

Defining Justice

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At the end of this chapter, you will be able to:

- Define and discuss justice
- Understand some of the major philosophical approaches to justice
- List the different disciplines that comprise the study of justice, and describe how each discipline contributes to the multidisciplinary study of justice
- Discuss how law fits into the study of justice

Justice is a term often used in everyday speech, but what is “justice”? How is it defined and described? In this chapter, justice will be defined by considering what it is and the various approaches to studying it. The discussion will be expanded by reviewing certain aspects of justice including “desert,” “fairness,” “equality” and “moral righteousness.” Philosophical theorizing about justice will be introduced and major philosophical approaches to defining justice will be reviewed. Law is often thought of as the ultimate expression of justice in society. But, justice is truly more than just the law.

Before pursuing a definition of justice, the rules of justice studies will be reviewed. These rules should not be forgotten when reading this book. These rules are meant to challenge thinking and, also, by opening and broadening perspective, prepare one for learning. Thinking of these rules when confronted with challenging and perhaps uncomfortable material within this book may prove helpful.

Main Points

As you read, highlight the answers to these questions:

Is it possible to agree on one definition of justice for all people, places and situations? For all time?

What do the various academic disciplines have to offer to the study of justice?

How are the various types of justice (for example criminal justice or restorative justice) informed by philosophical definitions of justice?

Studying Justice

Often when people think of the study of justice they think immediately of crime, perhaps a particular crime, the arrest of a person by the police, the courts and the eventual incarceration of an offender in jail and their possible rehabilitation. Another common theme is to describe justice in terms of the laws and rules of society. Crime and laws are part of the study of justice, but only part. Studying how these processes work together is the study of the criminal justice system. However, the study of justice entails more than just the operation of our criminal justice system and how to respond to a particular action by passing a law to make that activity a crime.

The study of justice is also concerned with how a person came to be in trouble with the law in the first place. Factors contributing to behaviour in contravention to society's laws from both an individual perspective and also on a broader societal level allow a much richer justice analysis. Studying this behaviour in relation to social factors such as poverty, racism and education can significantly inform our understanding of preventing crime and government law-making. Trying to understand why poor and marginalized people in our society fill our jails and our hospitals and have higher suicide rates than the rest of the population is also part of the study of justice.

A related pursuit is to study what is or is not labelled as crime in our society. Historically, being drunk or using recreational drugs was not a crime. In some countries prostitution is a legal activity. In many countries, and even in Canada, many workplace deaths and injuries completely preventable with proper safety equipment are labelled "accidents," not "crimes" (Rajan 2001: 385). Further, industrial discharges which have polluted drinking water and resulted in deaths and illnesses are not considered crimes (Nikiforuk 2008: 83). What is or is not a crime and who is and is not prosecuted for crime in our society are parts of the study of justice.

Studying justice is also concerned with many other aspects of our society. In fact, the study of justice by such people as Plato and Aristotle pre-existed modern notions of law and crime. How people are rewarded for their efforts in working, farming, creating and inventing and who profits from these activities such as corporations, retail stores and governments are also a concern of justice. Is the distribution of rewards fair? Are developing countries in other parts of the world paid a just price for their goods and services, or are their people employed in sweat shops, working long hours for very little compensation? How the environment of some of these developing countries supplying oil, rubber and other natural resources is affected and the impacts of climate change on these countries and their people in exchange for the exploitation of their resources are questions for justice studies. How this distribution is influenced by international human rights is also a paramount concern of justice studies.

In respect of the entire multitude of issues and topics pursued in justice studies, a few common rules exist, regardless of the topic. The first rule is that our own ethnocentrism (or preferences for practices and values reflective of our own culture) must be recognized. The potential of justice studies can only be achieved if we are able to break from our particular cultural background to take into account broader considerations that can affect the outcomes that we want to change. Recognition that we are ethnocentric and we think normatively (within the confines of our own values, norms, experiences and perspectives) is a first step in pursuing the study of justice, rather than just the study of law. If we are considering the destruction of the environment in a developing country supplying North America with oil and gas, it is necessary to consider the perspective of people living in that developing country. Similarly, if considering the appropriateness of a woman to wear a head scarf while playing soccer we would have to approach the issue from the woman's perspective. To disregard her perspective and consider only the thoughts, feelings and views of people where head scarves are not common, is not pursuing the study of justice. We must disengage from our personal emotion and recognize that we are products of our own cultural, religious and class background and, like most people, have a tendency to regard our own norms, values and standpoint as superior to all others.

