



# DIMENSIONS OF JUSTICE

## ETHICAL ISSUES IN THE ADMINISTRATION OF CRIMINAL LAW

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# DEDICATION

To my wife, Denise, and my children—Sarah, David, and Michael—all of whom have gone far beyond the requirements of justice in making it possible for me to write this book



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# ACKNOWLEDGMENTS

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The spur for this textbook came in the form of a teaching assignment. During my 20 or so years at John Jay College of Criminal Justice, I taught many courses with the term *criminal justice* in the title. Throughout that time, I took for granted the label affixed to my courses and so didn't pause to think carefully about the significance of the word *justice* as an organizing idea for the issues I was discussing with my students. My colleagues prompted me to take a closer look. While rethinking our undergraduate core curriculum, members of my department decided that students majoring in the subject should take an introductory course on justice. They further decided I should take charge of that course.

With this spur, I canvassed course offerings in criminal justice and justice studies programs at colleges throughout the United States. I also examined canonical works on justice, modern commentary on the subject, and interdisciplinary work that has emphasized the connection between justice studies and subjects such as history, anthropology, sociology, political science, literature, and game theory. Thanks to my department, a pedagogical duty became an intellectual pleasure.

Numerous friends have provided me with wise counsel as I've worked on drafts of *Dimensions of Justice*. In particular, I thank Mike Cullina, John Laffey, Jim Levine, Bob Schmiederer, and Steve Wasserman for their vigorous discussion of justice issues throughout the years of our acquaintance and also for their comments on specific portions of the book. I'm grateful as well to Frank Pezzella for giving me a chance to try out my ideas a year ahead of time by letting me deliver lectures in his introductory course in criminal justice.

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# A NOTE TO STUDENTS

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Welcome to the study of justice. It's likely you've already talked about justice for many years. You may not have used the word *justice* in the course of your conversations with others. You may instead have relied on the word *fair*—that is, you may have asked whether your parents treated you fairly by comparison with a brother or sister, whether your friends were fair to you in the games you were playing, or whether your teachers graded your papers and homework assignments fairly. But even if justice didn't figure directly in your comments, it was nonetheless the concept that informed what you said, for justice is the organizing idea for all discussions of the terms of fair cooperation in communal life.

This textbook will give you a chance to think more carefully about what you have long taken for granted. It won't provide you with definitive answers. It will, however, offer a framework for addressing the questions of fairness you began posing at an early age. Because you are now adults, the textbook focuses on subjects essential to mature life: among them, the nature of crime and wrongdoing, the corrective measures appropriate for victims of crime, the nature of equal opportunity, the ways to promote reconciliation in communal life, and the possibility of mercy and forgiveness in the wake of wrongdoing.

Each of these topics is addressed by considering the relationship between justice and law. The legal system relies on rules and principles that promote social coordination. Only a moment's thought is needed, however, to realize that the law itself may not be fair. At one time, American law protected slavery; it authorized the internment of more than a hundred thousand citizens of Japanese descent; it permitted racial discrimination as well as discrimination based on gender and sexual orientation. In these and other respects, the concept of justice has made it possible to step outside the law and assess its fairness. We will use the concept of justice throughout the textbook. We will assume that justice ought to be provided *according to* the law, but we will make allowance for the possibility of unjust legal outcomes—and so will rely on the concept of justice to appraise the law.

## THOUGHT Experiment 10.1

### Harm, But Not Wrongful Harm

On enrolling at State U, Sam was told that he had to maintain an average of C or better (i.e., 2.0 or better) in his freshman year to become a sophomore. Sam received Cs in Math, English, and History. In Criminal Justice, however, Sam received a D. At the end of his freshman year, he was told he would not be allowed to register as a sophomore. Deeply upset, Sam pays a visit to his Criminal Justice professor. "Look," Sam says, "you *harmed* me. I've loved being a student at State U, but because of the grade you gave me I'm not going to be able to continue."

The Criminal Justice professor checks her computer records to see how Sam performed in the course. "You failed to hand in one paper. On another paper, you received an F for the quality of your writing. The average score on your tests was a D+. As I see it, the grade of D was something of gift. I might have given you an F. You certainly couldn't claim a C as a matter of justice."

"I don't think you understand my point," Sam replies. "I'm not being allowed to continue at State U. If you'd given me a C in Criminal Justice, I'd be allowed to stay. So *you* harmed *me*."

