

**IS JUSTICE BINARY?:
A FREE-WILL-RELATED EXPLORATION**

SAUL SMILANSKY

Abstract: This article asks whether justice is binary, whether matters are either-or with respect to it. This question has been inexplicably neglected, and the elementary conceptual work has not been done. We consider this question through exploring the implications of free-will-related justice. We see that there are actually two questions of very different scope here, and that two distinct notions of binarity need to be distinguished. In the process, the plausibility of considering justice as a binary notion is evaluated.

Keywords: free will; justice; injustice; misfortune; binary.

Some notions are binary—matters are either-or with respect to them—and some notions are not. What about justice? When I ask “Is justice binary?” I am asking “Is everything within the scope of justice either just or unjust?” What the alternative to binarity can be we shall see later. The question under consideration is very broad. But in fact it falls under an even broader question, which we must tackle in order to do justice to our topic. The broader question is: “Is everything binary in terms of justice?” Now, strictly speaking, there are some things that it simply makes no sense to speak of as being within the sphere of concern of questions of justice: say, the fact that $5+7=12$. Hence when we ask this second question, “everything” refers to everything that it makes sense to speak of as just or unjust. In other words, we are asking whether we can say, of everything it makes sense to consider in terms of justice, that justice applies to it and that it is either just or unjust. Again, the alternative will be considered later. Let us call the first question the *internal question*, for its concern is internal to justice, namely, asking whether everything within the sphere of justice evaluations is either just or unjust. We shall call the second question, which asks also about the place of justice, namely, whether everything (that it makes sense to speak of as a matter of justice) is either just or unjust, the *external question*.

The question of the binarity of justice is vast, and it needs to be explored from various angles. I think that there is a point in asking this question in the most general form. Focusing on binarity may help

sharpen our understanding of existing theories of justice—at the very least, it will force us to re-arrange our prejudices and will give us greater understanding of the concept of justice itself. I shall not be able to tackle the question of the binarity of justice in all of its manifestations. I shall focus on the question of the binarity of justice as it is affected by the free-will problem. First I shall present in outline my conclusions on free-will-related justice (more thoroughly discussed in Smilansky 1993 and 2000). Then we shall see what these conclusions teach us about the binarity of justice.

1. Preliminaries

Before we progress any further, I would like to emphasise that our focus is neither metaethical nor epistemic. We shall not be concerned with the question of the ontological basis of justice, nor with how we can know what is just. For the sake of this discussion we assume that the notion of justice makes sense, and we bracket the question of how we can discern the just, asking whether the basic structure of justice is binary. Likewise, we shall simply assume that justice pertains to human beings.

There are various spheres in which justice functions. This is important for our topic, because the litmus test of binarity may be differently affected in the different spheres. The thought that justice is binary appears most intuitively persuasive in retributive or criminal justice. This is in part no doubt connected to the formal binarity of the law, and hence might not signify a great deal ethically. There may nevertheless be important factors that make binarity plausible within retributive justice in particular, although we shall not be able to examine this difficult question in detail. We shall consider retributive justice in the following section, when noting the dualistic nature of free-will-related justice. With distributive justice binarity is more dubious, and this will concern us as well, in a certain limited respect. We shall also explore elements of “life,” that is, some of the manifold beliefs, reactions, and practices of everyday living that are not necessarily related to justice. We shall impose our justice-related binarity questions on these elements as well. This wide aim will force us to begin unpacking the internal and external questions we began with: whether everything within the scope of justice is binary, and whether everything is binary in terms of justice.

2. A Free-Will-Based Understanding of Justice

For our present concerns, the free-will problem can be summed up in two questions: “Is there libertarian free will?” and “Are deserts and justice compatible with a world without libertarian free will?” Simply stated, my position on the free-will problem is a “no” to the first question and a mixed “yes-and-no” to the second.

Let us now review this field in slightly greater detail. The notion of libertarian free will is one we are all familiar with. Basically, it is the sort of ability to control one's actions and actually do otherwise in exactly the same situation, with internal and external conditions held constant, that people naturally assume they have, and that has formed the basis of most of the ethical teaching of Western religions and of major ethical systems like Kant's. The inescapable conclusion, however, is that libertarian free will is incoherent. One cannot sustain the culturally dominant, psychologically crucial, and perhaps even biologically natural view that human beings can as it were transcend what they are through choice.

