talk. Justice talk is plentiful across most political ideologies. I will not take to the streets because of a perceived lack of beneficence. But I will march for justice.

Justice is a blunt moral instrument. But when dealing with complex, nuanced issues, it may consume valuable moral resources or even lead us to misdiagnose problems entirely. This is especially worrying when it comes to addressing issues of poverty and economic inequality. When social scientists examine such issues, many important causes are—compared to justice talk—rather boring. For example, Matthew Rognlie (2015) argues that trends in the changing share of capital and labor income are driven entirely by housing prices. Dealing with economic inequality thus involves attention to issues such as zoning, restrictions on multifamily housing units, and the mortgage-interest tax deduction. Economists often point out that the causes and remedies for such perceived problems depend on technicalities such as the elasticity of supply or demand. It is difficult to organize a march about elasticity.

Resentment fueled by justice talk might get feet on the streets or into the voting booth, but it is not going to equip us to deal with such issues in a constructive manner.

This is not to say justice has no role in these discussions. When considering, for example, the economic disadvantages of African Americans, issues related to the criminal justice system loom large. But to load every challenge facing disadvantaged groups onto justice is to adopt a narrow moral view of complex, interrelated problems. Vincent Ostrom, meditating on a science of citizenship appropriate to self-governing, free societies, issues an important and unfortunately timely warning about this trend: “These powers [of the state] can only work with the development of a culture of inquiry in which conflict can be addressed in a problem-solving mode of inquiry rather than in a way that provokes fight sets where threats and counterthreats easily escalate into violent confrontations. Rhetoric about rage and outrage is the language of violent confrontation, which is not an appropriate prelude to inquiry and the exercise of problem-solving capabilities” (1997, 294).

Conclusion

This essay has assayed three responses to Hayek’s critique against social justice. The Planned Spontaneity response falls flat, fundamentally misunderstanding the nature of spontaneous order and the relationship between state and society. The Specific Complaints response is mostly correct and what I imagine Hayek had in mind when thinking about institutional evaluation. My only question is whether the adjective *social* adds anything to the noun *justice* in such evaluations. The Mere Semantics objection succeeds by simply bypassing Hayek’s concerns. Hayek’s argument against social justice can be defined away. But should it?

The mantle of justice is weighty. It should not be conferred lightly because doing so comes at a substantial cost. My argument is not that problems diagnosed under the heading of “justice” are not problems at all or that they are somehow less serious than problems of justice. Many of them are quite grave indeed. Rather, my aim has been to point out the danger of restricting our moral tool kit to justice, thus obscuring potential causes and solutions to these issues. Justice creep impoverishes our moral talk by eliminating important distinctions between moral principles and by giving pride of place to a very blunt principle at that. And in recent years justice talk has proven to be an engine of resentment and conflict. Hayek’s warning is as relevant as ever.

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