"Well, let's agree that I did," the professor replies. "John Stuart Mill's harm principle says that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' I don't think it can be said that I've harmed you *against your will*. You agreed to let me grade you when you enrolled in the course."

### Equal Treatment and Pregnancy

"Here's a situation where you clearly wouldn't settle for equal treatment," Lily says. "Imagine that a pregnant student calls the teacher and says she can't take the exam the next day because she's in labor and is about to deliver her child. I assume you wouldn't say that the teacher should tell her that she therefore fails the test."

"I might very well say that," Connie answers. "If she knew when the course began that she might have trouble taking a test because of her pregnancy, she should never have enrolled in the course."

"So your reasoning is that half the human race has to limit their reproductive capacity to conform to standards the other half of the human race has no trouble meeting," Lily answers. "My approach makes fair equality of opportunity a component of equality of treatment. That is, in the case of, say, a pregnancy, an equalizing measure ought to be provided, *as a matter of justice*, to make sure there's a level playing field. Your approach would make it virtually impossible for the wheelchair bound to go to school. It would put dyslexics in classes for the mentally retarded. I want *real* equality—in other words, I'm for equalizing measures that will make it possible for people with disabilities that are no fault of their own to compete fairly with other people who have no disabilities."

"No, what you want is to relieve people of personal responsibility," Connie answers. "I'm open to the possibility of passing legislation that requires an employer to grant paid medical leave to a pregnant woman *when the birth rate declines in such a way as to threaten social life*. Legislation of this kind will benefit everyone. Admittedly, it will impose costs on men, but these costs may have to be borne in order to further social life. In contrast, your proposal imposes a cost on men just so that women can indulge themselves by having children. This is completely unacceptable. Pregnancy is a private matter—unless, of course, society needs more children—so absent this condition, women should make decisions on their own about when to become pregnant. Even a pregnant student can figure out when to enroll in a course and when to stay away. Although the exact day of a baby's delivery is not foreseeable, the fact that a birth might occur during the course of a semester certainly is foreseeable."

Each chapter of the textbook is organized around two types of mental exercises you have probably not encountered before. One involves *Thought Experiments*—imagined scenarios that make it possible to think carefully about the principles of justice. The other mental exercises are called *Point-Counterpoint exchanges*. In these, fictional characters examine the implications of general principles of justice. The Thought Experiments and Point-Counterpoint exchanges serve as reminders that reflections on justice must focus not simply on the world as it is but on the world as it should be. This straightforward point informed your comments on fairness when you were young. In asking about the fairness of the grading scheme your teachers employed or your friends' fairness in organizing a game, you imagined possibilities that didn't exist at the time—and then drew on those possibilities to evaluate the circumstances of your actual life. The Thought Experiments and Point-Counterpoint exchanges do the same for subjects such as criminal law and criminal procedure.

The chapters in the textbook are organized around three central themes. The first cluster of chapters will introduce you to key issues that arise in all discussions of justice: personal responsibility, crime and the criminal law, procedural justice, and the concept of treating others as equals. The next cluster of chapters is concerned with tensions between law and justice. It relies in particular on the Universal Declaration of Human Rights to examine the practices of countries that have engaged in human rights abuses. The third cluster focuses on efforts to do justice according to the law. Legal rules often vest decision makers with considerable discretion to do what they believe to be just. In this final section, we concentrate on the exercise of discretion in sentencing criminal defendants. Each section addresses different dimensions of justice. I believe you will find it rewarding to examine justice in its many different settings.



## Studying *Dimensions of Justice*

Your instructor may choose to use the textbook on a stand-alone basis. Alternatively, your instructor may decide to supplement textbook chapters with readings that have a direct bearing on the topics those chapters discuss. Whatever decision your instructor makes concerning this, it's essential for you to treat the textbook as your starting point for inquiry. In reading the textbook, you should adhere to the following steps:

*Note carefully the learning objectives and key terms mentioned at the beginning of each chapter.* Although the topics discussed in the different chapters—for instance, punishment, responsibility, proving guilt and innocence—will be familiar, some of the key terms employed to analyze these topics may baffle you at first. It's thus essential for you to read with special care the boldface definitions contained in the course of chapter discussions, note the way in which these terms are used, and note also the examples used to illustrate them. Your goal will be to make these terms part of your working vocabulary as a student of criminal justice.

