Why We Need Justice

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ABSTRACT: My aim is to reintroduce into the discussion of justice an element missing from recent accounts of it. In those accounts, the emphasis is on the formal framework within which to decide what is just. The framework consists of certain key values, a relevant set of actors, and a democratic procedure for decisions. I shall emphasize the need to go outside a formal framework in order to ask what we hope to accomplish by doing justice. Short of answering this question, we can't know that the formal framework is right.

This essay has three parts. I first sketch out a view of justice that goes beyond laying out any formal framework we must stay within to accomplish justice. In going beyond the formal, I argue that the goal of not weakening society is what is missing. Then I shall outline Nancy Fraser's recent important contribution to answering what she terms the "what", "who", and "how" questions of justice. Finally, I try to show that her views are incomplete without addressing the question of the "why" of justice – the question of what we wish to accomplish by doing justice.

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A kind of criticism that I want to discus has its roots in a major strand of modern ethics. John Rawls (1971, p.4; 1993, p.3) gave importance to the "why" of justice. He held that the fundamental question of political justice is how to find a concept of justice that can guide citizens in the direction of being cooperating members of a society despite the differences between their values. He mentions this as the goal of justice mainly in introductory remarks. But his guide in the task of developing a formal framework – with his principle of equal rights and his "difference principle" – is the aim of avoiding anything that might weaken society understood as a cooperative endeavor. In this regard, he had important predecessors among British moralists, notably Mill and Hume.[1]

1. Balancing Rights

Deciding what is just is challenging since one must navigate among competing rights. Was justice done when a court punished someone for taking a life? The victim had a right to life that the culprit seems to have violated. But the victim could have first threatened the killer. One needs then to go beyond the right to life to consider also the right to self-defense. With both rights involved, the question becomes how to balance them to establish justice. Perhaps the threatened person could have survived by fleeing the scene rather than killing the assailant. This leads us to ask how much risk a threatened person should tolerate before killing an attacker. What reason would one give for preferring one degree of risk rather than another?

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1. John Stuart Mill, Utilitarianism, Chapter 3. Mill says, "This firm foundation [of utilitarian morality] is that of the social feelings of mankind … ." David Hume, An Enquiry Concerning the Principles of Morals, Section 3, Part 2. Hume says, "The necessity of justice to the support of society is the sole foundation of that virtue."

In deciding justice we look for several things. We look for the conflicting rights of persons locked in a dispute. And we look for a way of balancing those rights. A plausible criterion for balancing leaves no one in a conflict with excessive gains or losses. Turning to a different kind of case, people have a right to respect and it is unjust to deny it to them. Through balancing we put limits on the right to respect. If others are overbearing, the respect due them diminishes, so that we are free to interrupt or to walk away. We have no obligation to respond to or even listen to verbal outbursts. But a balancing of rights that allows this reduction of respect must not involve excessive gain or loss for either of the parties.

We need to determine what will count as an excessive loss or gain in a matter of social importance rather than individual preference? Is diminished respect an excessive loss for an overbearing person? Our answer will depend on what one could reasonably hope to achieve by diminishing respect. Paradoxically, one can hope to increase chances for a respectful society by diminishing respect for overbearing persons. The overbearing person who threatens us physically can earn respect only by ending those threats. A society of mutual respect, as a common good, would seem to be the goal we are aiming at here when we decide that it is fair to withhold respect in the case of threats.

Does this appeal to common goods offer the solution to the problem of how to balance gains and losses to have justice? We commonly think we have done enough, to justify a balancing by showing how it favors some common good. But discord erupts even at the level of common goods. In addition to those who balance gains and losses in light of the ideal of a respectful society, there are those who think balancing should take place in light of a different common good. Instead of a respectful society they argue that a security society is the

relevant common good. In it, security will be so tight that repression occurs even on suspicion that misbehavior might occur. A rationale for the security society might be that there are always factions organized for displacing those seen as different. Coddling those factions fails to lead them to respect others. So, the balancing of gains and losses to make justice proceeds, instead, in the light of the security society as a common good. Those on this side emphasize the importance of being threatening to realize a security society.

