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Is Social Justice a Mirage?

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STEFANIE HAEFFELE AND VIRGIL HENRY STORR

There is both popular and scholarly concern that the current socioeconomic systems in the United States and other Western democracies are not working, especially for the least advantaged.¹ Discrimination based on race, ethnicity, gender, sexual orientation, and age has declined in recent decades, but some worry that discrimination on these margins is still too prevalent.² Issues such as inequality and lack of social mobility are frequently debated, but there is no consensus around the nature or extent of or solutions to these social problems. The least advantaged certainly lack economic power and political capital. In response, there have been widespread demands for social justice usually motivated by genuine concern for the least advantaged.

Social justice is about the fair distribution of power and wealth in society (Duff et al. 2013, 321). Demands for social justice thus hope to correct the inequalities brought about by the interaction between powerful market participants and government officials. Proponents of social justice often call for increased equality through equal rights to opportunities or equal distribution of wealth based on merit or the redistribution of wealth (see Reisch 2002; Jackson 2005; Duffy 2010). Policy and social work—through both government welfare programs and private charity—became the major mechanisms for achieving these goals (see Reisch 2002; Duffy 2010).

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1. Wendy Duff and her colleagues (2013) find that scholarly articles on social justice have increased over time along with studies on civil rights and human rights. For articles on the conceptual history and cultural origins of social justice, see Reisch 2002, Jackson 2005, and Bankston 2010.

2. See Blau and Ferber 1987; Omi and Winant 2014.

Developments in the late twentieth century “expand[ed] the range of social justice concerns beyond distributive mechanisms by drawing in issues around recognition, representation, identity, a focus on process alongside outcomes, and inculcating an obligation to challenge the normative dominant governing, economic, and belief systems in which power, privilege, and oppression are enacted” (Duff et al. 2013, 321–22). This view of social justice is not only about redistribution but also about examining the underlying institutions and the dynamics between the privileged and disadvantaged, between the elite and the rest of society. It is no longer primarily about the potential abuses of capitalism, but also about a recognition of discrimination in all aspects of social life (Duff et al. 2013). Therefore, values of social justice today include equality as well as inclusivity, diversity, and multiculturalism (Reisch 2002).

Given the ambitious aims of the proponents of social justice, it is difficult to understand exactly what social justice might look like in practice. Although much of the literature advocates for government intervention to ensure rights and to redistribute income, and many efforts to do so have been enacted, our society still has social injustices. So how can we adjust the current system to effectively address the needs of the disadvantaged? Can we constrain profit and still make progress (i.e., balance the conflicting values of equality and liberty)? Can we constrain special interests from obtaining privileges from government and still provide a broad array of public services (i.e., diminish the power of elites in order to benefit the masses)? Any reforms that attempt to address these issues must arguably be developed from an understanding of (1) the institutional systems that shape our society, (2) the incentives and limitations that influence action, and (3) the unintended consequences that may arise.

F. A. Hayek’s critique of social justice, developed in *The Mirage of Social Justice* (1976), the second volume of *Law, Legislation, and Liberty*, is perhaps one of the most compelling critiques because it attempts to address the three aspects mentioned in the previous paragraph. Hayek argues that the outcomes of market activity (wealth inequality) cannot be deemed just or unjust. The outcome of the game (who wins or loses) is not an issue of justice, though individuals’ actions within the game may be.³ However, redress against individual actors is the realm of justice rather than of social justice. For Hayek, justice can be carried out only against individuals or individuals gathered in organizations, but not against society and social institutions. Hayek goes on to express that many calls for reform in the name of social justice have led to special interests seeking privileges from government, often in an attempt to keep their current social positions rather than to help the least advantaged. He argues that government should instead stick to universal, generalizable rules (such as the protection of private

3. See Lister 2013 on where Hayek and Rawls stand on the infeasibility of merit-based income distribution in markets as well as where they differ on short-run redistribution. See Jackson and Palm 2017 for a modern account of the infeasibility of egalitarianism in a free society. And see Radnitzky 2004 on linking this view with that of the work by Anthony de Jasay.

property and the freedom to pursue one's own goals and interests) that apply to everyone and ensure the functioning of a liberal social order.

