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Saul Smilansky

On Free Will and Ultimate Injustice

In “On the Alleged Shallowness of Compatibilism: A Critical Study of Saul Smilansky: *Free Will and Illusion*” (*Iyyun* 51 [January 2002]: 63–79) James Lenman mounts a strong attack on the notion of Ultimate Injustice. This notion is a mainstay of common dissatisfaction with compatibilism, the position according to which moral responsibility and related notions such as justice are compatible with determinism (or with the absence of libertarian free will, irrespective of determinism). The notion of Ultimate Injustice is also central for my “dualistic” position encompassing both compatibilism and hard determinism on the free will problem, as I developed it in the first half of *Free Will and Illusion* (Oxford University Press, 2000).¹ Lenman’s powerful and interesting discussion presents an opportunity to consider this notion, one that is central not only within the problem of free will but for any thorough understanding of justice.²

¹ The second half of the book is taken up, as the title indicates, with the role of illusion. If Lenman were to succeed in harming my claim for the existence of Ultimate Injustice this would thereby weaken my case for the positive moral importance of illusion.

² What could be called the direct normative argument against Ultimate Injustice is only one of two major arguments that Lenman makes. The other argument that he presents follows the familiar “How can the incoherent be worth wanting?” move, and attempts to rule out any “ultimate worries” because of the very incoherence of libertarian free will, an incoherence that is transferred to those ultimate-level concerns (Lenman 2002: 68ff). I cannot take up this issue in detail (cf. Smilansky 2000: 48–50), but do not think that it is disturbing. If libertarian free will is incoherent then indeed in one sense we do not have a positive model of what libertarian-based justice would look like. But since my worry is negative, i.e., it is concerned with injustice, all I need is to point out the *limitations* of the compatibilist view about free will–related justice. The human condition under the notion that libertarian free will could exist should be contrasted with the true picture, where libertarian free will is impossible. In terms of the social, ethical and personal

I shall begin by presenting the basic issue under discussion. Then I shall survey two broad ways in which we can understand justice. Under the first, the notion of Ultimate Injustice is indeed questionable, but under the second it makes good sense. Finally, I shall show that in the free will issue it is the second type of justice, the type that allows and indeed affirms Ultimate Injustice, which is most salient.

Ultimate Injustice: What It's All About

The free will problem is about control: it issues from the core normative intuition that we must take human agency, control, and its absence very seriously, particularly when judging ourselves and others. This I call the Core Conception. To blame and punish a person for an act that he did not commit is a paradigm of injustice. Control is a condition for moral responsibility, moral responsibility is a condition for blameworthiness, and blameworthiness is a condition for just punishment. The absence of control precludes guilt and blameworthiness, and hence punishment would be manifestly unjust.

It turns out, however, that the pertinent forms of control are fundamentally dualistic. On the one hand, we need to consider distinctions in local compatibilist control, if we are to respect persons. Questions about the existence of control, as well as about degrees of control, make sense and are morally and personally central. On the compatibilist level we take the person as a "given," and ask about his or her control in pedestrian ways: did he willingly do X? Was he coerced? Was he under some uncontrollable psychological compulsion? Most people most of the time do have compatibilist control over their actions, even if there is no libertarian free will (if, let us say, determinism applies to all human actions). The kleptomaniac or alcoholic are not in control of their pertinent actions in the way that, respectively, the common thief or occasional mild drinker are in

implications there is a huge difference. For instance, given that we shall continue to put people in prisons, the absence of libertarian free will means that this practice will have much shallower grounding, hence be much more unjust, than it would have been were justification based on the "ultimately guilty self" possible. The severe shallowness of desert and value, and the grave injustice that exist in a world without libertarian free will, are ethically and existentially momentous. It seems that Lenman's case here actually assumes the validity of his direct attack against the notion of Ultimate Injustice, which has been the focus of this paper.

control, irrespective of determinism. There are complex formulations of compatibilist control in the philosophical literature, and various borderline or problematic cases, but we need not enter into such matters here. On our level of discussion, which concerns the compatibilist perspective in itself, matters are sufficiently clear. In fact Lenman and myself agree that distinctions in terms of compatibilist control are viable and important.

