

JUSTICE ESSENTIALS

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Summary

Political philosophy commences with Socrates' question "what is justice?" Socrates and those who have followed him have sought a definition of justice which identifies its essentials: that which all cases of justice share, and by virtue of which each is a case of justice. John Stuart Mill identified five basic elements which any account of justice must explain: justice as legal rights, justice as moral rights, justice as desert, justice as promise keeping and justice as impartiality or equality. Wesley Hohfeld demonstrated that the concept of a right, so basic to our idea of justice, can itself be analyzed into a number of more specific elements, including liberties, claim rights, powers, and immunities. Contemporary moral and political philosophers, influenced by the analyses

of Ludwig Wittgenstein and W.B. Gallie are skeptical that there is a common essence that unites these disparate elements of the concept of justice. Rather than searching for a definition that reveals the essentials of justice, this entry examines competing theories of justice, which arrange the various elements of justice in different ways, stressing some while sometimes entirely omitting others. This entry focuses on (1) theories of justice which depict justice as arising out of free agreements by rational self-interested agents; (2) Lockean theories, which locate the core of justice on free agreements constrained by natural rights; (3) theories that identify the heart of justice as rewards deserved for contributing to the common good, or rewarding the meritorious; (4) Rawls's theory of justice as fairness which is based on the core belief that justice must be impartial and (5) egalitarian theories, which see justice as founded on the ideal of equal treatment.

1. What is Justice?

1.1 The Elements of Justice

Political philosophy begins with Socrates and Plato, and especially *The Republic*. In this imaginary conversation among a group of Athenians, Socrates poses what may be the most fundamental of all questions in political philosophy: 'What is justice?' Indeed, one of the great legal theorists of the twentieth century called this 'the eternal question of mankind'. We all wish a government and society that is just; to achieve such a government and society, though, we must first have a sound idea of what justice is. What, then, is justice?

In the *Republic* Socrates is searching for a definition that captures the essence of justice. Such a definition would show what all cases of justice have in common, and by virtue of which they are all cases of justice. Throughout his works Socrates repeatedly makes the point that, while people can identify examples of concepts such as 'justice' or 'virtue', very few understand the essence of these concepts—that which all the examples share. For Plato, then, an adequate definition of justice would identify its essence as the shared feature of many otherwise diverse examples.

In 1861, over two thousand years after Plato wrote, John Stuart Mill in chapter 5, paragraphs 5–10 of *Utilitarianism*, was still searching for the distinguishing character of justice. In order to answer this question, Mill begins in a sensible way: he tries to get a rough feel for the conceptual terrain of our uses of justice, what types of things we call just or unjust. Only once we understand the main features of the concept of justice can we see what they have in common. Mill identifies five "modes of action and arrangements of human affairs, which are classed, by universal or widely spread opinion, as Just or as Unjust".

1. "In the first place", says Mill, "it is mostly considered unjust to deprive any one of his personal liberty, his property, or any other thing which belongs to him by law. Here, therefore, is one instance of the application of the terms just and unjust in a perfectly definite sense, namely, that it is just to respect, unjust to violate, the legal rights of any one". Mill is pointing to an important feature of the concept of justice: it has especially close ties to the law, and in particular the laws of the country in which one resides. It would, for example, be unjust to punish an American for not voting in

a US presidential election, for an individual has a right to abstain; but it would not seem unjust to punish an Australian for failing to vote in an Australian parliamentary election, for he has a duty to. The same can be said for a variety of laws; if there is a law giving a person a right then, as a rule, it would be unjust to deny him that right.