Hayek highlights many concerns regarding social justice, but there are tensions or inconsistencies in his approach.⁴ Here we argue that although the outcome of a game cannot generally be deemed just or unjust, the referees of the game may be.⁵ We also argue that there is at least one scenario where it would be appropriate to call even a fairly played and refereed game unjust. When the rules of the socioeconomic game or the referees favor the powerful, the chances that the least advantaged will rise to the top is thwarted. In this scenario, it is worth reexamining the role and functions of these social institutions, attempting to reform them where possible, and providing redress for the disadvantaged where it makes sense to do so.

In this paper, we examine the concept of social justice by critiquing and expanding upon Hayek's (1976) view. Because his critique focuses on the social justice concerns regarding economic outcomes, we limit our discussion to this aspect of social justice. In the next section, we examine that critique, including the notion that the outcomes of a game can be neither just nor unjust. In the second section, we explore how the rules of a game, the officials empowered to interpret and enforce those rules, and even the results of a game that is fairly played and refereed may in fact be just or unjust and highlight how this argument relates to current calls for social justice and the social institutions involved. We conclude by briefly speculating on what social justice might demand and the potential institutions that can remedy injustices.

The Outcomes of Games Are Neither Just nor Unjust

In *The Mirage of Social Justice* (1976), Hayek lays out how the market functions, the principles and rules necessary for the maintenance of the market order, and a critique against calls for social justice that interfere with the workings of the market.

For Hayek, the market order is the result of a process whereby individuals come together to buy and sell goods and services in the pursuit of their own interests. The local baker does not get up early to bake fresh bread because he wants to make us happy but because he wants to receive income in order to provide for himself and his family and can do so by providing sustenance to others in his community; it is a bonus that he also makes us happy (Smith [1776] 1981, 26–27). If, however, we stop buying his baked goods (because our tastes for baked goods change or another bakery offers a higher quality at a lower price), he will suffer losses and eventually go out of business. He will

4. Others have criticized Hayek's view that social justice requires coercion, which will undermine a free society, as being simplistic and too optimistic of markets. They also criticize how his policy concessions (specifically supporting a minimum income) weaken his claims. For this debate, see Feser 1997, 1998; Johnston 1997a, 1997b; Lukes 1997; and Tebble 2009.

5. This approach to critiquing Hayek's claim that social justice is meaningless or infeasible because it would require identifying the individuals who or the organization of individuals that have acted unjustly is slightly different than the approach taken by Steven Lukes (1997) or David Johnston (1997b).

have to find another way to make a living. This process of interpreting the feedback of the market, learning about one's own skills and the needs of others, and adapting in order to make a living is what drives the market and the progress that has come along with it (Hayek 1945).

In order for this coordination to be possible, Hayek contends that society needs enforceable rules of just conduct (generalizable rules that protect property, ensure freedoms, and restrict harms from others) (1976, 35–42).⁶ These rules allow for the proper functioning of the market order by enabling individual action and constraining the chances of harm from others. However, they do not eliminate failure and loss within the market order. As Hayek states, “[T]his manner of co-ordinating individual actions will secure a high degree of coincidence of expectations and an effective utilization of knowledge and skills of the several members only at the price of a constant disappointment of some expectations” (1976, 107). Although individuals are free to decide what occupations and activities they want to pursue, they also must deal with the market's feedback (their peers' satisfaction or dissatisfaction) and adjust or fail to adjust accordingly. Hayek understands that these losses may not be based on merit.⁷ Individuals may work hard, learn new techniques, treat others fairly, but still not succeed. The local baker may receive losses because he slacks on the job, he is not a good baker, an even better baker moved into town, or many people in the community take up gluten-free diets. Some of these types of losses are not based on merit, and all are unfortunate for the baker and his family, yet they are the cost of a system that generally brings about progress and ensures individual freedom.