The case against libertarian free will has been well stated before and will simply be assumed, since we cannot "begin at the beginning" here. In a nutshell, the problem is as follows: the conditions required by an ethically satisfying sense of libertarian free will that would give us anything beyond sophisticated formulations of compatibilism are self-contradictory, and hence cannot be met. This is so irrespective of determinism or causality. Attributing moral worth to a person for her action requires that her action follow from what she is, morally (her reasons-based choices or the like). The action cannot, for instance, be produced by a random occurrence and count morally, for then it is the random occurrence that makes the crucial moral difference. We might think that two different things can equally follow from a person, but which one actually does follow from her, say, a decision to steal or not to steal, again cannot be random but needs to follow from what she is, morally. But what a person is, morally, cannot be under her control. We might think that such control is possible if she creates herself, but then it is the early self that creates a later self, leading to vicious infinite regress. Those who want to see in greater detail why libertarian free will is impossible can look, for example, at Strawson (1994) and Smilansky (2000, ch. 4).

Clearly the next step is to assess the import of the absence of libertarian free will, which leads us to the second, compatibility question: Are deserts and justice compatible with the absence of libertarian free will? Historically there are two alternatives here: compatibilists say "yes"; hard determinists (the traditional name for incompatibilists who think that there is no libertarian free will) say "no." When we investigate the compatibility question by examining the issues of deserts and justice as they arise in the context of the free-will problem, we see that we must accept a *fundamental dualism* residing in these issues. This dualism requires that we be, in a sense, both compatibilists and hard determinists, and maintain these two contrasting perspectives simultaneously. I agree with the compatibilists that it makes sense to speak about such ideas as deserts and free-will-related justice even without libertarian free will (and without recourse to a reductionist transformation of these notions along consequentialist lines). But I also agree with the hard determinists that the absence of libertarian free will is a grave matter, which ought to

change radically our understanding of ourselves and of justice. The most plausible approach to the compatibility question is a complex compromise; the idea that either compatibilism or hard determinism can be adequate on its own is untenable.

How does a fundamental dualism of deserts and justice follow from a world without libertarian free will? In order to illustrate this we must introduce one further (and last, for this stage) notion, the *core conception of justice*. This is the elementary conception of justice that considers deserts based on free will or control, in some sense, as the focus of justice. This core conception of justice, stressing free will and control, is so basic that in order to defend it we need only call upon our deepest considered intuitions. The central importance of the core conception emerges most clearly from considering the issue of moral responsibility. Holding people responsible for what was not in any sense under their control constitutes almost a paradigm of injustice and, at least with regard to the retributive sphere, is tolerated only at the margins of morality and the law. As one legal scholar states, "If it is true that an agent really could not help or control herself and was not responsible for the loss of control, blame and punishment are not justified on any theory of morality and criminal punishment" (Morse 1994, 1587). Responsibility and control seem to go together almost analytically, and common usage reflects the centrality of the core conception.

In the core conception, people's actions and control are essential to the maintenance of a morally justifiable mode of human interaction, and they cannot be neglected if we respect and consider people as we morally ought to. A wide positive scope for control and choice must be allowed, and conditions furthering it ought to be created. And so far as the (unequal) "rewards" and "punishments" of desert-based justice are concerned, this means that people deserve to get them according to what was "up to them," not for morally arbitrary reasons (arbitrary in lacking a basis in people's free choice).

The fundamental dualism flows from the core conception because there are compatibilist *as well as* hard-determinist aspects of control that must be taken into account. On one level it is normally not unjust to present alternatives to people, if the alternatives are real for them. Irrespective of the absence of libertarian free will, certain options are compatibilistically available to us at the time of choice, and are to be actualized *depending upon our wishes*, while other options are not. The fact that people cannot be ultimate causes of themselves does not imply that they are not often causes, both (partial, internal) self-creators and motivated actors in the world. Respect for persons requires that we take account of such free choices, giving credit when people deserve it, just as we should excuse them when such compatibilist control is lacking. Even if there is no libertarian free will, it is reasonable to desire that compatibilist distinctions affect the way one is treated. This desire is not based on the illusion of libertarian free will, and would survive its uncovering. Rather, our desire shows the reality of the compatibilist distinctions in terms of control.