2. Mill, however, immediately recognizes that “the legal rights of which he is deprived, may be rights which ought not to have belonged to him; in other words, the law which confers on him these rights, may be a bad law. When it is so, or when (which is the same thing for our purpose) it is supposed to be so, opinions will differ as to the justice or injustice of infringing it”. According to the United States Fugitive Slave Law of 1850, slave owners had a right to have their fugitive slaves returned to them. Private slave catchers were employed to assist them in securing their legal rights. In one case, slave catchers seized a black man who worked as a tailor in Poughkeepsie, New York, for nineteen years, and returned him to his owner in South Carolina. In Boston in 1850 local residents set up a ‘vigilance committee’ to identify and harass these ‘man-stealers’. They put one hunted black couple, the Crafts, on a ship to England. President Fillmore threatened to send in Federal troops to uphold the law as noted by McPherson in *The Battle Cry of Freedom*. Did the vigilance committee act unjustly? Many insist that a law which assigns an immoral claim cannot yield a genuine right, and so violating such a rule is no injustice at all. Indeed, the injustice was suffered by the Crafts, who were hunted down in violation of their moral rights. As Mill observed, when “a law is thought to be unjust, it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely, by infringing somebody’s right; which, as it cannot in this case be a legal right, receives a different appellation, and is called a moral right. We may say, therefore, that a second case of injustice consists in taking or withholding from any person that to which he has a moral right”. Mill’s first two elements of justice point to one of the most perplexing aspects of our thinking about justice. Although in some ways our notions of just and unjust are closely tied to our legal and judicial system, often it is called ‘the justice system’, in other ways justice clearly transcends it, and can be used as a way to criticize our current laws and the ways they are applied. It is tempting to simply say that these are just two different notions of justice, what might be called *legal justice* and *ideal justice*. That, however, would fail to appreciate the intimate relations between the two; as we saw in the case of the Fugitive Slave Law, if legal justice departs in a radical way from ideal justice, it seems to lose a claim to being justice at all. Our thinking about justice seems torn between the actual and the ideal.
3. “Thirdly”, observes Mill, “it is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind”. One can deserve both good and evil; criminal justice is sometimes understood as giving criminals their ‘just deserts’ i.e., punishment. Of course, people can also deserve rewards. Indeed to one prominent political theorist, J.R. Lucas in *On Justice*, wrote “Desert. . . says ‘Thank you’. Claims about what a person deserves are of the form: ‘Person *P* deserves some treatment *T* now because of some act’ that individual performed in the past.” That is, one deserves some sort of treatment because of something that one has already done. A student might be said

to deserve a good grade because she or he worked so hard; or a worker might be said to deserve more pay because he or she has produced so much. These two examples point to the two most common grounds for desert claims: *effort* and *production*. In the case of the student, the ground of the desert claim (the act performed that makes the person deserving) was that so much effort was made: in the case of the worker, the desert claim was grounded on how much was produced. A third ground for desert claims is *compensation* for suffering or unpleasant work: thus the claim that those who work in dirty or dangerous professions deserve extra reward.

Although in many ways it is akin to desert, merit is a distinct idea. Desert, we have seen, is typically conceived as backward-looking. We may think a person deserves a university place if he has performed well in his previous studies. But selection by merit seems to have a more forward-looking nature: the person who merits the position is the one who will do the job the best; to say the selection procedure chooses the best candidate is to say that it chooses the one best qualified to do the job (in the future). Consider the case of George, the star law student who graduates at the top of his class but is in a motorcycle accident over the summer and is severely brain damaged. He still deserves the award for the best student, but he would not be selected on the basis of merit as the best person in a highly meritocratic law firm.

4. “Fourthly,” as Mill says, “it is confessedly unjust to break faith with any one: to violate an engagement, either express or implied, or disappoint expectations raised by our conduct, at least if we have raised those expectations knowingly and voluntarily.” Breaking promises and contracts is quintessentially unjust behavior. Of course, as Mill says, few think it is always unjust to lie or to break a contract: there can be overriding considerations. For example, suppose that a professional killer is looking for his victim and asks you where the would-be victim is. You claim you do not know. It then occurs to the killer that you might call the police, and he asks you to promise not to do so. You reason that the killer will be more likely to flee if you say you will inform the police, so you promise that you won’t. As soon as the killer leaves, however, you telephone the police. Few think that you have acted unjustly in breaking your promise. Immanuel Kant disagreed. In a similar case Immanuel Kant insisted that you were obligated to tell the truth to the killer. “To be truthful (honest) in all your deliberations . . . is a sacred duty and absolutely commanding decree of reason, limited by no expediency” (quoted in Rachels’ *The Elements of Moral Philosophy*.)
5. “Fifthly,” Mill maintains, “it is, by universal admission, inconsistent with justice to be partial; to show favor or preference to one person over another, in matters to which favor and preference do not properly apply According to Aristotle in *Nicomachean Ethics* (1131^a6--1132^a2; 1941: 1280a--1281a), justice is treating equals equally and unequals unequally. This often-cited definition captures a great deal of what we mean by justice. To act justly is certainly to act impartially; it is to treat relevantly similar cases equally, and to distinguish between those who have unequal merits or claims. Thus a judge who sentences black defendants to death while giving whites a lighter sentence for the same crime is unjust, as is a teacher who gives higher grades to attractive students, just because they are attractive. However,