But we can ask the question about control also on the ultimate level. Given that there is no libertarian free will (and here Lenman and I agree as well, and the present discussion will simply assume this), then asking about “ultimate control” lands us with the hard determinist conclusion, where ultimately there can be no control. Any person who we could agree was free on the compatibilist level (for example, one who could reflect on her options, decide to do what she wanted, was not coerced) would be seen in a new light: under the ultimate perspective, the sources of her character and motivation would also be queried. And if we have no libertarian free will, then ultimately we are just “given,” with our desires and beliefs, and any change in them is ultimately down to our earlier selves, which we ultimately cannot control. We are what we are, and from the ultimate perspective, with all our compatibilist choosing and doing, we operate as we were moulded. As Lenman puts it: “So once we recognize that control matters, as it would be morally unthinkable not to, we have to recognize that ultimate control matters, for ultimate control is what we become concerned about when we carry our concern for control through to its limit” (p. 71).

Ultimate Injustice is the sort of injustice that, I claim, may follow when we do not take account of the absence of ultimate control. Such injustice occurs, for example, when we punish the compatibilistically guilty. We may well need to do so morally, overall and, as we noted, doing so along compatibilist lines is morally right in a way that, say, punishment based on factors beyond people’s control such as race would not be—because (compatibilist level) control and its absence is not being respected. But we must not hide from ourselves the (ultimate level) injustice that following compatibilist justice would involve. Thus I speak about Unavoidable Injustice (Smilansky 2000: sec. 11.1).

In my view we have to take account of both valid perspectives on control, the compatibilist and the ultimate hard determinist, for each is part of the complex truth on the free will problem. Hence I propose a Fundamental Dualism encompassing both perspectives (Smilansky 2000: ch. 6). We need

to try and limit injustice but a great deal of Ultimate Injustice will follow from justified social practice. Since compatibilists deny the importance of such injustice, I argue that they are morally shallow. It is this claim that has rattled Lenman, as can be seen from the title of his paper. In the light of the prevalence of Ultimate Injustice, which follows from our best practices and with which we must live, I claim that we cannot deny that life is full of Unavoidable Injustice, which is just one of the ways in which the free will problem implies that life is grossly unjust and inherently tragic.

Lenman, however, wishes to dismiss Ultimate Injustice:

In the context of such a conception of justice, we may well be tempted to speak of a form of "injustice" that is implicated in any punishment at all, given that all our actions may be just an unfolding of, ultimately, impersonal circumstances. But this is not injustice, properly speaking, at all. Injustice is prohibited by the best principles for the governance of human communities and not all punishment is so prohibited. Talk of "unavoidable injustice" is a somewhat paradoxical use of the term, a nonmoral deployment of an essentially moral concept. (P. 78)

Two Types of Justice

Behind the disagreement between compatibilists of Lenman's ilk and those, whether libertarian incompatibilists, hard determinist incompatibilists, or "dualists" like myself, who are concerned about Ultimate Injustice, seems to lie a deep difference as to how justice is conceived. We are naturally speaking here not of clear-cut views but of structures of thought, and general philosophical expectations, as to what justice can be. The following separation into two types does not aim to be more than a preliminary suggestion, and cannot encapsulate all views. The two types, broadly, can be described as "inherent" and "non-inherent":

The inherent views on justice may share the following features:

- a. Justice in some sense is "there"; and is not constructed by human beings or dependent on what human beings think.
- b. Justice is substantive and is not essentially related to the outcome of acceptable procedures.
- c. The content of justice will not be affected by pragmatic considerations.
- d. Within justice, the justification for the treatment a person gets depends on his or her own personal deserts.

The non-inherent understanding of justice may include the following features:

- a. Justice is constructed by human beings for their own purposes.
- b. Justice is formal, and is concerned with the establishment of procedures the result of which are just.
- c. Actual or hypothetical agreement by people to abide by certain principles, under adequate conditions for the formation of agreements, is a central factor in making those principles just.
- d. Within justice, the justification for the treatment that a person receives follows from the general principles devised for the sake of just and adequate social functioning.