The second rule in justice studies is recognizing that often the dominant viewpoint or the views of the majority are not the same as "justice." The idea of justice can't be captured by any single morality or standpoint but only emerges from the interaction among contending perspectives. Regard must be given to the perspectives of the marginalized, the poor and other minorities. Justice requires recognition that sometimes minorities and the oppressed must receive what may be regarded as "special status" and privileges to prevent what otherwise would be tyranny of the majority or tyranny of the most powerful groups or people in society. To only think from the perspective of one viewpoint and morality, especially when that perspective is the dominant standpoint or the majority of the population, limits meaningful contribution to broader issues of justice (Crank 2003: 2).

To fully understand the issues identified above, each of us must set aside our normative thinking. We have to be able to recognize when we are thinking normatively and understand that other viewpoints exist. Pursuing a full understanding of these viewpoints, even if they are held by a minority or only a few people, helps us to expand our understanding of a justice issue and approach it from more angles. In the example of the crime of drug possession, we can expand our understanding of the issues if we consider that in some countries the use of recreational drugs is not illegal. This exercise expands our consideration of this topic outside of the norms, values and culture that have determined that the use of and, therefore, possession of recreational

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drugs is illegal. We are able to recognize our own thought patterns, biases and perhaps prejudices. When we expand our thinking and begin to consider thoughtfully and respectfully the position, viewpoints, thoughts and opinions of the “other,” we approach the study of justice not as a debate between two viewpoints, but as a problematic. This approach challenges our traditional thinking and makes us embrace a plurality of positions.

The study of justice is also multidisciplinary as it combines several usually separate branches of learning or fields of expertise. In this way, no one profession, be it law, philosophy, history or sociology, has an exclusive claim to the study of justice. Each of these disciplines, and several more, play an important role in the study of justice. Knowing about the contributions of each discipline to the study of justice provides an important base to understanding justice.

Philosophers, including Plato and Aristotle, have wrestled with defining justice for centuries, dating as far back as 600 BCE. The study of philosophy is the study of general and fundamental problems concerning matters of existence, including truth, beauty, law, validity and justice. It is an approach to these matters that is critical, generally systematic (or all-encompassing and not individualized) and reliant on reasoned argument. It does not rely on empirical or statistical methods or evidence but it is rather the pursuit of wisdom through rational and logical argument. Philosophy offers a meaningful starting point for defining justice as it has a long history in struggling with the concept of justice.

More recently, the philosophers’ abstract speculation has been complemented by empirical ways of knowing manifested in social studies (such as psychology or sociology). Social scientists developed many disciplines in their efforts to understand human behaviour. Each discipline contributes to the field in its own way. History contributes by providing information on the past record of human social development with useful insights into patterns, regularities and irregularities. For instance, the historical treatment of people of Japanese ancestry during World War II, or the historical treatment of people from Africa enslaved several centuries ago, have important implications for understanding human behaviour and our own and others’ conceptions of justice or fairness. Not only does this history still impact our society today, but it also illustrates how society’s conception of justice has changed over time.

Similarly, political science and the study of the organization, structure, operation and administration of government is crucial for understanding the justice system, the role of courts, corrections and the development of laws. Often the media will portray a particular court decision as “outrageous” and blame either the judge or perhaps the lawyer. However, upon a closer analysis, students realize the government was responsible for writing and

passing the law, which the court and the judge simply applied. Ultimately, the people elected the government.

Lastly, sociology, the systematic study of social structure, is crucial when studying justice or fairness within society. Law and the justice system of a society constitute a social structure that is influenced by other social structures in society. As an example, the laws surrounding marriage and divorce are influenced, at least in part, by the structure of the family. Changing norms and patterns of the family, or the definition of what a family is, have had symbiotic affects on the laws surrounding the family. The heterosexual nuclear family was historically the only recognized family unit with the status to receive the benefits accruing to a family unit such as insurance payments and matrimonial support. This nuclear family consisted of a father, mother and children. Now, however, benefits may accrue to same-sex couples, effectively giving a same-sex couple the status of a “family.” Sociology focuses study on social structures and how human beings produce, reproduce and change social structures such as families and laws (Knuttila 2002: 21). The application of the principles of sociology to the study of law and the justice system improves and informs our understanding of justice.

Criminology makes an important contribution to the study of justice. Criminology is concerned with the study of the etiology or cause of crime. It looks at the role of the social setting and the interactions of various social groups in the cause of crime, as well as the biosocial and psychological causes of crime that tend to focus on the individual and their free will.

