

PROCEDURAL JUSTICE AND INFORMATION IN CONFLICT-RESOLVING INSTITUTIONS

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A logical analysis of the idea of justice would seem to be a very hazardous business. Indeed, among all evocative ideas, that of justice appears to be one of the most eminent and the most hopelessly confused.

—Chaim Perelman¹

I. INTRODUCTION

One difficult question that political and moral thinkers have grappled with is how to limit justice.² We have a tendency to see justice as potentially applicable to almost any circumstance in which values are somehow involved with interpersonal behavior.³ Yet in our contemporary parlance it does not seem appropriate to use the language of justice in all such situations. While there may be significant disagreement over which situations are appropriate for the use of the concept, there does appear to be some agreement

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¹ CHAÏM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 1 (1980).

² See, e.g., ARISTOTLE, *THE NICOMACHEAN ETHICS* 107–11 (David Ross trans., Oxford Univ. Press 1980) (1925) (dividing justice into two senses: the universal sense of law abiding—the “complete virtue”—and the particular sense of fair and equal). Aristotle’s latter sense of justice has limited scope and application and is concerned with particular kinds of acts, while the former is concerned with every act that might have an impact on one’s virtue. See *id.* at 108, 110–11; Joel Feinberg, *Noncomparative Justice*, 83 *PHIL. REV.* 297, 298 (1974) (dividing justice into “comparative” justice, which focuses on eliminating arbitrary inequalities, and “noncomparative” justice, which responds to basic rights).

³ See, e.g., PERELMAN, *supra* note 1, at 1–2.

sides, there would be no way for the parties to gain any use from such an institution, because the judge would have no way to ensure compliance with the outcome unless she knew what was at issue in the dispute.

One reply to this line of reasoning is that it does not involve a very robust notion of the norm to hear all sides. After all, there is a big difference between allowing the judge to know the issue over which the conflict has arisen and allowing a presentation of the actual claims of each side. To take our minimal judge, who is only allowed to hear what the dispute is about, it would seem sufficient to ensure compliance with the resolution if this minimal judge hears only, for example, that each side claims a piece of property. As long as the judge knows what the property is, she can ensure that the winner of the coin toss keeps the property. This is certainly the least amount of information possible to give to a conflict-resolving institution, and it certainly does not seem like a very strong application of a norm to hear both sides. However, it is still an application of that norm. Even though the judge does not hear the basis of each side's claim on the property, she still is informed that each side makes such a claim. In essence, she hears each side say, "I want it." We certainly do not think much of this institution as a conflict-resolver since we have other norms that demand the judge consider which side has the greater claim—based, perhaps, on substantive principles—thereby requiring more information. But this shows that the dictum to hear all sides in some, perhaps incredibly weak, form is a presumption behind a conflict-resolving institution.

We would be understandably reluctant to call such a stripped down process an institution. However, since it appears to have all of the characteristics of a conflict-resolving institution—an explicit and standardized decision process, some minimal authority to enforce the resolution, etc.—we might be best off calling it a primitive institution. Part of what makes it primitive is its inadequacy with respect to received norms of procedural justice. However, this merely shows that the extent to which institutions meet those norms is a matter of degree.

this information is to be given after the dispute has been resolved (i.e., after the coin toss), but then the principle of hearing both sides is still operative for the later disputes over compliance.

wants the culprit to be put to death is irrelevant to the question of whether it would be just to do so. Upon closer examination, however, it seems that these conclusions may stem from a preconceived notion about the content of justice and that there is nothing inherently wrong with a conception of justice that requires an examination of those issues. From one perspective, these subjective issues might be very important to a determination of whether the imposition of the death penalty was just. We might have a conception according to which it would be unjust not to impose the death penalty when the culprit devalues her claims to go on living in the face of the demands for retribution. On the other hand, we might want to be more reluctant to impose death on a culprit if the victim's family decides that the culprit's life is worth more than their claims. It seems possible that we should ignore one subjective valuation while accounting for the other, ignore both, or account for both. But at least some kinds of values seem to require an examination of the subjective valuation of the party in order to reach the most just outcome (even if this is not always the case in the death penalty situation under our normal way of addressing this issue in this culture). That these conclusions seem at least colorable indicates a very imprecise and insecure notion of what justice demands in these kinds of cases.⁹⁵

Additionally, these considerations highlight how tenuous the role is of any specific "thicker" notions of procedural justice. In a system that treated the subjective valuations of the convicted murderer and victim's family as relevant to the issue of whether the murderer receives the death penalty, a higher premium may be placed on the relevance of that information than upon the need for consistency in the application of punishment for given criminal acts.