We seem to have reached stalemate. Balancing solves disagreements only within a circle of adherence to a given common good; an alternative common good will have its devotees, who will balance gains and losses in a different way. The suggestion that we move to common goods at a higher level to avoid stalemate seems like an invitation to an endless regress. To avoid regress, it is tempting to go transcendental (on the notion of a comparative *versus* a transcendental view of justice cf. Sen, 2009, pp.96-101). Then the test of a decision about justice would be whether one would affirm it universally, affirm it if there were no reasonable objection to it, or affirm it in an ideal speech situation. But no human could visit all situations to confirm universality, attest that nobody will have a reasonable objection, or communicate while unaffected by passion and propaganda. This limits the relevance of justice to supra-human beings. Each of them would have the knowledge that they all thought alike, thereby avoiding controversy over justice.

However, we can accomplish what we want without leaving the terrain of everyday humans. Where common goods like respect and security collide, each side is aware that such a collision makes living together in a society more difficult. If removing obstacles to living together in a society is their aim, then it will be important for each of them to evaluate the

practices they engage in. An evaluation might indicate that neither respect nor security by itself can avoid serious risks to being part of the same society. Instead, it might indicate that a certain blend of the two would avoid the most challenges to living together in a society. This would give us what we want in order to claim that such a balancing of respect and security is just.

We have here a goal that spans the gap between conflicting values. It is the goal of avoiding obstacles to having a society. A society of a specific kind is not the goal we want here. It is not a socialist, an industrial, or an Islamic society that spans the gap between conflicting values generally. For, the dominant values in terms of which we characterize such a society may be in conflict with the values of opposition groups within it. And the dominant values in such a society will be in conflict with values found in a regional or global society encompassing it. What then is it about society that I am appealing to? In any society, one can rely on many others in it for help, for holding to their commitments, and for joining in relaxing pastimes. We severely reduce these expectations in a threatened society. As threats to these expectations accumulate, the society itself faces threats to its survival. Our interest in having a society to live in leads us to reject measures that would threaten it. So, to decide how to balance common goods in a way that we can call just, we ultimately rely on balancing that does not pose a threat to society. In fact, if we avoid balancing common goods, we pose a threat to society by encouraging polar views on justice that makes cooperation unlikely.

One might object that the regress of balancing does not stop with society since there are those for whom preserving society is not a goal. But it is an illusion to suppose that balancing could still go on between defenders of society and

those who refuse to treat defending it as a goal. In balancing the culpability due to homicide with justification by self-defense, a common ground of language and reasoning was available for discussing reasons for self-defense. But this common ground is no longer available where there is indifference to society. So, since balancing can only take place in society, society caps off the regress in balancing.

2. Fraser's Three Questions about Justice

One of the main strengths of Nancy Fraser's *Scales of Justice* (2009)[1] is her use of recent social and political changes and conflicts as the context for her philosophical account of justice. She hopes to develop ways to understand and ultimately move closer to resolving major disputes over justice arising in this context. She sees some of the major disputes as stemming from clashes of ideas from previous periods with those of the current period. Some of the older ideas were compatible with national insularity, but now they collide with newer ones arising from globalization. In addition, whereas distributive justice had commanded the greatest share of attention, now we attend more equally to issues of social recognition, political representation, and distribution.

How then does Fraser contribute to untangling such clashes? Her main strategy is one of separating three types of issue regarding justice. One of them has to do with deciding *what* we must do to act justly. (16) To act justly, must we punish rather than try to reform convicted criminals? We are dealing here with what she calls the "what" of justice. There are, she claims, three categories of claim that fall under the "what" of justice. These are justice claims concerning distribution of

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1. Numbers appearing in parentheses in the text refer to pages in this book.

goods, recognition of persons, and representation in politics. There is also a question about *who* is to come under the umbrella of justice. Does it apply to members of minorities and foreigners? (33) This is a question about the "who" of justice. (Fraser does not discuss whether the "who" could include infants, victims of dementia, pets, and corporations.) Lastly, there is a meta-question about *how* we are to go about reaching a binding agreement on an issue of justice. Do we let autocrats decide for us, or should we rely on participatory means? (27) Here the question is about the "how" of justice.