This, however, is not the end of the story. There is a large element of injustice even in many ordinary practices that are defensible in terms of compatibilist justice. Consider the Case of the Fortunate Criminal. The person whom we are considering came from a well-to-do family, and we may be inclined to say that he has had every opportunity to “turn out well.” He does not lack intelligence, is sane, identified with the life he chose to live, was free of inner or outer compulsion to act, and the like. Still, he has committed some highly unpleasant crime: cheating many people out of their life savings. He has done so for the sake of the money, although he was not in acute financial need. And he has been caught and given a long and harsh prison sentence.

Now, even in such a case, which may not arouse our sympathies, and which is almost a paradigm of compatibilist suitability for the attribution of moral responsibility and for the assertion of the “lack of victimization,” the criminal can in a way be seen as a victim of injustice. It is perhaps sufficient that the condition people end up in be very bad, however much this might have resulted from their (compatibilistically free) choices, for us to see them as victims in an important sense. Commonplace discussions of the “perennially unfortunate” criminal who had a hard life before committing a crime (that is, hard apart from being caught) are often misleading. For such cases commonly combine features giving rise to both compatibilist and incompatibilist intuitions of injustice. In our case, we need have no pity for the person *before* the crime, so if he is punished only ultimate-level, hard-determinist injustice is at stake.

I have purposely chosen an example where our intuitions might rebel, and many would be inclined to deny any moral difficulty in punishing our criminal. He has had all the choice one could want, knew the consequences, and chose freely. After all, had he gone on to live freely on the spoils of his crime *no one would have considered him a victim*. Even in such a case, the conclusion seems irrefutable that, since we have no libertarian free will, great suffering itself suffices to make one a victim of injustice. Even if our criminal significantly shaped his own identity he could not, in a non-libertarian account, have created the original “he” that formed his later self (an original “he” that could not have created his later self differently). If he suffers on account of whatever he is, he is a victim simply by being. Again, this does not eliminate the difference between his being a victim and the way in which he victimized his victims, or show that it could not be morally proper from the compatibilist perspective to punish him. Indeed, we might be required to maintain the moral order along compatibilist lines and punish him, as we ought not to do, in the light of the core conception, had he acted out of kleptomania or as a result of a brain tumor. But his status as a victim ought not to be denied. Compatibilistically justified institutions of retributive justice create grave injustice on the hard-determinist level.

3. “Life” and Justice

Consider the Case of the Man Who Envied Rembrandt. Imagine a man who wishes all his life to be a great painter. He has always lived in a small town but nevertheless has had both the time and training to develop his painting talents, which, alas, remain quite mediocre. On retirement, this man goes to the Netherlands, is confronted with the wonderful paintings of Rembrandt at first hand, and is overcome with envy and a sense of injustice.

There is a sense in which the difference between this man and Rembrandt seems unfair and unjust. Neither man is responsible for it or gave his consent. It is an arbitrary, brute fact, not following from any ethical decision-making process. Our man feels unfortunate, and the state he is in is hardly his fault, so how can we say that it is not unfair and unjust? He has not created paintings like Rembrandt, hence does not deserve the latter’s acclaim, but after all our man does not deserve to be thus not deserving. In terms of the core conception this is clear, but I hope that it will be found intuitively plausible irrespective of this specific theoretical commitment. On the other hand, we are unlikely to be very impressed by this man’s cry of injustice. This is no doubt due in part to considerations unrelated to justice: for example, when confronting the wealth that Rembrandt has provided us, any concern with injustice seems irrelevant—we are happy in terms of beneficence or “life” that it happened that such a man as Rembrandt existed. Any person who truly values art, we might also feel, will not wonder why he or she is not a Rembrandt but be happy instead that Rembrandt existed. But even in terms of justice, the envious man’s claim on our attention is weak. The “baseline” of desert certainly does not lie at the point where anyone (or anyone wanting to be a painter) is as talented as Rembrandt. Hardly anyone throughout human history has been so, it is such an exceptional event that no one can say that he or she has not received the justice due to a human being merely because he or she has been “deprived” of the talents of Rembrandt.

