

## PERSPECTIVES ON ETHICS AND JUSTICE

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### Summary

Justice is an idea that relates ethics to law. It is a tool for the measurement of laws through the applications of ethics, and it is a tool for determining the ethical sufficiency of the scope and the enforcement of laws. Ethics may be used to determine the justice of a particular law. A just law that requires an act by a citizen is one that requires an ethically appropriate act. Likewise, a just law that forbids an act by a citizen cannot be a law that forbids an ethically demanded duty. Moreover, a just law is one that is enacted and is carried out by officials who are acting by ethical means and to achieve ethical ends. The primary means of determining ethical limits on law are in assessing the operation of law among citizens and between officials and citizens. Finally, ethics provides a foundation for evaluation of the entire legal system to determine whether the law is insufficient, sufficient, or overburdening.

Justice is an ideal that cannot be completely realized because of conflicts among ethical obligations, the requirement of action in an essential time frame, and incomplete information. There are three broad forms of ethical evaluation of legal obligations: theories based on right conduct, theories based on pursuing good results, and theories measuring the satisfaction of particular ends of law. Each of these broad forms include a host of competing approaches. Theories of right may be based on whether the law is based on particular virtues, motives, or traditions. Theories of the good may be based on

promoting values of happiness, or wealth, or humanity. And theories of particular ends may seek liberty or responsibility for the citizen or equality of life among them. These varying approaches to ethics often create conflicting obligations in a given situation, and legal officials must then seek to determine which ethical demands are to be followed and which are to be disregarded. The most just outcome is the least unethical. Thus justice provides an ideal against which practical decisions of officials may be assessed using the many, competing tools of ethics.

## **1. Introduction**

Justice is what the law ought to be, to accomplish; it is the goal that law ought to serve. Put thus broadly, it is clear only that justice is an ideal, a goal that is to be pursued by those who create and carry out the laws. Justice, then, is the ideal for the conduct of legal officials in making and enforcing laws.

Ethics describes the ideal form of conduct for any person; it provides reasons for deciding what any person ought to do. And so ethics provides the sources of justice as the ideal of what legal officials ought to do. Ethics functions for officials in the same manner, although more specifically applied, as it provides the sources of any ideal of conduct. Thus, justice is what legal officials ought to do when they act according to the obligations of ethics.

Further, ethics (in the form usually called morality) describes the ideal relationship among every person in a society. Thus, morality can serve as a measure of the state of society, as the conduct of members of that society is shaped by law. In that manner, morality provides a tool to determine whether the whole system of law is just. Justice is then what all the officials of the legal system ought to accomplish in order to achieve a moral society.

## **2. The Demands of Justice**

Justice is an ideal to be pursued, a metric against which the law can be measured. The law itself is difficult to define, in some ways as difficult to ascertain as justice. However one defines law, it is the product of actions and inactions by legal officials. Justice can, therefore, more easily be seen as a measure against which the conduct of legal officials can be assessed. Certain obligations always apply to the conduct of legal officials, as requirements of both the ideal of the rule of law (*see The Rule of Law*) and as ethical requirements. To the degree that the principles of justice can be ascertained through the use of ethics, ethics then may be applied to the conduct of legal officials in particular circumstances to determine that the law applied by the official is just.

### **2.1 Justice between Citizens**

Legal officials are often required to resolve a conflict between citizens. When such conflicts are resolved through the formal use of the laws, the laws employed may be assessed by the ethical standards of the conduct of the citizen that is promoted or condemned by the law. So when the law is the reason for an official to penalize a citizen for certain conduct, the law may be assessed by an ethical evaluation of the conduct for

which the citizen was condemned. A law that punishes ethically appropriate conduct is unjust. This injustice is compounded when a person who has been ethically treated complains of the treatment and so doing brings about a legal penalty against the ethical citizen.

While it is clear that a law may be condemned as unjust when it penalizes ethically sound conduct, it is not as certain that injustice would result if the law failed to penalize every unethical act between citizens. There is a considerable range of ethical wrongs that one citizen might inflict on another, and the character and severity of the resulting harms might be appropriate for ethical condemnation but not appropriate for legal condemnation. The more severe the harm, and the more significant the character of the ethical misconduct, the greater the likelihood that a failure by legal officials to create or enforce a rule penalizing such misconduct will be considered unjust.

This idea, that it is unjust for a law not to condemn unethical conduct (or at least grossly unethical conduct), seems to many people controversial. At the margins, it is. Many people would argue that the state should not enforce ethical obligations to perform an act for the benefit of others without a reciprocal benefit to the actor. Likewise many would argue that the law should not enforce ethical obligations to refrain from conduct that offends others, that harms them only indirectly, or that harms only the actor. These people argue that the state cannot enforce such obligations without so intruding into individual lives as to compromise other important values of law, such as liberty, privacy, or individual responsibility. They might also argue that the ethical nature of the obligation depends upon the action taken under the obligation being taken without coercion. They also argue that the substance of any such ethical principles are themselves very controversial.

All of these objections may be quite sound. Even so, none respond to the broader argument that the state can enforce ethical obligations that are nearly uncontroversial, because the ethical norm in question is both widely accepted and seen of such importance that state enforcement of the norm is appropriate. Thus, the ethical obligation to respect the life of another is sufficiently profound that the state may enforce this ethical obligation through a prohibition of homicide. Such an obligation is supported by a host of different ethical theories, and so it is nearly universal in its acceptance.