Of course, there are many positions on justice, and we must beware of creating caricatures. Moreover, various mixtures of meta-ethical and normative positions are possible, and a two-way division into two types of justice is far too crude. These two are also, as it were, two ends of a scale, and various more moderate combinations of the elements of each can be imagined. Nevertheless, it seems quite obvious that, broadly, Lenman affirms something like the second view of justice while I reject it in favour of the first. As he realizes, the key notion is that of desert (p. 78). We can make two different sorts of requirements in order for punishment to be just. The more demanding, inherent view may say that a person's desert is in some sense "there," and we have to discover it, that it is substantive, that a person ought to be treated only according to her deserts, irrespective of the results, and that injustice occurs when the undeserving are punished — because they are undeserving. The less demanding non-inherent view would, on the contrary, set no stock on desert as an independent factor, but see it as a useful term following from just arrangements. Once such institutional arrangements are in place, they generate expectations and "desert" (or, rather, entitlement), but this latter notion is only derivative. Such arrangements in themselves depend on the decisions people make, and there is naturally a variety in the ways in which the social world can be constructed in the relevant respects. Justice exists when the adequately agreed upon social arrangements for the treatment of persons are met.

Because I take justice to be of the more demanding, inherent form, I pursue the search for control as a basis for desert up to the ultimate level, and find there no control but only ultimate arbitrariness. When people are

nevertheless punished, I thus find Ultimate Injustice. And I have no difficulty with the notion of Unavoidable Injustice, because I take it to be simply there whenever we pursue (as we morally should!) compatibilist practices, and punish people. Moreover, the very notion of justice, since it depends on “pre-institutional” desert, need not accommodate or be limited by the adequate social arrangements, and hence there *is* room for criticizing such arrangements in terms of justice. Justice, I claim, provides an external standard that does not depend on social necessities.

For Lenman, however, little of this makes sense. Desert is either completely misleading or a mere derivative notion of the adequate social institutions, and hence has no inherent moral force. Once we see that the most adequate social arrangements demand practices, such as punishment, *there is simply no conceptual room for positing “justice” in opposition*. And so, any idea of Ultimate Injustice is nonsensical for, after all, we have already determined that the social institutions are just, and there is no additional vantage point from which to judge them.

I think that the less demanding, non-inherent, picture of justice does capture some aspects of the notion of justice: sometimes justice is indeed contractual and once we adequately decide on, say, some decision procedure, the participants must accept the outcome as fair and just. Which team will possess the ball first in a football match? Perhaps the best way to decide is to toss a coin. If both teams agree, then the team that loses the toss cannot complain of injustice. Moreover, there are other ways of deciding such matters, but the fact that this decision procedure follows from agreement goes a long way in explaining why it might be best.

But I do not think that this *sums* up the notion of justice. We shall see shortly which view is more relevant to the free will problem, but the present point is to see how strong Lenman’s claim needs to be: he cannot tolerate the existence of various ideas of justice, as I do, but rather needs to rule out the very *possibility* of talking about injustice beyond that following from the practices of agreed-upon social institutions. This already makes his position vulnerable. Anyone who does not think that justice is summed up by the sort of contractual view of justice that Lenman favours, but thinks that justice goes beyond it, or depends upon individual desert, or indeed exists irrespective of any contract, whether hypothetical or not, already seems to be ruled out of legitimacy! I find this both dubious and uncalled for. Certainly the price of acknowledging a measure of Ultimate Injustice, or even of admitting that the

optimal social arrangements will involve some (unavoidable) injustice, is not large enough to justify such conceptual exclusion.

Which Justice Is the Free Will Problem About?

I have readily granted that there is a view of justice according to which Ultimate Injustice (and hence Unavoidable Injustice) does not exist, and perhaps does not even make sense. But I see no reason to limit all of justice to this contractualist view. And once this is realized, Lenman's attempt to "veto" the implications of the ultimate perspective fails.

Yet we also need to ask *which* view of justice most concerns us within the free will problem. In order to do so it would be helpful to make a slight digression, and go back to compatibilist free will-related justice. Why must the innocent not be punished? Consider three possible forms of reply:

- a. Punishing the innocent is wrong because it transgresses the set of moral rules that will deliver maximal overall human well-being (rule-utilitarian).
- b. Punishing the innocent is wrong because it transgresses the set of moral rules that would be constructed by free, informed people interested in the regulation of their lives (contractualist).
- c. Punishing the innocent is wrong because the innocent do not deserve to be punished (free will-based desert).