*Take seriously the tensions that run throughout the Point–Counterpoint exchanges.* Disagreement about the nature of justice has been a common feature of discussions of the subject. Indeed, the founding work of the Western philosophical tradition—Plato's *Republic*, written 3 centuries before the common era—consists entirely of debates between Socrates and others about the characteristics of justice. The Point–Counterpoint exchanges contained in *Dimensions of Justice* are not as mind-bending as those Plato includes in the *Republic*. They do, however, make allowance for substantial disagreement about the proper application of key concepts. An attentive student of justice will respond to issues debated in the Point–Counterpoint exchanges not by determining instinctively that one side is right and the other wrong but instead by grasping the issues under consideration and the range of disagreement about those issues.

*Demonstrate your acquaintance with the key terms mentioned at the beginning of each chapter by writing Commentary essays that incorporate those terms.* It's not enough to say "I understood the concepts and so don't have to write essays that demonstrate comprehension of them." In this course (and, it should be added, in most other college courses) a student can demonstrate that he or she has mastered a concept only by writing an essay that competently deploys that concept as it pertains to a relevant topic. Mercy and forgiveness—to cite two concepts discussed in the textbook's later chapters—are terms with a sufficiently close affinity to one another that no one can claim to understand them merely by proposing an abstract definition of each. Rather, it's essential to incorporate each term into a sentence and so to show that they have become part of intellectual bloodstream.

*Take a stand.* The issues you're about to confront are frequently contested. This doesn't mean you should pull back and merely summarize disagreement about them. On the contrary, you should stake out a position about the merits of the questions under consideration, note the way in which someone might reasonably disagree with your position, and attempt to explain why you believe your position is nonetheless preferable. You may find that, in the end, you too are persuaded by the criticisms you have initially rejected. This isn't something you should fear. The only way to think through an issue related to justice is to follow conflicting arguments pertaining to it as far as you can.





# A NOTE TO INSTRUCTORS

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One of the peculiar features of the discipline known as *criminal justice* is that few colleges offering this major require students to take a course that directly addresses issues of justice. Even colleges with a major in *justice studies* rarely require such a course. Students in each discipline are sometimes asked to take a course in ethics, in which this text is also appropriate, as well as a course on public policy. But justice itself—the master concept that unmistakably defines the field of study in which students are enrolled—is missing from the undergraduate curriculum at most colleges and universities.

This textbook is designed to fill that gap. Its informing premise is that disciplines that rely on the word *justice* to define themselves are necessarily concerned with the fair terms of social cooperation—and so with the proper response to conduct that violates those terms. In taking this as the starting point for inquiry, the textbook offers a survey of key ideas associated with the concept of justice. The first chapter introduces students to perhaps the most fundamental distinction in the field: the difference between corrective and criminal justice. Though different, these two dimensions of justice are nonetheless complementary. The first chapter underscores this point by considering at length the way in which corrective and criminal justice inquiries operated on parallel tracks in the Bernard Madoff case.

Chapters two through six introduce students to key principles of justice. The second chapter draws on two concepts introduced by John Rawls—the *original position* and the *veil of ignorance*—to establish a framework for exploring foundational questions concerning justice. The remaining chapters in this initial cluster extend the original position framework by considering the nature of criminal responsibility, the distinction between procedural and substantive justice, and the significance of equality claims when thinking about justice. Philosophers have often discussed issues such as these in dauntingly abstract terms. The textbook, in contrast, relies on concrete examples and also on Point–Counterpoint exchanges to illustrate the ramifications of the ideas to which the students are being introduced.

A second cluster of chapters examines the tension between law and justice. The Rosa Parks case is considered, for instance, in part because Martin Luther King’s *Letter from a Birmingham Jail* contains a straightforward appeal to natural law over positive law, in part because it underscores the fact that a profound injustice was, until recently, embedded in American law. Other examples considered in this cluster have to do with the nature of international law, the procedures developed for prosecuting human rights abuses in the International Criminal Court, and the concepts appropriate for assessing the scope and content of positive law. One cannot accept complacently the notion that the actual rules in force at any given time in a legal system are themselves just. The premise underlying the second cluster of chapters is thus that justice serves as the master concept for the ongoing evaluation of the fairness of the terms of national and international cooperation.