There seem to be a number of options. First, we can discount the whole matter as not one of justice, since no human agency is responsible for the man’s comparative lack of talent. According to this option, injustice occurs only when one agent has wronged another, and (bracketing God) no one has wronged our man. This position, however, goes against the intuitive force of the core conception. It is hard to see why lack of control and responsibility, and the ensuing arbitrariness, suddenly cease to have *any* moral weight when we leave the sphere of blame and punishment. (On free-will-related deserts of this “passive” sort see also Smilansky 1996.) Similarly for any attempt to distinguish injustice from unfairness: this cannot be motivated from within a core-conception-based perspective, for the absence of free-will-based justification for one’s comparatively bad state, for example, means that this state is not only unfair but also unjust.

Second, assuming that the matter is one of justice, it can still be understood as a case of morally insignificant injustice. It is unjust that this man lacks the talents of Rembrandt, but it is not a significant injustice. A third way of understanding things would be to say that the situation is neither just nor unjust. It is not just that our man does not have the talents of Rembrandt (he does not deserve not to, it is sheer luck, after all), but neither is it an injustice. There is simply a “limbo.”

Consider the matter of personal attractiveness and love. If a woman chooses not to dance with you because you lack charm and are a bad dancer, it would probably not help matters were you to explain that in fact it is not up to you, that you cannot be otherwise, and hence that it is unjust if she does not dance with you. It can hardly be said that she (or anyone else) is morally obliged to dance with you. And in more general terms, it is commonly allowed that one may be not loved for factors not up to one, factors of which it cannot be said that it is just that one does not possess them, such as one’s basic traits of personality (indeed, no reasons need be given for love or lack of love). As we know well, much more can happen to people that is not a result of their free choice, and hence is not within their control and cannot be just in terms of the core conception. People who become severely ill through no fault of their own, or are laid off after years of work in massive company work-force reductions, or lose close relatives in car accidents, are only a few among many possible examples.

While we sometimes speak of “metaphysical” injustice in such cases, more often we want to distinguish the unfortunate from the victims of injustice. The distinction is crucial in determining the proper attitudes of the victims and of others. (This is not to say that the notion of “misfortune” is simple. See, for example, Murphy 1992; Smilansky 1994; McMahan 1996.) People who have been dealt a bad card by nature or circumstances may not have been treated unjustly by anyone, although they have been unfortunate. The difficulty, however, is that (like utilitarianism) free-will-based justice may judge states of affairs and not only treatment by humans. According to the core-conception many situations we would traditionally classify as (mere?) misfortunes are properly deemed unjust, for *they lack justification in terms of free choice*.

We saw various cases where people may want to put up complaints in terms of justice. Even where a claim for injustice is unlikely to be taken seriously, the idea that some injustice is involved cannot be easily dismissed. We may not have much sympathy with the Man Who Envied Rembrandt, and we may want to dismiss his claim that he suffers from injustice, but it is not so easy to do so.¹ The interpretation according to

¹ Part of the story, at least with respect to our intuitions, seems to lie with the distinction between natural and humanly made conditions: had our painter had Rembrandt’s talents but then been deprived of them by some person, he would surely be said to have suffered an “injustice.”

which the injustice is insignificant is plausible, but this is not a dismissal of injustice. Insignificant injustice remains injustice. And an alternative interpretation making use of the notion of “limbo,” a state where matters are neither just nor unjust, is also difficult to accept. There is something in the notion of justice that wants to recognize the grievance even in unlikely cases, like that of our artist. And since I have purposely taken a most unpersuasive example, such a result is significant. When we broadened the consideration of such common-life matters and asked about situations where people are not loved, or are harmed through no fault of their own, we saw that it is even harder to disclaim that some injustice seems to exist in many such instances.