Fraser's drawing clear distinctions between the three areas is an undeniable contribution to the literature on justice. Yet something is missing that is the key to making her tripartite analysis work. There is a long teleological tradition in normative matters, including justice, that would insist on a fourth division, the "why" of adopting values as morally binding on us. In that tradition, one wants to know, about a claim to moral validity, whether it serves the kind of aim needed for it to be a valid moral value.

There have been various views of what such an aim is, but the immediate issue is how a norm can be binding without an aim. If we think justice is a moral value, and not a regulation adopted by a state, we cannot account for justice apart from its having the kind of aim that moral values in general have. Moreover, we shall see below that Fraser links justice to a variety of norms of equality to answer the "what", "who", and "how" questions. These norms of equality must also promote the aim that moral norms in general promote. The moral importance of acting justly rather than unjustly turns on its promoting this aim – the "why" of justice. Moreover, if we know the "why," then we are on our way as well to answering the "what," "who," and "how" questions for justice. That is, if we know why we reject injustice, we shall choose norms of

justice ("what"), populations to which they apply ("who"), and methods for having them treated as binding ("how") that help satisfy our reason for wanting justice.

The specific context Fraser sets for her discussion of justice is the post-Cold War, neo-liberal, globalizing condition with which the 21st century began. Disputes in this context over justice are rampant, posing "a major problem for anyone who cares about injustices today" (56-57). Of course, views of answers to the "what," "who," and "how" of justice developed before this period still show up as parts of present disputes. The centrality of the temporal dimension in her discussion of justice enables her to avoid a sterile treatment by emphasizing just how high the stakes in the debate have become for all of us. What though are the stakes? Suppose the "wrong side" wins. What does that mean for you and me? To be able to say, we need an answer to the "why" question. What is there about injustice that can make one not want to win by adopting it?

Is, though, the "why" question necessary? Aren't the values Fraser appeals to in answering the "what," "who," and "how" questions sufficient? She speaks of these values as "clues" for getting beyond "abnormal justice", that is, for getting beyond a failure to have a shared understanding of justice (57-58). As we shall see, these values belong to a circle of values that includes justice itself. If they can lead to agreement on justice, then they make the "why" question unnecessary. For, once justice has alongside it this circle of norms, justice seems to need nothing more than these norms to have a binding character. I find this hard to accept. My general point is that what is at stake in adopting a given value, like justice, is not whether it belongs to a circle of closely related values. What is at stake, if we are to avoid formalism, is something outside any such circle of values but that the values in the circle can help us protect.

Just what are the values Fraser places in the circle around justice? There are three of them, paralleling the "what", "who", and "how" questions. One of them concerns participation inside a society. Equal participation in social life is unlikely where some experience economic, cultural, or political barriers to participation. For example, denying the vote to an ethnic, gender, or racial group rules out equal participation. Such a denial would violate what Fraser calls the principle of *parity of participation.* (60) This principle limits the "what" of justice by rejecting as unjust any discrimination in the distribution of goods, of recognition of cultural differences, or of representation in politics. In the circle of values referred to above a denial of parity of participation would become an injustice.

The second value is embodied in what Fraser calls the *all-subjected* principle. (65) It addresses the issue of the "who" of justice by telling us that a governance structure of whatever kind must treat those subjected to its decisions as subjects of justice. The all-subjected principle makes sense in our new world where communities are no longer isolated. But there will still be those who hold that communities are responsible only to their own members. What the all-subjected principle tries to avoid is a lack of reciprocity. A governance structure enforcing regulations on insiders and outsiders must treat both with "equal consideration". If it regulates both, it cannot deny the outsiders the same participation in deciding on such regulation that the insiders enjoy. The G-20 is an elite organization made up of economic leaders and officials from 20 large economies. It has influence not just over these 20 economies but over other economies as well. In this sense, all economies, including those not represented in the G-20, are subject to its decisions. According to the all-subjected principle, even the non-represented economies here have standing in relation to the G-20 and hence it owes them

justice along with its own members. The worry is that, due to its unrepresentative structure, the G-20 will ignore the needs of the economies of the non-members.