The third cluster of chapters considers the way in which decision makers can seek to do justice *within* the law. A properly organized legal system will afford those exercising authority discretion to make decisions that respond appropriately to the facts relevant in a given situation. The restorative justice movement, one of the chapters in this cluster, can be considered in light of this point—that is, to the extent the law grants judges and prosecutors the authority to pursue the goals associated with restorative justice, they should do so in a way that promotes the prospects of forgiveness and victim–offender reconciliation. A similar point is relevant to sentencing guidelines. Such guidelines grant judges discretion because it is impossible to determine in advance how to balance two competing considerations: uniformity among sentences (understandable in terms of the maxim *treat like cases alike*) and responsiveness to the characteristics of a specific crime (understandable in terms of the maxim *the punishment should fit the crime*). An effort to do justice within the law requires attention to the potential conflict between these factors. The chapters in this cluster of the textbook make allowance for this tension—and so, more generally, for the tensions that arise when trying to promote justice in everyday life.

The final chapter considers the relationship between mercy and justice. Many people think of justice as the most important of all concepts pertinent to the organization of communal life. The last chapter raises questions about the soundness of this assumption, for mercy, it might be argued, should sometimes take precedence over justice. Because this is a subject that ventures beyond standard remarks on justice, the chapter relies heavily on two Shakespeare plays that explore the mercy–justice connection: *Measure for Measure* and *The Merchant of Venice*. Shakespeare’s comments are included in the chapter to stimulate thought. It’s unlikely anything definitive will ever be said about this subject, but a book on justice would surely be incomplete if it failed to address the mercy–justice connection.

In addition to these organizational arrangements, two other features of the textbook should also be noted. One has to do with the title. The term *dimensions of justice* makes allowance for different components of justice. Everyday speech sometimes leads people to speak of justice as if it were a granite-like, internally coherent concept. The textbook, in contrast, alerts students to cross-currents within the idea of justice: to the tension between substantive and procedural justice, to conflicts between the value of uniformity of treatment and the exercise of discretion, and to the possibility of divergence (at least in some instances) between corrective and criminal justice. These tensions must be openly considered. They aren’t incidental to the study of justice. It’s by confronting them directly that students will have a chance to begin to engage in justice reasoning on their own.

The textbook’s other key characteristic is understandable in terms of this point. Although each chapter relies on expository sections that summarize concepts pertinent to justice, the book draws on two mental exercises—Thought Experiments and Point–Counterpoint exchanges—that give concrete meaning to the concepts under discussion and that also expose tensions within the different dimensions of justice. Thought experiments (i.e., imagined scenarios that illustrate principles under discussion) are essential to careful reflection on justice. John Rawls explicitly relies on the concept of a thought experiment when talking about the original position; indeed, Rawls rethinks the Lockean notions of the state of nature and the original contract by treating them not as actual features of human history but instead as thought experiments about the components of justice. Point–Counterpoint exchanges build on the chapters’ Thought Experiments by examining the ramifications of the principles mentioned in the expository sections. These exchanges offer students a way to explore ideas. In particular, they provide students with a way to consider the less attractive consequences of concepts that may at first glance seem entirely appealing. The opportunity to deliberate about the implications of ideas is an inescapably important feature of justice reasoning, for in thinking about the terms of fair social cooperation one must be alert to the possibility of unintended consequences. Put differently, the textbook offers college students considering careers in justice an opportunity to engage in the critical reasoning essential to the evaluative concept at the heart of their chosen subject.

## Supplementing the Textbook

*Dimensions of Justice* can be used as a stand-alone text for an introductory class in justice. This is the way I have used it while teaching at John Jay College of Criminal Justice. During the last few years, I have had the privilege of teaching a course on justice designed for freshmen enrolled in the college’s undergraduate major in criminal justice. The introductory course I teach is designed to equip students with concepts they will employ throughout the remainder of their undergraduate career at the college. No supplementation is appropriate given the introductory nature of the course. *Dimensions of Justice* would also be very well suited as a primary text for any course on ethics, as well as special topics or seminar courses.

On the other hand, the textbook can be used as the anchor for an advanced undergraduate or graduate course in criminal justice or justice studies. In adopting this strategy, an instructor relies on a given chapter to set the context for class discussion and then turns to book chapters and articles to provide students with extra analysis of the chapter’s topic. When relying on the textbook in this way, instructors should turn to the “Further Reading” section at the end of each chapter. Because each of the readings cited argues for a specific (and often contestable) position, it’s essential to rely on the Point–Counterpoint exchanges in the textbook to define the parameters of the issues under discussion and then to turn to more than one of the supplementary materials mentioned in the “Further Reading” section to make sure that students are exposed to a balanced approach to the subject under consideration.