From this reasoning, Hayek (1976) views calls for social justice—defined as redistribution to remedy economic injustices—as incompatible with a free society (specifically the institutions of the market and a limited government that enforces the rules of just conduct). His critique focuses on two major grounds: (1) the concept of social justice has no real meaning within the context of a free society, and (2) advancing reforms based on social justice will undermine a free society and the progress that has come along with it (1976, 68).⁸

First, Hayek argues that social justice in a free society is meaningless. Claims for social justice are based on the perception of systematic injustices against people owing to the structure or process of social life. However, Hayek notes that actions and outcomes are unjust (and can be remedied) only when you can pinpoint who precisely is acting unjustly. He compares “the general feeling of injustice about the distribution of material

6. Hayek notes that these rules of just conduct are less restrictive than the rules for small groups or communities, but as the market grows, so does the need to minimize the number of rules to those necessary for it to function (1976, 88–91). Our desire for more restrictive rules is part of the atavism argument Adam James Tebble (2009) discusses.

7. See Lister 2013 for how Hayek's understanding of merit is similar to Rawls's.

8. Tebble further classifies the critique to cover “meaningfulness, atavism, feasibility and compatibility” (2009, 582). For our purposes, we focus on meaningfulness as part of the first critique and on feasibility and compatibility as part of the second.

goods in a society of free men” to the misfortune of fate, such as when “a succession of calamities befalls one family while another steadily prospers, when a meritorious effort is frustrated by some unforeseeable accident” (1976, 68–69). According to Hayek, “Though we are in this case less ready to admit it, our complaints about the outcome of the market as unjust do not really assert that somebody has been unjust; and there is no answer to the question of *who* has been unjust. . . . There is no individual and no cooperating group of people against which the sufferer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and prevent such disappointments” (69). The cost of disappointed expectations is the price paid for living in a society where we can choose our occupations and pursue our own goals and interests. In this system, Hayek argues, “the fates of the different individuals are not distributed according to some recognizable principle of justice” (69–70).

Further, according to Hayek, the market order can be viewed as a game with rules of conduct as well as winners and losers. He states that the market

is wholly analogous to a game, namely a game partly of skill and partly of chance. . . . It proceeds, like all games, according to rules guiding the actions of individual participants whose aims, skills, and knowledge are different, with the consequence that the outcome will be unpredictable and that there will regularly be winners and losers. And while, as in a game, we are right in insisting that it be fair and that nobody cheat, it would be nonsensical to demand that the results for the different players be just. They will of necessity be determined partly by skill and partly by luck. Some of the circumstances which make the services of a person more or less valuable to his fellows, or which may make it desirable that he change the direction of his efforts, are not of human design or foreseeable by men. (1976, 71)

For Hayek, as long as players do not cheat, the outcome of the game cannot be called just or unjust even though the players’ success or failure may not necessarily be a result of superior skill or effort (1976, 72). If the players do cheat, there is someone to pinpoint as acting unjustly who can be dealt with under the rules of conduct.

Consider the game of basketball. The team that scores the most points may not be the one with the most skilled players or the hardest-working players; the winning team may have practiced less than their opponents and may have been more lucky than good. Although we may complain that the worse team has won against the more deserving one, the winning team has not acted unjustly, and the outcome of the contest is not unjust. However, if members of the winning team took steroids or tampered with the ball or net, they have acted unjustly. It would be appropriate to kick them out of the game or have them pay a fine for their misdeeds and to declare that the results of the game are void. According to Hayek, the same is true of the market. However, as we argue in the next section, under some circumstances the results of a game might be fairly

described as unjust even though none of the participants broke the rules and the referees impartially enforced the rules.

Second, for Hayek (1976), attempts to bring about social justice will undermine a free society by expanding laws beyond the rules of just conduct and by increasing government's command on people's actions and livelihoods. In other words, according to Hayek, equality of wealth can be achieved only at the expense of liberty. If social justice does have meaning and our institutional settings can provide insight into how social justice may be achieved, however, it is possible that reforms can be made that do not undermine the values and existence of a free society. We discuss this possibility further in a later section.

