

LAW, ETHICS, AND JUSTICE

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Contents

1. Introduction
 2. Authority, Norms, Ethics, and Laws
 - 2.1. The Idea of Authority
 - 2.2. The Idea of Norms
 - 2.3. Ethics as Authority
 - 2.4. Law as Authority
 3. Ethics and Justice
 - 3.1. Ethics, Morality, and Justice
 - 3.2. Competing Notions of Justice
 - 3.3. The Pursuit of the Ideal
 - 3.4. Best Efforts
 4. Laws and the State
 - 4.1. Evaluating Laws
 - 4.2. Equity as Ethics that Apply to Law
 - 4.3. Promoting the Rule of Law
 - 4.4. Promoting Justice
 - 4.5. State Promotion of Ethics and the Good among Citizens
 - 4.6. Limits on State Promotion of Ethics
 5. Officials, Laws, and Citizens
 - 5.1. The Relationship between Official and Citizen
 - 5.2. The Problem of One among Many
 - 5.3. Relationships between Ethical and Legal Duties
 6. Official Obligations
 - 6.1. Institutional Obligations
 - 6.2. Personal Obligations
 - 6.3. Procedural Obligations
 - 6.4. Substantive Obligations
 - 6.5. The Problem of Dirty Hands
 7. Justice and Legal Systems
- Acknowledgment
Glossary
Bibliography
Biographical Sketch

Summary

This topic entry is both an independent exploration of the interplay of laws, ethics, and justice and a synthesis of the ideas considered in greater detail in the chapters within this theme: *The Rule of Law, Equity and the Law*, and *Perspectives on Ethics and Justice*.

Laws and ethics are both norms, or rules that provide a practical basis for action, although they arise from different sources. Both have authority, in that they are followed because they are norms and not because of any particular idea that people following them might have regarding their sources, content, or justification. People tend to follow norms out of habit.

Ethics apply to officials, creating obligations for them just as they create obligations for citizens. In exercising their offices, officials must act with charity for the citizens that they burden, which is best seen in the ancient maxim of reciprocity, “do unto others as you would have them do unto you.” They must also act with humility, reason, duty, courage, honesty, and morality. The cumulative obligation that arises from all of these often competing duties can only be met with best efforts. Applying ethics to the results of law as it is applied to individuals and to the society, ethics can create a duty to pursue justice. Such a pursuit is an individual obligation upon every official.

1. Introduction

One of the most important goals of humanity is to live with justice. Justice itself is an elusive ideal. The content of justice and the manner in which it can be successfully pursued have been debated for millennia.

The most fundamental argument is whether justice can be achieved without the vehicles of a state and a system of laws. Some, especially those who follow the more utopian writings of Karl Marx, believe that mankind may progress to an age in which justice between individuals may be achieved without the aid of a state or of laws. Whether this will one day be the case, the rest of us must follow the advice of US President James Madison, when he noted, “If men were angels, no government would be necessary.” Men not being angels, government cannot be avoided.

To achieve the goal of justice, the state is the essential means. States do, of course, pursue goals other than justice. One might see the state as merely a means to prevent people and land from being taken over by a different state. Others might see a state, or at least its government, as no more than a vehicle for the benefit of its leaders; this is the underlying moral flaw of most tyrannies and many forms of colonies.

The best rationale for a state is not merely to protect a people from other states, although that is a necessary condition for all states to exist. This reason alone, however, cannot fully justify the existence of any one state; it cannot even explain why it would not be better for a state’s people that its government be banished and the state become part of another. A far better moral justification is that the state exists to create a condition of justice for the people who live within it.

The tools by which the modern state is likely to pursue justice, or for that matter to do anything else involving the people, are laws. Laws create obligations for individuals to act, whether these individuals are officials who must create and manage the system of laws or citizens who must act in accord with the laws.