although the ideal of impartial treatment captures much of justice, it leaves much unaccounted for. As Mill recognized, we do not always have to be impartial:

favour and preference are not always censurable, and indeed the cases in which they are condemned are rather the exception than the rule. A person would be more likely to be blamed than applauded for giving his family or friends no superiority in good offices over strangers, when he could do so without violating any other duty; and no one thinks it unjust to seek one person in preference to another as a friend, connection, or companion. Impartiality where rights are concerned is of course obligatory, but this is involved in the more general obligation of giving to every one his right. A tribunal, for example, must be impartial, because it is bound to award, without regard to any other consideration, a disputed object to the one of two parties who has the right to it.

So, although one should certainly give each person what he has a right to, and thus should treat equally those with equal rights, in much of life you should be partial to your friends and family. As Aristotle's famous dictum suggests, and as Mill acknowledges, "allied to the idea of impartiality is that of equality; which often enters as a component part both into the conception of justice and into the practice of it, and, in the eyes of many persons, constitutes its essence." Mill himself seems skeptical; as he saw it, people think that equality is fundamental to justice except when they think inequality is called for! Nevertheless, it is clear that, to some extent, the concepts of justice and equality overlap.

1.2. The Elements of Rights: Hohfeld's Classic Analysis

Justice concerns our rights and our duties. In general, there is, however, almost as much diversity in analyses of rights as there is about justice in general. The most famous analyses of legal rights was advanced by Wesley Hohfeld in *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning* written in 1913. To Hohfeld the concept of 'a right' involves several different ideas, each of which is related to the others. Figure 1 sketches part of Hohfeld's analysis: single lines with an arrow at each end represent what Hohfeld called 'opposites' or contradictories (legal statuses that are inconsistent), while lines with single arrows represent 'correlatives' (statuses that imply or entail each other).