This brings us to the "how" question. When facing a dispute over the justice of taking a certain step, how are we to go about resolving it? We would not resolve the dispute between isolationists and globalists about the "who" of justice just by appealing to the all-subjected principle. Fraser's proposal for resolving such a dispute has two parts. First, we must deal with a dispute about justice through dialogue rather than appeals intended to cut off discussion. Yet she says dialogue is no guarantee of reaching ultimate agreement on justice. So, second, there is a need for institutions that can make rules of justice binding. These institutions are to take into account the dialogue going on around them. And they must be democratic enough themselves to have legitimacy in making their decisions about justice binding. As Fraser notes, this approach to the "how" of justice avoids both a populism focused solely on democratic dialogue and a hegemonism focused solely on institutional autonomy. (68-69) The binding character of justice arrived at in this way has little to do with being backed by raw power. But in the last section, I ask whether justice of this kind binds morally rather than merely politically.

Now I wish to consider Fraser's idea that framing questions about justice through "what" and "who" questions opens the possibility of misframing them. She considers two kinds of "misframing" of justice. My concern is that in each case a crucial element is missing in her analysis of misframing.

The first type involves the "what" of justice. Consider the example of a poll tax for voting. Suppose we frame the "what" question about the justice of paying a poll tax as a distributive

issue. It might then be about whether voters should share the cost equally of setting up the polling places and counting the ballots cast. However, this could be a "misframing" of the issue of the justice of the poll tax. For a proper framing of the "what" question, we might need to look beyond the distributive issue to that of political representation. From this viewpoint, we would see the poll tax as unjustly denying those who could ill afford the tax their right to political representation.

This, though, raises the question of balancing. One should avoid trying to find what is just here by flatly rejecting either political representation or equal distribution. Instead, one could look for help in a system that calls for modifying both the ideal of political representation for everyone and that of equal distribution of the cost of voting. This system would balance representation and distribution in a way that does not create excessive gains or losses for anyone. In it, the power gained through representation by the well off would diminish since they would take over from the less well off a large share of the expenses of voting. This hypothetical system would promote the common good of a fair voting system. The basis for this common good would be that it helps avoid threats to society.

For Fraser, the second kind of misframing involves a more serious mistake. (62) It does not involve the "what" of justice but the "who" of justice. In the case of the poll tax, we considered those who could not pay the tax as members of a larger community that includes those who could pay it. The problem was merely that the poor could not participate fully in this community. Yet the second type of misframing involves separate communities. Despite being separate, one community may try to control the other through some means of governance – an occupying army, international loans, or

media ownership. This governing community might try to avoid treating those in the community it controls as deserving justice. Its excuse would be that it does not owe justice to those outside its community. Suppose exports of cheap grain are devastating rural populations in many communities. Fraser would say that communities promoting these exports misframe justice by not treating those subjected to harm by their exports as subjects to whom they owe justice.

Here, as in the first case of misframing, Fraser seems to ignore the room for balancing. One can find this room between devastating rural populations and modernizing an economy. Those who subject others to trade will reply to her that only through increasing trade and doing away with inefficient agriculture can a newer and more promising form of justice prevail. As in any serious case of a conflict of views of justice, there is need to balance the sides. This will call for an appropriate common good, one that will guide the sides to a solution that can avoid threatening society. One cannot avoid the "why" question in the process of claiming a misframing of justice.

3. Challenges to the "Why" Question

Reflecting on the way just rules bind us can provide a better understanding of the "why" of justice. We begin this reflection by clearing up an ambiguity. Fraser says governing bodies that take account of public dialogue can decide issues of justice and make them binding. She does not make clear whether justice here is an ethical or a political justice. She could have resolved the ambiguity by noting that much that the state and other governing bodies do is simply for the sake of maintaining their rule. Governing bodies may consider public dialogue merely to learn what obstacles they will face

in pursuing their own ends. Governability then provides an answer to the "why" question that is appropriate for the justice of governing bodies. The limits set by governing bodies are politically just limits when they succeed in avoiding major threats to their governability (this connection between governability and state justice is the theme of Fisk, 1989, pp.155-161).