But Some Games Are Unjust

Actual socioeconomic systems in the United States and other Western democracies differ in at least two ways from the idealized game(s) that Hayek (1976) uses in his critique of social justice. First, although all games favor players with certain skillsets, this in and of itself does not raise any justice concerns because there are countless games that individuals can and do play that favor individuals with different skillsets. Stated another way, we do not worry that some individuals will almost always be winners and some will almost always be losers in some particular game because there are likely to be other games where the pattern of winners and losers is likely to be very different. There is a sense, however, that there is only one economic game (i.e., one set of rules governing economic life) in any real-world context. If there are individuals who cannot or are unlikely to ever be able to win this game, for whatever reason, then it might make sense to call this game unjust.

Second, the referees in Hayek's idealized game are fair. In real-world contexts, there are many instances in which the referees are not fair. Referees of the game can be partial to certain players over others or stand to benefit from one outcome over another, and so their monitoring and enforcement of the rules of the game may not be neutral. In this case, it would be reasonable to say that the game is or at least the referees are unjust. Further, specific individuals have acted unjustly. It would thus make sense to hold those biased referees accountable for their actions and either remove them from the game or require that they provide redress to those they have harmed.

Consider again the game of basketball. In basketball, it is widely accepted that players who exhibit exceptional height, speed, and hand-eye coordination are more likely to succeed and that players who are slow and short will be disadvantaged. Because of this, all the successful players are likely to display the characteristics that lead to success. This is not cause for concern because there are other games that can be won even if you are shorter and slower—games that advantage individuals with other characteristics (e.g., chess). There are even multiple types of games for the tallest, fastest, and most coordinated in society (e.g., football, volleyball). These options mean

that even if you fail as a basketball player, you can still succeed by playing a different game that privileges your characteristics and skills.

Now imagine that basketball is the only game people are permitted to play or, further, that everyone is forced to play basketball. The rules and structure of the game would still be the same, but the alternative options would be missing. In this scenario, there would be permanent winners and losers; the tallest, fastest, and most coordinated would consistently beat the rest of the players.⁹ In this instance, you could say that anyone who insists on basketball being the only game and perhaps even anyone who benefits from it being the only game has committed an injustice against the rest of the members of a society (i.e., the permanent losers of this game). It would be appropriate to call the results of this solitary and mandatory game unjust precisely because this game is the only one and mandatory. The game and its results may be thought to be unjust even though no one associated with the game has committed an unjust act. Social justice thus might have meaning even when assessing the results of a game that is fairly played and refereed.

In fairness, Hayek likely views the market order as a constellation of games instead of as one single game and certainly not as a game that everyone must play. And he would probably reject the notion that there is anything like permanent winners and losers in markets, as he envisioned them. Nevertheless, there are actual markets where the rules and the referees favor big, established businesses over new, small competitors. There are market environments where big businesses receive government bailouts during financial downturns, secure tax breaks for opening new ventures, and succeed in getting regulations passed that make it harder for other businesses to compete. In those cases, the referees (government agents) alter the rules of the game to rig the outcome to benefit big business. Rent-seeking firms petition government agents for favors, and the government agents may benefit in turn from campaign contributions, expert insight into the industry, future job prospects, or other favors (that range from mundane benefits to outright bribes).

Many market societies (almost all real-world market societies) are forms of political capitalism. Political capitalism, Randall Holcombe (2018) explains, is a unique system (or game) where the rules are created and refereed in such a way that elites win at the expense of the rest of society (see also Wagner 2016). Likewise, Joseph Stiglitz similarly notes that “[w]e have a political system that gives inordinate power to those at the top, and they have used that power not only to limit the extent of redistribution but also to shape the game in their favor.” “It’s one thing to win a ‘fair’ game,” he states. “It’s quite another to be able to write the rules of the game—and to write them in ways that enhance one’s prospects of winning. And it’s even worse when you can choose your own referees” (2012, 39–40, 59).

9. Of course, even if the rules remain fixed (which they rarely do), the strategies and types of players who dominate a game often change over time.

Interestingly, Hayek argues that although the concept of social justice would support merit-based reforms, in practice reforms under the guise of social justice are often advanced by groups insisting on protecting their accustomed positions in society:

The satisfaction of such claims by particular groups would thus not be just but eminently unjust, because it would involve the denial to some of the changes to which those who make this claim owe their position. For this reason it has always been conceded only to some powerfully organized groups who were in the position to enforce their demands. Much of what is today done in the name of “social justice” is thus not only unjust but also highly unsocial in the true sense of the word: it amounts simply to the protection of entrenched interests. (1976, 95–96)

Of course, groups of players (special interests) attempting to sway the referees (the government) existed long before the concept of social justice was developed or utilized as another way of gaining favor (see Smith [1776] 1981, 710).