4. Distributive Justice

Moving now to traditional areas of distributive justice, we shall consider G. A. Cohen’s “choice-based” egalitarian position. Examining this conception of justice should further help us in exploring the binarity of the concept of justice. As we shall see, this position is ideally suited to a core-conception-based orientation for the discussion of justice (this is not to say that a person who accepts the core conception need follow Cohen, for one might begin with non-egalitarian assumptions). I think that we find here the fundamental dualism we saw with retributive justice, but I shall not cover similar territory again. (I elaborate on this point, and consider Cohen’s position in greater detail, in Smilansky 1997a. For an investigation of self-respect on these questions, see Smilansky 1997b; Smilansky 2000, § 6.3.) Cohen will help us not with the fundamental dualism but with other questions pertinent to binarity and justice.

Cohen (1989) has suggested a new way of thinking about the measure of equality, the “currency of egalitarian justice”. He argues that it is not “equality of welfare” or “equality of resources” that egalitarians ought to strive for, but “equality of access to advantage.” The egalitarian ideal, according to Cohen, holds that virtually the only way in which inequality can be excused is when it results from “genuine choice.” The problem with inequality that does not result from “genuine choice” is a moral problem, the problem of the injustice of the arbitrary way people become disadvantaged. “A large part of the fundamental egalitarian aim is to extinguish the influence of brute luck on distribution. Brute luck is an enemy of just equality, and, since effects of genuine choice contrast with brute luck, genuine choice excuses otherwise unacceptable inequalities” (Cohen 1989, 931).

This position would seem to give justice a pivotal role: almost everything affecting humans is presumably within the scope of justice, can be judged as to its justness. There are other values, but in terms of the egalitarian ideal the only way in which a substantial inequality of

“advantage” can be justified is when it follows from a person’s free choice. And “advantage” is of course a very broad term. I think that when properly understood the implications of such a position on distributive justice are radical. If (all?) misfortunes and inequalities become injustices, the role of compensation for injustice becomes dominant, and the whole character of the notion of “injustice” within practical social deliberation is transformed. Almost everyone becomes a “hostage” to the interests of those who are badly off, and the idea of compensation of those who are in any way unfortunate will upset any possibility of positive social motivation and disrupt the social order. I have considered this matter elsewhere in different ways (Smilansky 1995; Smilansky 2003). I shall just note that here we may find one (rather cynical) reason why the concern with free will is not as influential in distributive justice as it is in retributive justice.

There are certainly ways of preventing unwanted results of the kind mentioned in the preceding paragraph. One can, for example, attempt to limit the *scope* of considerations of justice so that they do not apply to personal life. There would be “justice-free zones” where considerations of justice were somehow not allowed to enter. (We must be careful here—there could be unjust acts between spouses, for example, but a fine-grained discussion could elucidate the respects in which considerations of justice would not be relevant in some matters within the sphere of personal life.) Recall our painter, or the matter of love. Likewise, one can argue that the *price* of any serious move toward a redistributive ethos, in terms of coercion and the limitation of freedom, in practice precludes most egalitarian agendas. Similarly it is possible to discount considerations of justice in favor of *promoting well-being* or other forms of *value*. There are various familiar ways of constructing such arguments, and well-known counterarguments to them exist. We cannot consider the merits of such philosophical moves here. For us it suffices that we see how free-will-related conclusions, when combined with strongly egalitarian assumptions and the concern with choice and control as the basis for justification, create a consistent and radical picture of justice, with implications for binarity that can be discerned.

5. Two Types of Binarity

We have seen, very broadly, how free-will-related justice manifests itself in retributive justice, distributive justice (at least given strongly egalitarian assumptions), and various other aspects of life. It is important to differentiate the two very different ideas of binarity that have emerged. First, we have what can be called the *inclusive binarity of justice*, the idea that matters *can* be *both* just and unjust. Justice is not binary in the sense of “either/or,” for “both” is also a possibility. The formula then is

“either/and”—that is, matters are either just, or unjust, or both. The whole weight of evidence surveyed attests to the prevalence of inclusive binarity, from the Case of the Fortunate Criminal onward. Quite simply, matters could be both just and unjust at the same time and in closely related aspects. Recall the Case of the Fortunate Criminal: the proper description of the case was that his incarceration is fully just in compatibilist terms but unjust in ultimate hard-determinist terms, *and both perspectives are part of justice*. This is akin to the “pro-dilemmas” conclusion in the recent “moral dilemmas” debate (cf. Gowans 1987).