Justice, regardless of what else one thinks it is, is a matter of the conduct of individuals toward others. This is true whether the individual is an official or a citizen and the others are citizens or officials. So long as justice requires any particular conduct or forbids other conduct, even if the requirement is as fundamental as “Do unto others as you would have them do unto you,” the requirement of justice can be stated as the content of the obligations of one person toward another. Debates about justice are therefore, at least in part, debates about the content of obligations between individuals. When justice is seen as a relationship between people, not just as an abstract idea about the state or about the people in general, it is capable of being seen as an ethical relationship among individuals. At that level of understanding, our ideas of ethics, which are themselves sometimes messy and controversial, may help in our understanding of justice, or at least what justice requires us to do.

Given that the best justification for the state is that it pursues justice, and given that anything the state pursues is likely to be pursued by laws, then the relationship between ethics and justice suggests that there ought to be a relationship between ethics, justice, and law. The state must have some role in ethics, and ethics must have some role in our idea of the state.

The relationship between law, ethics, and justice is one of the most important in any modern state. While it is rare that any citizen or official might think about this relationship in the abstract, conflicts among differing views of this relationship in specific situations can be both common and severe. The simplest relationship among laws, ethics, and justice is one in which justice is satisfied when the laws enforce ethics. On this model, ethics describe the best conduct of an individual in some situation, law enshrines the duty of that individual to engage in such conduct, and justice is done when the law is enforced, and, as a result of this enforcement, the duty is performed by the individual (or at least protected from interference by others) or, if it is not performed, the individual is punished. The classic example of this model is a law forbidding homicide. Each person has an ethical obligation not to end the life of another without very, very good reason, such as self-defense against a threat to one’s own life. The law creates an identical obligation, and one of our most fundamental notions of justice is that the state will ensure that these obligations are enforced.

Despite the clarity of such a relationship among ethics, law, and justice, this model is insufficient to describe the interaction among these different types of obligation. To begin with, in this model it is hard to determine who does these things and how they would do it. Who defines an ethical duty, who creates laws that enshrine such definitions, and who determines what justice requires and whether it is satisfied? The model is necessarily dependent on who can accomplish these tasks and how they would do so. Most importantly, how far can such people go? It is one thing to say murder is unethical, but why cannot the same people who determine that murder should be forbidden also determine to punish those who make a profit, or refuse to attend a state

church, or to wear a veil in public, or to attend school to learn the biology of evolution? All of these actions of the citizen were considered unethical, and indeed made illegal, in one or another major legal system in the twentieth century.

The greatest problem in relating ethics, law, and justice is not just to determine what ethics the citizen must have in relating to others. A more compelling question is how to determine the ethical obligations of the official. This question is the most essential to determining what justice requires.

This article describes one model of how to determine what ethical obligations must be fulfilled in a just state, either by the citizen or by the official. It also raises a question separate from these two but necessary to both: what of these obligations may be required or enforced by the law?

2. Authority, Norms, Ethics, and Laws

There is a relationship between laws, ethics, and justice, in that each is a set of norms or ideas of what we ought to do. Each norm creates an independent source of authority, or basis for a reason for action. Understanding how norms work, and the limits of norms in general, may help in understanding the relationship between ethics, laws, and justice.

2.1. The Idea of Authority

Authority is the reliance by one person on a statement by someone else as a reason for action, if the person believes he or she ought to commit that act, and this belief is only as a result of the statement and not on independent grounds for acting. The statement might be made indirectly, and the statement might be quite distant in time or place from when it is acted upon. Thus, a person who today complies with a prescription believed to have been given long ago by God to the prophets Moses or Muhamed is acting according to that authority, just as much as a soldier is who carries out an order given by an officer.

What matters most in the idea of authority is that the individual acts under an obligation because of a belief that that individual ought to do so as a result of the source of the obligation, not because of its rationale. The person subject to authority may be unaware of the reason for the action that person will take but take that action nonetheless because, and only because, the action is required by the source of authority, whether it is a divine command given by God or it is a military order given by an officer. It might be that the person subject to authority acts in accord with the authoritative statement, knowing the reason for the action. It might also be that the person is mistaken about that reason. Neither accurate nor inaccurate knowledge of the reason for the action is as important to the effectiveness of the authority as the degree to which the person acts because of the authority alone.