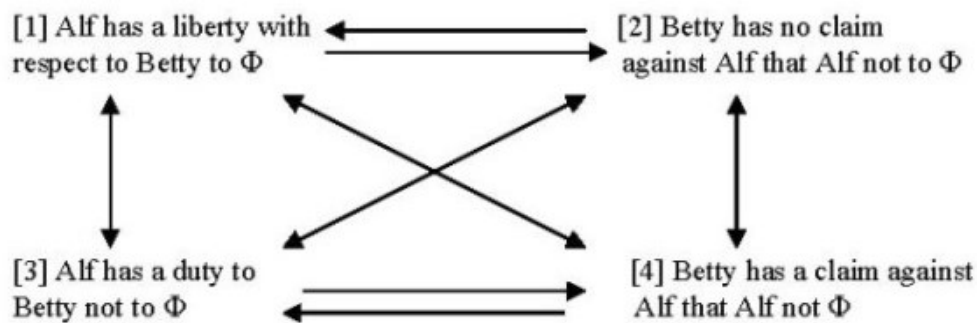


Figure 1: Hohfeld's Analysis of Liberties and Claims

For Hohfeld, then Alf has ([1] in Figure 1) a *liberty* to engage in act Φ if and only if ([2] in Figure 1) Betty has no claim against Alf that Alf not Φ . It also follows from Figure 1 that, if [2] Betty has no claim that Alf refrain from Φ -ing, then it is false that [3] he has a duty to Betty to not Φ : [2] is a contradiction of [3]. For Hohfeld, sometimes when we talk about a person having a right to do something, we mean that he is at liberty to do so; he has no duty to refrain. But merely to have a liberty to do something does not imply that you have a claim that others not interfere. The classic example is the liberty of two pedestrians to pick up a bank note lying on a path. Neither have a duty to refrain from picking it up, but neither has a claim on the other to stand aside and let her pick it up. Such ‘naked liberties’ often characterize competitions; people have the liberty to win, but no one has a claim to win. In contrast, Betty has a [4] ‘claim right’ that Alf not Φ if and only if [3] Alf has a duty not to Φ and so he is *not* [1] at liberty to Φ . In contrast to liberties, claim rights imply duties on the part of others not to interfere; we might call them rights in the strict sense. Unlike liberties claim rights limit the liberty of others. If you and I both have a liberty to Φ , neither of us have a duty to refrain from Φ -ing; our liberties represent an absence of duties. To have a claim right, however, is to be able to demand that others respect your claim: they have a duty to respect it, and so are not at liberty to ignore it. One’s claims, then, concern what is owed to you, and so what people are not free to decline giving you.

Claim rights can be either negative or positive. If Betty has a claim that Alf refrains from doing something (say, breaking into her house), she has a *negative claim right*. Alf has a duty not to perform the action breaking into Betty’s house. A negative claim right thus corresponds to a duty on someone else’s part not to perform an action; it implies that they are not at liberty to perform the action. If Betty has a *positive claim right* against Alf (e.g., to help when she is in need), Alf has a duty to perform that action. He is thus not at liberty to abstain from performing the required action.

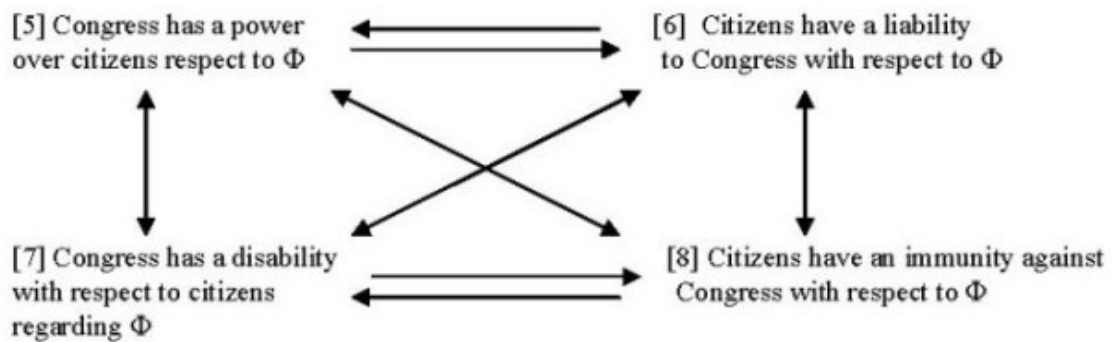


Figure 2: Hohfeld’s Analysis of Powers and Immunities

Hohfeld also distinguished between two other legal statuses that are called ‘rights’. Someone has a power if he or she can alter other people’s liberties, claim rights and duties. For example, that the United States Congress has the right to make laws, means that ([5] in Figure 2) Congress has the legal power to alter the liberties, duties and claim rights of American citizens. It can create new duties, rights and liberties, or abolish old ones. If Congress has the power to make such changes, citizens have [6] a liability, their claim rights, liberties and duties are subject to alteration by Congress. If citizens have

[8] an immunity over some area, then Congress does not have the power to alter some liberties, rights or duties; Hohfeld would describe this as [7] a disability on the part of Congress to alter these liberties, claim rights or duties. An example of a right *qua* immunity is the United States Constitution's First Amendment right of freedom of religion. The First Amendment actually assures citizens an immunity [8]: it bars Congress from enacting laws establishing a religion, thus providing citizens with an immunity from legislation. According to Hohfeld, this immunity held by citizens corresponds to [7] a disability (a lack of power) on the part of Congress to pass such laws; that is, the crux of the right to freedom of religion as specified by the First Amendment is an inability or lack of a power on the part of Congress to pass laws establishing a religion. Alternatively, to say that Congress has the right to make laws regulating interstate commerce is to say that it has the power to enact laws that alter the legal rights and duties of citizens.

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Biographical Sketch

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