Utilitarianism is notoriously dubious on the issue of the punishment of the innocent, even in its diluted rule-utilitarian forms. The reason is simple: utilitarianism grants no inherent value to the blamelessness of the innocent, and their treatment is merely a component of the master consideration, maximizing the good. Should we devise our justice system so that ten guilty people will go free in order that one innocent person will not be sent to prison? Perhaps not, if the guilty are dangerous enough; and we could always clinch the argument against the innocent by upping the numbers. The innocence of the innocent not being an inherent consideration for the utilitarian, let alone a trumping one, it will surely often lose out. We do not need to posit fanciful "Sheriff and Lynching Mob" type stories; considerations of efficient social planning may well suffice to dilute common legal practices designed to prevent the punishment of the innocent (see, e.g., Smilansky 1990).

I do not think that contractualism is quite as problematic as utilitarianism here. It is, for one, a theory of justice, and its criteria, while admitting concern for pragmatic considerations, also allow their dismissal. The only well-developed contractualist system we have on these issues is Scanlon's (1984; 1998; cf. Lenman 2000), and the role of considerations of social utility in it is not clear. It is arguable that contractualist procedures may themselves lead to the adoption of utilitarianism, but this strong claim is beyond our scope here, and I do not need it. In any case, I think that it is striking to see the resemblance between the contractualist and the utilitarian formulations. Neither, it seems natural to say in the present context, is really concerned with justice towards the innocent. In the determination of the optimal social order, neither contractual nor utilitarian criteria will necessarily put great weight on what the innocent deserve (or do not deserve) in the light of their (in)actions. Only the desert-based account is unwilling to accept social arrangements whereby some innocent individual will pay the price for the social good, and makes innocence in itself an inherently superior moral concern.

Developing this direction of criticizing contractualism on the *compatibilist* level would take us beyond our main concern, namely, the concern with Ultimate Injustice. But I think that we already see that the contractualist perspective is some distance away from common concerns with free will and justice. Lenman does not criticize my own desert-based understanding of the issues, on the compatibilist level. Perhaps this is because he thinks that the contractualist and myself will reach roughly the same results on, say, criminal justice. As we saw in the previous paragraph this is not at all certain. In any case, the *sort* of concern that motivates contractualists is not at all that of the typical concerns with the free will problem, which are desert-related. Again, from the perspective of genuine concern with justice in the free will context, contractualist revisionism begins to look not very different than utilitarian revisionism.

Some of the reasons for opting for utilitarian or contractualist directions perhaps derive from the fear that a slide down a slippery slope towards the recognition of ultimate arbitrariness and injustice would occur. But that thought does not deny Ultimate Injustice at all, it merely wishes to move the goal posts so that we do not arrive at it. This cannot be Lenman's motivation.

A different and potentially more damaging thought might be that from the ultimate perspective desert itself ceases to make sense: it is not that no

one deserves, say, to be treated worse than others, but that the very notion of desert disappears. Desert-based justice, it might be claimed, cannot exist for hard determinists. This, however, is a mistake. As I have shown elsewhere in greater detail (1996a; 1996b), the conceptual structure here is as follows:

1. We assume background conditions delineating those to whom the categories of desert and justice apply (persons of a certain capacity).
2. We assume a baseline of desert or entitlement (e.g., everyone should be treated as innocent).
3. The only way in which people can come to deserve not to get the baseline is through being responsible for not getting the baseline. Hence, if people suffer from the lack of the baseline without being so responsible, they do not deserve to suffer.
4. In terms of free will-based desert, such suffering would be unjust, and might generate second order desert or entitlement that one be compensated for not getting the baseline.

Insofar as one takes the ultimate hard determinist line, one denies that one possesses the sort of capacity for responsibility that, through one's actions, might justify one's not getting the baseline. Hence, any departure from the baseline is unjust.

Take, for example, G.A. Cohen's view on free will-related justice (Cohen 1989). The baseline for Cohen is strict equality, and only free choice — say, the choice not to work hard, which then makes one worse off — can justify inequality. If we come to believe that there is no free choice in the pertinent sense, choice that would allow for inequality that is just, the conclusion is *not* that “anything goes.” Nor is the conclusion that we are then at liberty to forget about choice and go in, say, utilitarian or contractualist directions. Rather, the correct conclusion is that any deviation from the baseline of equality is unjust! Justice requires free will-based justification for abandoning the baseline of justice, and if there is no such justification, then we must remain at the baseline. On the ultimate level there cannot of course be any such justification, and hence such deviation is — at least in the one, ultimate sense — unjust (cf. Smilansky 1995; Smilansky 1997a).