An important source of authority is not in a particular statement made by a particular person. Rather it is a collective understanding held in a community as to what people ought to do. Such understandings may be collected in some form and written, or they

may be the result of custom or oral tradition. They may arise from many sources, and habit alone may be a source for them. These understandings are, generally, norms.

2.2. The Idea of Norms

Norms are the ideas that people have in a community as to what individuals ought to do or not to do. Norms include obligations that arise from social interaction, such as manners; that arise as a matter of custom and reason, such as ethics and morals; that arise as a result of institutional acts by the state, such as laws; from commercial relationships, such as trade customs; and from more private habits, such as family traditions or sporting rules. There is, in fact, a nearly infinite number of sources of norms, which would govern an almost unlimited scope of human activity.

The effectiveness, or strength, of a norm will vary from person to person. For most individuals, not all norms from a single source of authority are equally successful in creating a sense of obligation to act according to the norm. The effectiveness of norms varies according to the degree to which the person holds a desire to act in a manner contrary to the obligation created by the norm, according to the degree the person accepts the authority from which the norm is believed to originate, and according to the degree to which the person perceives violating the norm will cause them greater hardship. Norms are ordinarily effective not because people are aware of their obedience or conformity to the norm, but because they do so from habit. When the person is aware of the norm as a source of their decision to act, they are more likely to question the validity of the norm, as well as to question the justification for the authority according to which the norm exists.

When such questions arise, the most prominent bases for continued action consonant with the norms are fear of the consequences of violating a norm and desire to satisfy the source of the authority from which the norm issues. These bases are easily seen in a child's obedience to a parent's command: The child acts according to the command both from a fear of punishment and from a desire to please the parent.

There is a third basis for accepting authority and the norms that flow from it, even when the authority or the norms are questioned by the person who is to follow them. If the person accepts the authority as a source of norms the person would believe it is best to follow, regardless of the authority, the person is more likely to accept the authority. This is particularly the case if the authority is a source of norms that the person recognizes would lead to better conduct by the person than the person would engage in otherwise. Thus, a student who seeks a teacher who requires the student to train and study harder than the student would otherwise accepts the teacher's authority because the student recognizes the student will learn more by accepting the norms established by the teacher than the student would learn alone. In its most mature form, this basis for the justification of norms and of authority is one in which the person obligated to follow the norms believes that conformity to the norms will encourage the person to live more according to an ideal.

Thus, norms are followed usually as a matter of habit, although they may sometimes be followed out of fear or the pursuit of an ideal. When the habits based on these norms are

questioned, they are likely to remain compelling if the person fears the consequences of disobedience, desires to give affection or to seek reward from the source of authority, or accepts the norms as a better basis for action than the person would choose without them.

A single norm may arise from more than one source of authority. As we have seen, the norm, “do not murder,” for instance, arises from many sources, including ethics and law, but also including religion, manners, family tradition, and many other authorities. These multiple authorities may be reinforcing, and a person’s habit in accepting the obligation not to murder may not be easily hived into accession of one source of authority alone. On the other hand, the more sources of authority a person accepts that each support this norm, the less likely that the person would contravene the norm.

Ethics, laws, and justice are all sets of norms. Laws are unusual in that they must arise from within institutions of the state and are enforced by officials, but, in their operation as norms, both laws and ethics are norms operating to create obligations for individual conduct.

2.3. Ethics as Authority

Ethics is a field of philosophy that is subject to great controversy among philosophers. It is also a human understanding, held by nearly every mature human being, about what are appropriate reasons for action, what are appropriate actions, and what results are appropriate to pursue through actions. Although there are some variations according to region and culture, there are greater areas of agreement as to what ethics requires in general between individuals than many observers would admit.