Second, we have what can be called the idea of *exhaustive binarity*, that matters cannot be *neither* just *nor* unjust. In other words, matters *must* be either just, or unjust, or both. While the focus in the first conclusion is on what happens within the just-unjust possibilities (that is, that a matter can be both), in the second conclusion we exclude anything else from within the scope of justice. Here a decision on binarity is more difficult. In the Case of the Man Who Envied Rembrandt, for example, we saw the attraction of a “limbo” option, to the effect that this man’s state was neither just nor unjust. Nevertheless, and particularly to the extent that we do want to put this case under the core conception of justice, we saw that the very notion of justice seemed to pull in the direction of (exhaustive) binarity, so that we were inclined to say that this man’s state was in some sense unjust (albeit not importantly so). A similar conclusion emerged within distributive justice, given strong egalitarian and choice-requiring positions like Cohen’s.

6. Implications

Let us review some possibilities that we have encountered. First, we saw that something can be *both* just and unjust. If our initial interpretation of binarity were as “either/or” then justice would not be binary in this sense. Second, we saw the possibility of arguing for the claim that something might be in some sense within the scope of justice, that it makes sense to apply notions of justice and injustice to it, and nevertheless be *neither* just nor unjust. Where exactly that “thing” will be located is a difficult matter for this proposal (calling it an instance of “limbo” is not, after all, very informative). On the other hand, we saw that there was an inherent tension between the notion of justice and these two “binarity-disturbing” positions. Justice calls for decision as to a moral verdict, and it does not live well with “yes-and-no” verdicts. Similarly, justice is imperialistic, it spreads its gaze on the whole sphere of its concern and as it were does not know what to do with any idea to the effect that there is a sphere of “limbo” between the just and unjust.

These two tensions are, however, very different. Or so they seem to me. With the first, justice needs to become more sophisticated and

accommodate the conclusion that something may be both just and unjust at the same time. This endangers our simplistic tendency to use “unjust” as an action term calling for immediate relief, but we should modify our understanding of justice on this point. No radical conceptual difficulties seem to be lying in that direction, which appears, indeed, to be the one that a sophisticated understanding of justice must incorporate. Justice, then, can be inclusively binary. As to whether something (affecting the interests of humans) may be neither just nor unjust, matters are more complex. We can perhaps make sense of the idea that certain matters are not the concern of justice although they affect humans (we saw various ways of attempting such “justice-constraining” options when we considered distributive justice). But within the scope of justice, that is, within the scope of what we called the internal question, it does seem that justice is binary. The idea of a “limbo” of the neither just nor unjust is conceptually dubious for justice. The justness or unjustness need not be morally important in a particular case, or nothing should be done about it although it is morally important, but there is in principle a reply in terms of justice. Justice, in other words, would seem to be also exhaustively binary.

As to the external question, we saw that the notion of justice was again “imperialist,” that is, it pulls toward considering more and more as within its scope (and hence as binary in terms of justice). The strength of this tendency of course depends upon one’s broad view of justice. Insofar as we follow the core conception and recognize the importance of control for justice, judgment in terms of justice is appropriate within a very wide sphere. While it is difficult to accept that strictly everything (affecting humans) can be within the scope of justice, the (inclusively binary) notion of justice does seem to spread out a great deal, and to cover more than we usually think it does.

Throughout the discussion it seemed that the notion of justice “pulled” us farther than we wanted to go. It is not clear that we have very strong conceptual resources to resist. This is particularly so to the extent that we value the core conception and want to follow it beyond the retributive sphere. Our tendencies to create “justice-free zones,” to say that one may not deserve although one does not deserve not to deserve, and sharply to differentiate injustice from misfortune, are put under threat. It is clear that if my case on justice (or at least on free-will-related justice) stands, we need to modify the way we see justice, in a direction that should also affect the practical uses of this term.

Department of Philosophy
University of Haifa
Haifa 31905
Israel
E-mail: Smilsaul@research.haifa.ac.il

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