F. Information and the Requirements of Justice

This suggests that we cannot divorce the issue of the content of justice from the issue of what kind of information gets considered in the question of the just outcome. One conception of procedural justice will require the inclusion of certain kinds of information that another conception will exclude. So the only conclusion possible without delving into the content of these conceptions of justice is

rather than victim versus accused. See *supra* note 60.

⁹⁵ The vehemence with which one might argue for a given conclusion in these situations may indicate a very precise and secure concept of the content of justice, or it might indicate the opposite.

that procedural justice does offer guidance as to what information ought to be included in the process of adjudication. Different conceptions of procedural justice, fleshed out as they may be in different institutions and for the purposes of resolving different kinds of conflicts, will require different inclusion and exclusion principles in the marshalling of information as the basis for adjudication.

Nonetheless, it is clear that relevance cannot serve as a fundamental criterion for decisions about what kinds of information are admitted into the conflict resolution process. While relevance may be useful as a threshold criterion for initial determinations about whether a given piece of information is appropriate for use in the process, other—perhaps more substantive—criteria relating to the conception of procedural justice in use will quickly begin excluding even relevant information.⁹⁶ The justice discount is a good example of information that appears to be relevant yet will likely be appropriately excluded—depending on the circumstances of the conflict—by institutions operating within many conceptions of procedural justice.

G. Ideal Institutions and Dealing with the Justice Discount

For the institutional setting, the justice discount can complicate matters greatly. Imagine an institution that uses justice itself as the only criterion for solving problems; that is, it is not beholden to considerations of efficiency, practicality, etc. How does such an “ideal institution” deal with the justice discount? Here, it is important to separate the two situations described above: the situation in which the justice discount does have an impact on the most just outcome and the one in which it does not. In the latter case, an ideal institution successfully tracking what justice demands of the situation will ignore the justice discount of either or both parties. That is, if the justice discount would not change the most just outcome, then the ideal institution can—and should—ignore it.

But what of the cases in which the justice discount does have an impact on the most just outcome? In these cases, justice demands

⁹⁶ See Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. OF PHIL. 113, 114 (1991) (discussing the exclusion of wrongfully obtained evidence in the legal setting in order to maintain procedural fairness despite the fact that the evidence would be relevant to uncovering the truth). These would count as nonepistemic reasons for excluding relevant evidence.

mechanism will likely attempt to arrive at the most just solutions that are compatible with the continued functioning and flourishing of the orchestra. That second criterion is one for which the institution can claim special knowledge and interest, and it serves as the primary reason that parties should respect the decision of that institution. If they care about the continued functioning of the orchestra and wish to remain a part of it, they will respect the resolution arrived at by its dispute resolution process.

Institutions should be wary of unqualified claims of the justice of their solutions as the grounds for those solutions for fear that doing so gives others an independent justification for ignoring or disrespecting those solutions. Rather, qualified claims of the justice of resolutions interpose additional criteria that undermine such possible independent justifications. If an institution claims that their solution should be respected since it is the most just solution, then every individual can decide for herself whether justice favors that solution. If, rather, the institution claims that the solution should be respected since it is the most just solution practicable, or is the most just solution compatible with our needs, then individuals are not necessarily in as good a position as the institution to decide issues of practicability or compatibility with the other announced needs.

This is a conclusion about authority based upon a pragmatic consideration. Since everyone is in a potentially equal position to adjudicate the justice of any value conflict situation, institutions that seek to have their solutions respected should modify their claims to the justice of their solutions with other criteria on which they can credibly claim to have more ability or authority.

C. Justice and the Equality of Moral Judges

What is it about justice that allows everyone to claim equal authority? Why can't institutions claim greater authority with regard to justice? These questions do seem to have an answer that depends upon the scope and form of justice rather than any particular content. The answer lies in the fact that justice is a moral concept and not purely a political one. Most everyone understands what it would entail to adjudicate the justice of a conflict given a certain amount of information about it. Institutions can claim greater information or understanding of the information relevant to the conflict, and that would be a ground for respecting their determinations. However, we have independent reasons for

the very nature of a conflict-resolving institution. We have also seen that, as moral norms, principles of justice—both procedural and outcome—are not of the kind that institutions can claim special expertise with respect to their application. Hence the authority of institutions that claim to be guided purely by considerations of justice is called into question by those with divergent views on the content or application of those norms.