Though governability may be the answer to the "why" question for political justice, it is not the answer to it for justice in ethics. In seeking ethical justice, the concern is not with society's institutions of governance but with society itself. Clearly though, the two forms of justice are often closely connected, despite being answers to different "why" questions. This close connection accounts for the ambiguity of the "why" question just noted.

Racial discrimination for those in the mid-19th century US was an ethically unjust practice. It created a chasm in the society that could have led to its collapse. But at that time, a government that passed and enforced a law against racial discrimination would have seriously compromised its capacity to govern. When in mid-20th century some of those forms of discrimination actually became illegal, this of itself did not imply any change in their ethical status. By then, the moral crusade against racism, a central aspect of which was dialogue, had won over a sizeable section of the population thereby making laws against racism compatible with governability. In this case, extended dialogue among the governed, not only addresses the ethical issue as to what the rules of justice should be, but it provides valuable evidence for those who govern about which rules would, or would not, permit governing. It would weaken governance to have it rest on rules that flew in the face of an enduring popular ethics.

In this light, Fraser's transition from public dialogue to making rules for governing appears too smooth. At the level of public dialogue, people will test a potential norm of justice to decide whether it is compatible with parity of participation and the all-subjected principle. If there are no additional obstacles to this norm, it could achieve widespread support in the public forum. Then, for Fraser, the governance level, after taking the dialogue in the public forum into account, makes its own decision on whether or not to consider the norm binding. (69, 84) However, there is a break in the apparent smoothness of this process, which is not evident in Fraser's version of it.[1] The break comes with the change in criteria as we move from the public forum to the governance level. In the public forum the criterion is to avoid threats to society, whereas at the governance level it becomes avoiding threats to governability. This break does not keep a governing body from supporting a norm of justice that the public forum accepts as a means to social survival. But the governing body will support the norm, not because it promotes social survival, but because it promotes governability. After all, if a governing body cannot govern, it is of little use in promoting justice of either kind.

Having drawn this distinction between politics and ethics, I turn now to ask how Fraser with her dedication to justice can pull up short before raising the "why" question. It is clear from her book that Fraser writes, not as a mere onlooker, but as a justice seeker in passionate pursuit of at least a provisionally correct circle of values around justice. This is evident in a number of ways. She wants to relate justice to the world we face now. She does an admirable job of bringing up to date the circle of values associated with justice. She

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1. Nor is this break evident in Jürgen Habermas' version of the same transition. For the transition cf. Habermas, 1996, pp.129-131.

updates the circle that seemed adequate when nation states were less involved in a world market and privileged groups less likely to face criticism for failure give full recognition to less privileged ones. Furthermore, she wants to raise our hopes of escaping the trap of abnormal justice with its unresolved disputes, ones that are often between older and newer views of justice. She suggests that the new "how" of justice, with its emphasis on public dialogue and democratic governance, can move us closer to ending these disputes. Even if other disputes will take their place, we can reach provisional agreements – provisional hegemonies – that help to avoid a "paralysis" of action. (72) But paralysis suggests the loss of a decisive gain. So, what kind of gain can one expect from resolving disputes in matters of justice? Answering this question, which can reveal the basis for her passion, will answer the "why" question about justice.

To have a fully critical study of justice (38) or of morality in general, it is important to add the "why" question to Fraser's list of three questions. Her three questions are ones that call for answers that, like justice itself, are values. The "why" question addresses the whole edifice of values, so one does not answer it by introducing another value – "a new normal." This restriction holds for any answer to the "why" question. A number of answers are familiar, ranging from the theological to the humanistic and beyond that to the biological. On a theological view, the reason for being just is ultimately the desire to be in harmony with a sacred being. On the humanist view, the reason is that just behavior allows humans to develop the best traits of their humanity. One among various biological views is that justice evolves from random acts of cooperation, which prove to promote survival among otherwise self-interested beings.