2.3.1. Sources of Ethics

There is a great deal of agreement that ethics are required of every person, but there is little agreement as to why. The primary reason for this lack of agreement is the tremendous dispute among the many people who believe, often quite firmly, that a single source of ethics exists, rooted in a particular tradition, culture, or set of ideas.

Some people believe that ethical obligations are inherent in the nature of the universe or of mankind, and these obligations are real and unchangeable. Some people believe that ethics are no more than social conventions that properly vary among different communities or cultures. Some people accept ethics only as a constraint on human competition, and others claim that ethics are necessarily rooted in religious dogma. The forms of argument offered for different views vary widely, and many of these forms of argument are offered as demonstrations not only to defend one view but also to exclude competing views.

2.3.2. Conflicts among Ethics

Many systems of ethics purport to be exclusive of other views. For example, a person dedicated to utility as the sole source of the good will reject any other basis for action as ethical, and a person who believes that all actions must be measured by right motives

will consider acts unethical regardless of their outcome. Thus, many views of ethics are capable of determining according to a single method what obligations are acceptable, and according to such views there is no significance in whether such views are shared by other views of ethics.

Despite the disparate sources it remains possible to consider obligations from a level of abstraction once removed from the dictates of any single view of ethics. This is sometimes referred to as the “meta-ethical” view, the view of ethics that encompasses all notions of ethics, regardless of the source of any ethical view.

From this view any obligation, or potential obligation, may be considered in the light of any number of ideas of what is right, what is good, or what ends are the most important in life. From this view, then, an obligation might be one that is considered an ethical requirement from a variety of views of ethics. Likewise, it is possible for an action of any form to be condemned from a variety of ethical perspectives.

As this cursory inventory demonstrates, there are myriad views of ethics that may support different, competing conceptions of justice. Moreover, there are profound arguments and passionate claims made in support of all of them. The significance of this disagreement is seen by some as sufficient grounds to reject any conception of justice based on ethics, or at least on ethics of any specificity as to be controversial.

The fact of disagreement, however, proves neither that considerable agreement is not possible, nor that some conceptions of the good or the right ought not to be pursued as a basis for justice, despite their controversy. Choice among alternative views of ethics is inevitable in society; as society changes, it is likely that choices regarding ethics will also change.

2.3.3. The Problem of Religion

The most effective source of ethics over time has been religious tradition. At the same time, though, religion is the most difficult source of ethics as a basis for justice.

Religions are often the most enduring institutions instructing individuals in a conception of ethics, and the ethics that are learned from religious institutions have a significance in society beyond their religious origin. Thus, ethics learned as religious obligations may serve as the basis for ethical obligations, and may therefore be the basis for claims of the content of justice, in the same way as other ethical obligations that do not share religious acceptance.

The fact of religious origin does not, however, suggest that ethics derived from religion are likely to be compatible. Difference among sectarian views of the good and the right define important differences among religious sects, and each sect teaches its followers that its particular views are not only correct but, often, exclusively correct.

Human history recounts a great many violent struggles between adherents of different religions, each group seeking either to impose its religious ideals on another or, at least, seeking to bar another from imposing its religion. The result has been to increase the

importance of both skepticism of claims to religious truth and toleration of competing religious truths.

Thus, there are many methods by which an ethical view based on a particular religious understanding might be compared to a conception of justice. One is to exclude ethics rooted solely in a sectarian understanding and, on the corresponding extreme, another is fully to endorse sectarian views of the right and the good as the only basis of justice. Another is to apply ethical principles derived from a sectarian understanding, but to apply exclusively those principles that do not conflict with non-sectarian conceptions of ethics or with the views of competing sects. There are, clearly, a variety of further methods, each setting different balances and limits on the influence of the sectarian view on the state.

Historically, the most successful states have employed a conception of justice that incorporates ethics based in religious understanding. These states have, however, also enforced an obligation of tolerance among competing views of religion and their associated ethical systems.

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Biographical Sketch

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 .