Lenman's contractualist view has, by contrast, much affinity to that of John Rawls in his well-known *A Theory of Justice*. Justice, according to Rawls, is fairness, and fairness follows from a certain recognizably fair

decision procedure, namely, the “veil of ignorance” (Rawls 1971: 136ff). There seems to be no conceptual room for criticism, once the proper social order is established. However, we can find room for Ultimate Justice even within Rawlsian constraints. In order to see this we need to go back to Rawls’ reason for not following desert: in light of free will considerations, neither one’s native endowments, nor the character that allows one to cultivate one’s abilities, are inherently deserved, he argues: “The notion of desert seems not to apply to such cases” (Rawls 1971: 104). Because inequality of treatment cannot be justified by desert based upon free choice, he thinks that we need to turn elsewhere for justice. Hence Rawls abandons what I have called the inherent view, and opts for a non-inherent position. The economic and social station of those worse off in society is not justified in the light of their agency-based desert in itself but because there is no alternative social order where the worse off are better. The talented need to be tempted into working hard by unequal benefits, and those at the bottom will gain from the inequality. Since the worse off must acknowledge this, they must acquiesce that the social order is fair and just.

Even if we think that such an ideal Rawlsian order is indeed optimal in certain ways, and perhaps even justified overall, it seems to me that we can still say that there is something fundamentally unfair and unjust about such a situation. We have here a pragmatic compromise whose contours follow from the superior bargaining power of the talented, rather than a truly fair and just arrangement. If the talented do not deserve the fruits of their talents, then the fact that social contingencies (or their own greed!) make it preferable that they be motivated by the lure of unequal gains, does not make their superior social and economic position, however justified, fair or just (cf. Cohen 1995).

We cannot enter further into a detailed consideration of Rawls’ theory and of the various discussions of it in the literature. It is sufficient to see how even within materials supplied by Rawls we can make sense of Ultimate Injustice, together with the more pragmatically oriented and theoretically hybrid view he offers. The conceptual possibility to talk about Ultimate Injustice that I defended with respect to Lenman’s critique is seen to have wider import.

If we can defend Ultimate Injustice within distributive justice, surely we can do so within retributive justice. Here it seems even more compelling to posit control as the focus of inherent concern and, when ultimate control is

seen to be impossible, to take note. Moreover, here concern with a genuine notion of desert rather than with mere entitlement seems to be called for. The extremity of Lenman's position can be seen from a simple fact: according to him, the reality of determinism and an absence of libertarian free will can make *no difference* in terms of criminal justice! Put differently, the fact that we acknowledge that ultimately a man who has committed a crime could not but have committed it, given the way he was moulded by factors ultimately beyond his control, is somehow irrelevant to justice. The very thought that this man is in a deep sense a victim of the circumstances that have formed him, and that this matters for justice, is ruled out. This, I claim, is simply incredible. Note that my own claim is not that Ultimate Injustice is all that there is of free will-related justice: I acknowledge that compatibilism captures much of justice, and indeed that compatibilist distinctions are to have a dominant role in establishing social practices. What I resist is the claim that the ultimate arbitrariness of it all is, somehow, of no import. The proper description of such a case is indeed dualistic: given that we need to order social life within certain constraints, we are obliged to follow compatibilist distinctions in terms of control and its absence, if we are to respect persons. But those who pay the price, by ultimately acting as they have been moulded, are in the end victims as well. Their treatment is hence, on a deep view, manifestly unjust.

By way of conclusion, I shall present two further considerations. First, note that Ultimate Injustice is not some foreign addition to our ethical arsenal, but the continuation of a compatibilist's concern with control and aversion to moral arbitrariness. "Ought Implies Can" and similar foundations of our reflective normativity normally lead quite naturally to concern about ultimate level injustice. There is something quite artificial about saying, as Lenman seems to do, that to ask all those questions about control, arbitrariness, and justice beyond a certain point is not helpful for, since we cannot do any better than follow compatibilist justice, then the very questions are to be outlawed. Being helpful has its proper place but our deepest concepts and ideals have their own pull and also extend worries about free will-related injustice far beyond the comforting abilities of pragmatic contractualism.