Even if we were to grant that social justice is a mirage when looking at the results of a game that is fairly played and refereed, social justice is not without meaning when evaluating the results of an unfair game. Of course, a game where the same players always win and other players always lose might still be a fair game. But when the distribution of rewards seems skewed, it would not be inappropriate to examine the rules or the nature of the play that they engender or the types of players that they systematically reward to determine if the rules promote fair or unfair outcomes. Rather than being meaningless, the concept of social justice can be useful in assessing political capitalism.

Some Speculation on What Social Justice Demands

Social justice is a meaningful concept.¹⁰ To the extent that the socioeconomic system in a country favors some and not others, either because it systematically rewards some characteristics (e.g., hard work, inventiveness, intelligence, etc.) that are not equally distributed or it privileges some groups (e.g., based on economic power, political capital, demographic characteristics, etc.), it is appropriate to question the justness of the system and its results. The question of what to do to promote social justice, however, remains an open question.¹¹ If the concern is that some simply lack the skills to

10. This view of meaningfulness is different than the view in other critiques of Hayek (such as Johnston 1997a, 1997b, and Lukes 1997). Tebble summarizes: “The core of the objection that it is not meaningless to predicate (in)justice of catallactic outcomes is that even if no single agent or group of agents acting in concert can be said to have intentionally brought them about that does not mean that, as a (political) society, we cannot hold ourselves responsible for them” (2009, 591). Our argument, rather, is that by looking at the referees of the game, we can determine if social institutions lead to injustices.

11. Further research on this approach can examine (1) the causes of social justice issues, (2) the limitations in government remedies, and (3) how society (through markets and civil society) can provide remedies or alternative opportunities to the least advantaged.

ever win the socioeconomic game, then social justice might demand that we ensure that these permanent losers have the resources to live a reasonably decent life.¹² David Johnston (1997a, 1997b), for instance, advocates for indirect efforts at social justice. Similarly, Hayek recommends providing a minimum income for the least advantaged (1976, 87).¹³

However, if the concern is that elites have gained and maintained their socioeconomic power through altering the rules of the game and choosing the referees, then relying on government to remedy social injustice is an untenable option.¹⁴ To be sure, ending political capitalism (i.e., eliminating the rules that favor some groups over others) is the first best solution to the problems associated with political capitalism (see Wagner 2016; Holcombe 2018). But political capitalism is likely to resist reform for the same reasons that it evolved in the first place.

The market process, however, might offer alternative opportunities to remedy social injustices (see Tebble 2009; Tomasi 2012). Hayek argues that the market and civil society (through liberty, competition, and coordination) can provide opportunities and remedies to social injustices that the government cannot. Indeed, the transaction-cost revolution is not just a radicalization of the way we distribute and consume goods and services, but a fundamental challenge to existing socioeconomic privilege (Munger 2018).

This approach to conceiving of social justice allows for both recognizing social justice concerns about the least advantaged as legitimate and determining the appropriate responses to and the likely paths through which we might remedy social injustices.

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12. Hayek interestingly writes about the appropriateness of exploring reparations for past injustices but ultimately argues against them because of the challenges involved in identifying the victims and the uncertainties of time—that is, how recently or long ago the injustice took place (1976, 131).

13. Tebble (2009) identifies this concession as a major contradiction in Hayek’s claim of infeasibility. For a recent discussion of a basic-income guarantee, see the debate edited by Michael C. Munger in *The Independent Review* 19, no. 4 (Spring 2015), at <http://www.independent.org/publications/tir/toc.asp?issueID=81>.

14. Not only is it unlikely that the elites will want to remedy these injustices, but any attempts they make to do so are also unlikely to be successful due to the knowledge and incentive problems prevalent in central planning (see Hayek 1976, 99; Coyne 2013).

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