Searching for a Definition of Justice

One of the first written definitions of justice is that of the philosopher Aristotle, who lived approximately 2300 years ago (384–322 BCE). Aristotle stated that justice consists of righteousness, or complete virtue in relation to one’s neighbour. He also espoused the idea of justice as a state of character, a cultivated set of dispositions, attitudes and good habits. Aristotle expands on justice by stating it consists of treating equals equally and unequals unequally, in proportion to their inequality. This is also known as distributive justice (Aristotle 1985). Although this first appears simple, its application becomes somewhat problematic. Are women and men different, therefore, unequal and to be treated unequally? Are people of different skin colour different, unequal or equal? Although most people today would say, “Of course these people are all equal. These are categories of difference that we should not take into account to exclude from privileges in society like voting, or riding at the front of the bus.” This, however, was not always the case. In the first part of the twentieth century, women could not vote in the United States and Black people could not ride at the front of the bus.

Normative thinking, beliefs and value judgments form the basis for the

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determination of our categories of “equal” and “unequal.” When we answer questions about equality, we answer them based on beliefs and biases that we learned from parents, teachers, peers and other subtle influences like media, television and the books we read. It is these influences that form internalized beliefs and values and a person’s conception of “justice” and beliefs of what is fair and equal. As little as fifty years ago, many people did not think of themselves as racist, although they supported the laws of racial segregation (denying Black people the right to have full privileges of club membership, ride at the front of the bus or swim in a swimming pool); today we would consider these people and the laws segregating people on the basis of race as racist. Today, racist practices still occur. In Saskatoon, Saskatchewan, until very recently, police officers would take Aboriginal people out of the city and leave them in -40° weather without proper clothing instead of processing the necessary paperwork to charge them with a minor criminal offence. Several died (Wright 2004). Although this practice is clearly racist, many would not consider the Saskatoon police officers as racist. The challenge for justice studies today is to ascertain what practices in today’s society are unequal and unfair but are regarded as normal.

The second type of justice that Aristotle contrasted with distributive justice was what he termed “rectificatory” justice or corrective justice, dealing specifically with the justice of transactions, whether they are voluntary (like buying, selling or lending) or involuntary (such as a victim of theft or violence). In this type of justice a judge tries to restore an unjust situation between parties to equality (Aristotle 1985). This theme receives most attention in the chapter on restorative justice.

The definition of justice is a moving target; conceptualizing justice is an ever-changing, subjective process of assessing the fairness of relations between individuals and groups of people. The following are four main popular or everyday meanings and understandings of justice.

Desert

This is the idea of “getting what one deserves.” On the positive side, we may bestow an award or social recognition on someone for a good deed or unselfish behaviour (for example, a medal for bravery for risking one’s life to save a drowning person or designation as “volunteer of the year” for providing valuable help without pay in a community service organization). Awards and honours may also be a way to recognize extraordinary talent (Album of the Year at the Junos or a gold medal at the Olympics) or great effort (designation as “the most improved student” or award for “the biggest loser” in a weight loss contest).

There is also a negative side to desert — punishment or bad consequences for harmful or immoral actions, laziness or incompetence. Sentencing in the courts through the use of fines, imprisonment and community service orders

certainly fits this category — although there are numerous ongoing debates about the balance that should be struck in criminal sentencing with regard to retribution, restoration and rehabilitation (more on this question later). Other examples of getting what one deserves through negative consequences include children losing privileges for misbehaving, lazy students getting poor or failing grades and employees without the necessary skills for a job being demoted or dismissed.

Sometimes consequences are perceived to be genuinely deserved — for example, a repeat offender drunk driver who has his driver’s licence taken away, or the athlete who avoids performance-enhancing drugs and still wins the gold medal. However sometimes credit or blame is ascribed in ways that are not deserved or fair. For instance, in regard to the distribution of wealth in society, sometimes people who are rich due to inherited wealth are highly regarded, and people who are poor due to circumstances beyond their control are seen as “lazy” or “stupid.” In the latter regard, it is a common trend to distinguish between the “deserving” and “undeserving” poor in ways that reinforce invalid and negative stereotypes and that prevent us from adopting good policies and programs to combat poverty.