This means that contractualists—like utilitarians—might be pushed towards radical revisionism. For the prevailing paradigmatic thinking is through and through attached to the control-desert-justice paradigm, and

pursuing this familiar direction naturally leads towards concern about ultimate arbitrariness, absence of control — and Ultimate Injustice. However, just because my Fundamental Dualism does encompass the compatibilist insights within the traditional paradigm, there is little reason to abandon our deepest free will–related intuitions in favour of the radical utilitarian or contractualist substitutes, even on the compatibilist level.

Secondly, the free will issue combines a wealth of moral and amoral notions: not only desert and justice, but also those reactive attitudes such as (self-)respect, love, gratitude, appreciation, and resentment.³ I cannot consider here in detail how matters appear beyond justice, but it is important to see that Lenman-style contractualism, even if possible with respect to social arrangements of justice, is hardly pertinent for much of our free will–related emotional life. Take for example self-respect and respect for others. A similar course of argument to that which I have made with respect to justice can be made concerning (self-)respect. Compatibilism is a shallow position because the basis for human self-respect and respect for others, in central senses of respect, is largely dependent upon what one does freely. Fundamental Dualism means that we can make some sense of compatibilist distinctions here, e.g., a woman can be respected for her hard work but not for her height or skin colour. Together with the compatibilist level there nevertheless exists an ultimate hard determinist one, whereby ultimately all the basis for (self-)respect is a matter of how one was constituted, i.e., of one's luck. And there is no doubt that if people really thought of themselves or of their parents as determined outcomes of what existed a century ago (perhaps with some random indeterminism thrown in), this would make a substantial difference to their attitudes of (self-)respect and pride. The appreciation of achievement or lack of it cannot emerge unscathed from such reflection: in retrospect, we might tend to say of an achiever that 'Well, *he had it in him*'. When applied to ourselves or to others, such deprecatory thoughts can be extremely damaging to our sense of achievement, worth, and self-respect. For if *any*

³ These beyond-justice issues bring to mind P.F. Strawson's well-known discussion in "Freedom and Resentment" (Strawson 1981). I cannot consider here the affinities and differences between Strawson's emphasis on the reactive attitudes and Lenman-style contractualism. In my view both are complacent about the principled and pragmatic difficulties posed by the free will problem, if for quite different reasons (see Smilansky 2000: ch. 9; Smilansky 2001). On self-respect and respect for others in particular, see Smilansky (1997b) and Smilansky (2000: sec. 6.4).

virtue that one has exhibited, if all that one has achieved, was 'in the cards', just an unfolding of one's predetermined self, one's view of oneself (or important others) cannot remain the same. As Michael Walzer put it: "The reflexive forms of recognition, self-esteem and self-respect, our most important possessions... must seem meaningless to individuals all of whose qualities are nothing but the luck of the draw" (Walzer 1983: 261). Compatibilist assurances remain unconvincing and shallow here: self-respect hardly seems contractual. It is difficult to think how Lenman-style contractual revisionism could even begin to be helpful. And this means that even were it successful, the contractualist approach to justice would drastically cut off justice from other crucial elements in our lives.

Conclusion

Assume that there is no libertarian free will, either because the world is deterministic, or because even indeterminism cannot help us, the very idea of a worthwhile notion of libertarian free will being incoherent. What does this mean for justice? I have argued in *Free Will and Illusion* that the implications are importantly dualistic, hence calling it Fundamental Dualism. Fundamental Dualism means that we must take account of both compatibilist and of ultimate hard determinist perspectives. On the one hand, we need to create a Community of Responsibility that tracks compatibilist distinctions in terms of control and its absence: for instance, we can make sense of the distinction between the guilty and the innocent, and need to follow this distinction. Not to do so would be not to respect persons; indeed it would be barbaric. On the other hand, given that the sort of transcendence that libertarian free will was supposed to give us cannot exist, everything that people do, including their compatibilistically free actions, is ultimately an unfolding of the given. Hence, for all the moral importance of following compatibilist justice, we cannot avoid the ultimate perspective that means that doing so is in a crucial sense unjust. This is Ultimate Injustice. Since we need to follow compatibilist justice in social life, e.g., continue to punish people (who are compatibilistically guilty), Ultimate Injustice is unavoidable. This creates Unavoidable Injustice.