Some ethical theories have indeed grown so widely accepted that they are no longer even seen as ethical theories. The principle that no one should act so as to harm another, and the principle of utility, that the each person should act to promote happiness and diminish pain for everyone, are ethical standards, which are now so widely enforced by law that the ethical principles underlying these standards are sometimes seen as something other than ethics.

## **2.2 Justice between the Officials of the State and the Citizen**

In a dispute between the citizen and the state, or more particularly between a citizen and other officials, ethics provides a foundation for judgment not only of the citizens' conduct subject to dispute but also of the officials' conduct. In the instance of judging

an official's conduct, additional considerations apply as a result of the official's participation in the legal system. What is ethical as between equals may not be ethical between one person representing a monopoly of lawful violence and one who is subject to that monopoly. An additional range of ethical obligations may apply to the official as a result of the unequal relationship between citizen and official; the voluntariness of the individual official accepting this role contrasted to the involuntariness of the individual citizen; and the particular tasks with which the official is charged. In these cases, a just result must at least be that the law demands an ethical action by the official, or at least does not accept an unethical action.

Considerations of justice in a given conflict between a particular official and citizen may take two forms, according to whether the dispute is one within the official's discretion or outside of the official's discretion. Those actions within the official's discretion are those in which the official has the least constraint by other legal obligations and, correspondingly, the highest constraint by ethical duty. The consideration of the justice of these actions is essentially a consideration of the justice of the individual official's act. Those actions that are bound to limited discretion are subject to legal obligations set in place by other officials at an earlier time, and to consider the justice of such actions is consequently to consider the justice of the earlier legal obligation as well as the action it compels.

### **2.3 Justice in both the Substance and the Procedure of the Law**

Justice as an ideal may thus be broadly used to assess the law in two aspects. In law's substance, justice provides a measure of the requirements of the law as they are manifested in the lives of citizens. In law's procedure, justice provides a measure of the method by which the laws are adopted, altered, and enforced.

The use of ethical principles of justice to assess the substantive laws provides not only a mechanism for assessing the resolution of particular disputes; it is also a tool for the measurement of the system of laws as a whole. This assessment is made by the evaluation of the entire social structure regulated by the legal system. A social structure that enshrines, or protects, or merely allows the continued existence of seriously unethical relationships among citizens is an unethical social structure. The legal system that protects or fails to disturb such an unethical social structure is unjust.

The use of ethical principles of justice to assess the procedure of laws likewise may be used to determine whether the adoption of a particular edict or the resolution of a particular dispute were done justly. Moreover, the ethical assessment of justice may be used to assess processes that affect the legal system as a whole.

### **2.4 The Incomplete Realization of the Ideal of Justice**

Justice cannot be fully realized by law for two fundamental reasons. First, justice is controversial: there are many competing claims of ethics (see section 3). Indeed, there are too many for them to generate a single comprehensive and coherent set of ethical obligations for the law. Second, justice is ideal but the law is practical, and practical obstacles are likely to prevent full realization of any ideal.

As to the first, the very nature of human conduct is often based on the existence of a wide range of alternatives, each of which is good. Further, the nature of life in a complex world in which many people are acting according to many motives requires that a person who intends to act ethically is often faced with choosing between two incompatible actions, both of which seem to be ethical obligations. Legal officials are personally no better equipped than any other person to resolve such dilemmas, although they do have an obligation to the law to act, to make choices. Although philosophers may argue over whether such a choice is immoral, there is no doubt that a choice in such a case cannot be a complete realization of morality. Thus, even when officials desire to act according to the dictates of justice, the actions and choices legal officials make are unlikely to satisfy all of the ethical demands upon them.

Furthermore, there are practical constraints on the action of officials that very nearly ensure that injustice will occur. There is never enough reliable information to perfectly understand most situations in which the legal official must act. There is never a sufficiency of resources so that all that is required can be done. Still, the obligations of the legal system in general and of a particular official's jurisdiction and discretion in particular ensure that when a given official does not act, inaction is just as significant as action. Thus, officials determine to take action or inaction with a likelihood of mistake, and the mistake is as unjust to the person burdened by it as the action or inaction would be if it were taken for deliberate reasons.

That perfect justice is impossible does not mean, however, that justice cannot be realized in some degree. As described in section 3.5, the most just legal action is often the least unethical available.

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**Steve Sheppard** is associate professor in the University of Arkansas School of Law, where he teaches jurisprudence, international law, environmental law, U.S. constitutional law, and equity. A native of Mississippi in the United States, he is a graduate of the University of Southern Mississippi, Columbia University, and Oxford University. He has written widely on the relationship between legal, moral, and official obligations, as well as on the history and theory of legal institutions. Sheppard's works include a two-volume *History of Legal Education in the United States* and, to be published in 2003, the first anthology of the works of Sir Edward Coke, one of the great figures of the common law world, whose views of law and the state presaged the ideas of Locke and Montesquieu. He is completing a monograph on the moral obligations of legal officials and a new edition of Blackstone's *Commentaries on the Laws of England*. He can be contacted at sheppard@uark.edu.