Fairness

This is the idea of treating equals equally. For example, two people doing the same job competently with the same amount of experience and training should get the same pay. There should not be distinctions in rates of pay based on gender, age, racial or ethnic background or any other factor not related to performance on the job. “Fairness,” however, also means, in certain circumstances, treating people unequally in order to recognize and correct past injustices. For instance, if women or members of racial minorities have been historically excluded from certain (relatively well-paid and desirable) occupations, there may be a justifiable case for employment equity measures — giving suitable candidates from the disadvantaged group preference in hiring. Hence, there can sometimes be a distinction (and perhaps tension) between what is considered fair at the individual and collective levels.

This concept of justice also denotes “procedural fairness” — ensuring that everyone receives a fair hearing and due process in courts (for example, their case follows all the requirements of knowing the case against them, they have enough time to prepare and they have an impartial judge), tribunals, appeal boards and other formal decision-making bodies. For example, people with a low income should not be denied competent representation in court by a lawyer if they are charged with a serious criminal offence, even though they cannot afford legal fees. Legal aid schemes, in principle, are supposed to ensure such legal representation for all. Procedural fairness also demands a transparent process for decision-making that can be clearly understood by all, ready access to practical help to make one’s case and

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the right to appeal a decision to a higher body in one feels that one has been unjustly treated.

Equality

This common understanding of justice is embodied in equal citizenship rights for all persons (for example, the right of all to vote in elections and run for political office and equal entitlement to universal public programs such as health insurance and education). Equality also demands that there be an equitable sharing of civic burdens, such as paying taxes (although “progressive” taxation schemes may require the wealthy to pay proportionately more, they are about fairness) or performing compulsory military service for a set period of time (in countries where this is required).

Equality also has economic and social dimensions. Does everyone enjoy adequate economic security through some combination of labour market earnings and income security programs provided through government? Do all people in society have ready access to adequate and affordable housing, sufficient, safe and nutritious food and other public goods such as transportation and green space?

These aspects of economic and social rights do not necessarily demand treating everyone exactly the same, or giving people equivalent shares of a social good. It can be acceptable to have differences in income levels, house prices and the consumption of goods and services. Such differences may in fact provide incentives that benefit individuals and society. For example, physicians tend to be well-paid in order to encourage people to complete long years of medical training and to provide this valuable service that benefits others. Economic and social differences also allow for individual preferences. For example, a person may decide to live in low-cost housing in order to save money for extensive travel. However, justice demands equality of access for everyone to adequate income, decent and affordable housing, food security and the other necessities of a modest but dignified life. A disabled person may require more resources than an able-bodied person for such things as transportation, communication or housing.

The social aspect of justice brings up questions of distributive justice — how resources (for example, money, natural talents, health care or political power) and opportunities (for example, places in the best educational institutions or access to the best jobs and the most lucrative business opportunities) are divided up among everyone in society. Unjust distributions may require corrective measures, in other words, “redistributive justice.” For example, wealthy people may be required to pay more taxes than those with modest or low incomes, so that government can fund a reasonable level of public services for all. Educational institutions may have to take steps to recruit students and faculty members from groups that they have historically excluded, such as women, racial minorities and people with disabilities, so that these

minority groups have access to the same educational opportunities as the majority. Once again, treating every individual exactly the same may not be possible or even desirable if we are to realize a collectively just distribution of money, social recognition and political power. Such a redistribution of economic resources, positive social status and the representation in decision-making bodies may serve the collective good of society by creating a fairer, more inclusive and more harmonious social order, even if some privileged individuals end up with less than they started with.

The process of redistribution, or, more specifically, arriving at a fair redistribution, involves participation. Participation in this context requires a societal decision mechanism or process that allows the meaningful participation of all people in society with recognition, mutual respect and an ethic of making decisions by taking into account the position of the least favoured or neediest in society. This idea introduces and bridges to the next conception of justice.

Moral Righteousness

This final aspect of justice encompasses the ideal of individual virtue and ethical conduct. Individuals are thought to be “just” when they engage in altruistic behaviour to help others or make society a better place and set an example of altruistic conduct in both their personal responsibilities (as a spouse, parent or friend) as well as civic and public roles (as an employee, elected politician or club president).

The four aspects of justice as described above are not mutually exclusive categories and often piggy-back onto one another. For example, a morally righteous person may work hard to achieve equality and fairness in broader society. We might think of famous people who fit this description, such as Nelson Mandela, in his public activities, who led the anti-apartheid movement in South Africa, or Nellie McClung who struggled for women’s rights in Canada.