Lenman has challenged the very notion of Ultimate Injustice and, by implication, the sort of Unavoidable Injustice it generates. He argues that justice follows from the best moral way of arranging social life, as people

would agree to it. Once such a social order is in place, we have no conceptual resources for challenging it as “unjust.” Speaking about Ultimate Injustice is a fundamental mistake, or mere rhetoric. And to the extent that my case for the positive role of illusion in *Free Will and Illusion* depends on such notions, this case is weakened.

I have attempted to show that Lenman’s arguments are unconvincing. There are many forms of justice that can be classified broadly as inherent or non-inherent. Lenman’s contractualism captures only certain undemanding and non-inherent forms of justice. In fact, his sort of contractualism is deeply revisionist on justice, and, for all the differences, disturbingly similar in certain ways to utilitarian re-interpretations of justice. Once we realize that we can talk about desert even from the hard determinist perspective, namely, desert based upon a moral baseline (say, equality) that must be kept to, we see that there is no reason to abandon the notion of desert in the free will context. Moreover, when we examine both distributive and retributive justice, we see that the type of justice at stake seems to have more to do with the demanding inherent forms rather than with Lenman’s contractualist non-inherent forms. Compatibilist justice seems to capture all of justice, in the free will context, only when we remain on a shallow level, and do not pursue the concern for control up to the ultimate level, where we end up with constitutive arbitrariness. People who are in prison justly according to compatibilist lights are nevertheless in an important moral sense victims, and their fate is an injustice. By and large we must follow compatibilist justice, and mitigate it when we can. But in a world such as ours, i.e., one without libertarian free will, even the best social orders will be deeply and inevitably unjust.⁴

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Bibliography

- Cohen, G.A. (1989). "The Currency of Egalitarian Justice," *Ethics* 99: 906–44.
- Cohen, G.A. (1995). "The Pareto Argument for Inequality," *Social Philosophy and Policy* 12: 160–85.
- Lenman, James (2000). "Contracting Responsibility," in Ton van den Beld, ed., *Moral Responsibility and Ontology*. Dordrecht: Kluwer.
- Lenman, James (2002). "On the Alleged Shallowness of Compatibilism: A Critical Study of Saul Smilansky: *Free Will and Illusion*," *Iyyun* 51: 63–79.
- Rawls, John (1971). *A Theory of Justice*. Cambridge: Belknap Press, Harvard University.
- Scanlon, T. M. (1984). "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond*. Cambridge: Cambridge University Press.
- Scanlon, T.M. (1998). *What We Owe to Each Other*. Cambridge: Belknap Press, Harvard University.
- Smilansky, Saul (1990). "Utilitarianism and the 'Punishment' of the Innocent: The General Problem," *Analysis* 50: 256–61.
- Smilansky, Saul (1995). "Nagel on the Grounds for Compensation," *Public Affairs Quarterly* 9: 63–73.
- Smilansky, Saul (1996a). "Responsibility and Desert: Defending the Connection," *Mind* 105: 157–63.
- Smilansky, Saul (1996b). "The Connection between Responsibility and Desert: The Crucial Distinction," *Mind* 105: 385–86.
- Smilansky, Saul (1997a). "Egalitarian Justice and the Importance of the Free Will Problem," *Philosophia* 25: 153–61.
- Smilansky, Saul (1997b). "Can a Determinist Respect Herself?" in C.H. Manekin and M. Kellner, eds., *Freedom and Moral Responsibility: General and Jewish Perspectives*, 85–98. College Park: University of Maryland Press.
- Smilansky, Saul (2000). *Free Will and Illusion*. Oxford: Oxford University Press.
- Smilansky, Saul (2001). "Free Will: From Nature to Illusion," *Proceedings of the Aristotelian Society* 101: 71–95.
- Strawson, P.F. (1981). "Freedom and Resentment," in Gary Watson, ed., *Free Will*. Oxford: Oxford University Press.
- Walzer, Michael (1983). *Spheres of Justice*. Oxford: Martin Robertson.