Fraser would be skeptical of efforts to settle issues regarding the need for justice in any of these ways since they do not make dialogue central. She picks out for harsh criticism the use in matters related to justice of scientific experiment or postulation. (42) This use of science largely deserves her criticism. But we should not extend it to all investigation. My reservation comes from the need to investigate to find whether a proposed norm of justice could pose a threat to a society. We would have to sift data, look for exceptions, and constantly dialogue with others. Whether we call such a course scientific investigation really doesn't matter. What matters is having an investigation that can confer objective status on its results. If after investigation laced with dialogue we can claim that adopting a certain norm of justice would likely end up generating crises severe enough so that they threaten society, then we have an objective basis for rejecting that norm. This warrants our saying that it is an objective matter whether a norm of justice, or any norm in the circle of justice, is valid. Why we accept or reject norms of justice depends on how they could affect society.

We can now piece together an account of what the role of society is in ethics and in justice in particular. The answer to the "why" question is, I claim, society's viability rather than something found in theology, humanism, or biology. The fundamental reason for a norm would then be that investigation, including observation and dialogue, would show that its widespread adoption could help avoid threats to society. In general, we are averse to a life that, as Hobbes put it in *Leviathan*, chapter 13, is brutish and solitary. All of the values that Fraser finds connected to justice – equality, inclusion, democracy, governance – lose their importance without society as their context. Thus, for example, parity of participation applies to participation in society. The all-subjected principle might seem an exception. Those

subjected are outsiders. If they were outside a social network that includes the subjecting power, then we would have an exception. True, the all-subjected principle applies when the outsiders are not part of the same governance structure. But they can be outside such a structure and still inside a social network that includes the subjecting power. The governing power will need to form the rudiments of a social network with those it governs. And finally, the way we go about contesting views on justice involves a blend of democratic publics and democratic institutions, both of which belong to a society. Destroy society; then none of these three requirements of justice would hold.

To understand how society can play such an important role, consider a few of its salient features. Fraser herself speaks of society and civil society distinguishing them from organizations with formal governance functions, like states and the international financial organizations. (70, 154) In addition, we can distinguish, as we did in Section 1, a change within a society from a society's demise. A society that evolves from militarism to pacifism undergoes a change that need not signal its demise. In fact, this change may have been necessary to avoid threats to its survival. By contrast, the collapse of a society goes deeper by destroying trust, mutual aid, and joy in the company of others. Moreover, it is important not to think of avoiding threats to social collapse as itself a moral principle. Instead, if one lives in a society, then it becomes the context of one's activities. As just noted, we assume our presence in society when we debate matters of justice, equality, and democracy. Justice and other norms are ethically binding when they help avoid threats to society can make even though avoiding threats to society is not itself an ethical norm. Norms will need revision as some societies become parts of regional societies and then parts of global society. What the survival of a smaller society needs may not be needed for survival when it is included in a society with a larger base.

Conclusion

In conclusion, I consider an objection to my claim that Fraser's view is incomplete. Doesn't the "how" question show that the issue of the "why" of justice is superfluous? For her, a correct answer to the "how" question tells us, first, how to avoid conflict among justice claims and, second, how to reach a binding justice claim. The first part of her answer proposes having dialogue within civil society. But she feels this isn't enough since in civil society not everyone participates and one cannot guarantee that the procedures are democratic. So the second part of her answer proposes going well beyond civil society to democratic institutions that have governance functions. That is, though taking into account the views worked out within civil society, these institutions will make decisions that bind their members. (69) In this way, conflict is resolved – without ever having to ask the "why" question – through linking popular dialogue with institutional decisions.

My response is that this answer provides a formal framework for a procedure to handle a dispute. It leaves out any indication as to why the dispute has importance. All we know is that there is a conflict about something called justice and that we are to have a discussion at various levels to resolve it. The only guidelines for the discussion are the participatory parity rule, the all-subjected principle, and the norm of democratic discussion. We are supposed to advance to a stage of being bound by the results that come from following these guidelines to the end. Yet without an inkling of what the stakes are, there is no reason to be bound by the results. Fraser's framework is useful only when we attach justice to a goal. Of course, different parties to a dispute about justice might have different goals in mind. We can dismiss most of these goals for leading away from the kind of egalitarian and participatory justice Fraser has in mind. The point though is

that, to have a passion for making justice an active force in the world, justice must have a goal compatible with the various requirements Fraser places on justice. For this reason, settling the "how" of justice does not make its "why" redundant.

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