It is also true that these four distinct conceptions of justice may sometimes compete or run contradictory to one another. For example, advocates of social justice as equality often call for broad and generous social programs and are willing to accept relatively high taxes so that we can afford such programs. On the other hand, those who advocate for “justice as desert” in the marketplace tend to favour low taxes and highly differentiated rates of pay in order to provide financial incentives for the talented and hard working and to punish those who are seen as lacking in skills or effort. These two different camps will likely disagree on many aspects of how to distribute resources justly and on what a “just society” should look like.

Similarly, people in the “justice as desert” frame of mind often believe that criminals deserve retribution and harsh treatment. On the other hand, people who equate justice with equality or fairness may see the roots of

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criminal behaviour in social and economic marginalization and the lack of rehabilitative services for individuals in trouble with the law. So these two sides call for very different kinds of policies and programs in the criminal justice field.

Self Test

Are arguments founded on moral righteousness and desert always compatible? How do the rules of justice studies inform this answer? What are the differences between the four meanings or understandings of justice?

Types of Justice Studies

Often we categorize the application of justice in a particular field as a special type of justice. For example, in respect to the environment, the area of environmental justice has developed. This area seeks to understand how the environment impacts our justice system and what aspects of the environment should be included in or protected by our justice system. Should sentient beings (entities with the ability to feel) have rights? Do horses or burrowing owls have rights? If we do grant them rights, are they the same as or different from the rights of humans? If their rights are different, how are they weighted against each other? Do we need to protect burrowing owls (an endangered species) from being trampled by horses? How do activities of development such as oil drilling, mining or manufacturing affect the environment and the people in the environment? Do these affected people determine what development is allowed to occur? How does the contribution of carbon emissions to climate change impact global distributive justice? These are all questions of environmental justice.

When people commit crimes, or offend the norms and morals of our society to the extent that the offence has been labelled as a “criminal” act, we state that they and their victims deserve criminal justice. In justice studies we examine the demarcation in society between acts that are deemed “criminal” and those that are not and how this changes over time. Up until 1969 the *Criminal Code* stated that it was an offence to engage in homosexual activity. Now, human rights statutes attempt to protect homosexuals from discrimination. Similarly, crimes in relation to occupational workplace safety (or running a business or place of employment in such a manner that it is dangerous and causes injury to employees) have just appeared in the *Criminal Code* in s. 217.1, illustrating the ways in which acts considered criminal change and evolve over time. The study of criminal justice explores how the criminal justice system operates and achieves the parallel of corrective justice and the goals of offender rehabilitation and retribution.

When we examine the restoration of a victim after a crime or injustice has been committed against them, we are speaking of the principle of restorative

justice. Restorative justice also applies to more than just the victim — it also applies to the offender and the community. It can include reconciling harm done to a victim; restoring the relationship between the offender and victim after a criminal act; restoring the offender, victim and entire community after a criminal act; and also the restoration of two disputing parties (committing a wrong or several wrongs against each other, which are not necessarily criminal). Defining restorative justice is a difficult task. Narrow definitions focus on crime and resolving crime, while broader definitions focus on restoring community relationships (Marshall 1999; Zehr 2004; Braithwaite 2002). The final chapter of this book will pursue this task.

Social justice (very similar to distributive justice) is the broadest form of justice and relates to whether people have access to the things they need to live a secure and dignified life. Social justice refers to the conception of justice applied to our entire society; the idea of a “just” society is one in which individuals and groups receive fair treatment and a fair share of the benefits of society. Fair treatment often is termed “procedural justice” or the experience of fair processes in resolving disputes or processing an accused through the criminal justice system. Social justice works toward the realization of a world where all members of a society, regardless of background, have basic human rights and equal access to their community’s wealth and resources.

An ideal definition of “social justice” might be:

A set of ideas, values and social practices to ensure that all persons and groups enjoy economic security, can participate effectively in democratic decision-making, exercise mutual respect and caring for one another and live their lives in ways that protect and sustain the natural environment for future generations.

In Western democracies and in specific and concrete terms, social justice is implemented in part through democratically enacted law, effective public policy and programs delivered by governments and international organizations at all levels and, in part, through groups, organizations and social movements at the local, regional, national and international levels. This constellation of public institutions and activist groups strives to:

- overcome social exclusion or oppression of individuals and groups, including that which is based on gender, social class, racial-ethnic identity, cultural practices, religious belief, sexual orientation or disability;
- provide sufficient material resources to ensure an adequate standard of living for all, through some combination of decent, well-paying jobs in the labour market; readily accessible and non-stigmatized income security programs that recognize the socially valuable and unpaid work in the family and community; and high quality public services (including