

Chapter 6

Justice

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Introduction

In 1.2 *Dancing the legal dance*, Mary Todd was upset because she thought that by declaring that the 12-year-old was not sexually abused, the Juvenile Court judge invited more sexual abuse. The girl had accused her father of sexual abuse and taken it back in open court, in front of her father, and Mary thought that if the judge had looked at the child's situation in and of itself, he would have investigated further. She thought it was only because he required that the girl's story match her sister's that he made the legal finding he did. She thought it 'so unfair that the 12-year-old should be treated differently because she has a sister.' She thought the 12-year-old was not being treated justly because any other child in such a situation, but without a sister, would have been treated differently.

We all know that hearings in Juvenile Court are imperfect. The proceedings may fail to protect someone who is being abused or may penalize someone who is not abusing. Mary thinks that the judge made a mistake and that the judicial system is wrong because it allows such a finding. The procedure, she thinks, should err on the side of protecting the innocent when the innocent are abused children, not on the side of protecting the guilty. So, she thinks, the procedure is unjust.

Mary thus has at least two complaints about injustice in *Dancing the legal dance*.

First, she thinks the judge has not treated like cases alike because he has treated the 12-year-old in a different way than he would have had she not had a sister. He has failed to be just even if the system as a whole is just. Second, she thinks the system itself is unjust because it allows for such a judgment, forcing the child to be abused again to get justice rather than protecting her in case she had been abused. She is in effect applying our method of tracking harms and asking of the judge, 'Why didn't he consider the consequences of what he decided? If he had, he would have realized that he is setting up a situation in which the younger daughter will have to be abused -- harmed -- again in order to restrain the father.' Laying out the alternatives, in other words, and assessing their consequences makes it obvious, Mary thinks, that the judge ought not to have acted as he did.

But Mary also objects to the judge and the system not supporting the family well, but letting it drift apart. She thinks this is happening because the mother was developmentally disabled and the family was African-American and poor. Mary thought that the mother did not know how to make use of the system to help herself or her children, but, more important, she thinks that the nature of the system makes those in it less willing to help because it was 'a family of that nature.' It is an unjust system, she thinks, when those in need of help are not helped as much because they belong to a particular class, or a particular race, or have particular personal characteristics (see the Code of Ethics 6.04(d)).

So Mary thought the legal procedure unjust and the social system in which it is embedded unjust as well. It was in response to these difficulties that she decided to work against the judge's reelection. Her hope, presumably, was that replacing him would produce a judge who was more just.

Almost every case we have examined raises issues of justice, and we shall need to sort out and examine at least two questions.

(1) Is the system as a whole just or unjust?

Apartheid in South Africa is a good example of an entire system that was unjust. But there is a second issue:

(2) Is a particular act (or omission) within a system just or unjust?

When Mary complained about the judgment made by the judge, she was objecting to a particular judgment, saying that it was unjust. But when she complained about the racism she thought was motivating those who failed to act, she was complaining not just about the acts of individuals within the system, but about the injustice of the system itself.

A particular act or practice may be unjust without the whole system in which it occurs being unjust, and, vice versa, a whole system may be unjust but still have within it just acts and practices. So we need to distinguish questions of social justice, concerning the system as a whole, from questions of particular justice.

For both we must distinguish between formal and substantive principles of justice and between various forms of procedural justice. These distinctions will be made as we work our way through a case which raises an issue of particular justice.

1. Particular justice

Consider the following case:

6.1 *Still waiting after all this time*

An agency had the opportunity to provide an Employee Assistance Program (EAP) for a number of local businesses. In such programs, businesses contract with agencies to provide such services for their employees as substance abuse or mental health counselling.

When asked whether the agency struggled with the issue of its serving fewer clients if it took on EAP clients, the director, David, responded by saying that without EAP clients, the agency would be serving fewer clients. With EAP clients, the agency has the potential to see more clients at 'full-cost reimbursement.' 'In fact,' he said, 'we're treating all the clients exactly the same. The clients we had are still on the waiting list, and we are seeing the EAP clients. Those who pay up-front get quick service, and those who cannot continue to wait, just like before. It's just like the health-care system.'

David does not see any ethical issue in his agency's providing an EAP. He says that when his agency takes on EAP clients, nothing has changed and so no injustice has been done to the agency's other clients. He says, 'We're treating all the clients exactly the same.'

If adding an EAP does not change the way anyone is being treated, and allows the agency to serve more clients, and to get paid fully for doing so, who could be harmed? What could be unjust? Such a combination seems too good to be true, and it is. But if we are to understand fully David's response, we must distinguish between formal and substantive principles of justice.

a. The formal principle of justice

We all remember cases where we felt that we were being treated unjustly because we were being treated differently than someone else when we thought we should be treated the same. A colleague has a larger office, or more secretarial help, for instance. We can also empathize with the experience of having others being treated the same way we are treated when we think they should be treated differently. A new employee for the agency is getting just what you are getting even though you have been there for a number of years. We all are familiar with such feelings. Lying behind them is what is called the formal principle of justice, namely, that like cases ought to be treated alike and unlike cases ought to be treated unlike.

Any attempt to justify what appears to be unjust treatment always appeals to the formal principle of justice. When you complain that your case is unlike someone else's who is being treated the same way you are, or is like someone else's who is being treated differently, the form of response is always the same. Those you are complaining to will claim that the case you think is different is not (really) different, or the case you think is the same is not (really) the same. So your supervisor argues that the office of your colleague just looks larger, but is not really, or that it is larger, but that more has to go into it and the colleague really has no more room than you do, or that the colleague's situation is different from yours because the colleague has a different kind of work, requiring meeting with more people at a time than you do, say, and so requiring a larger office. We are all familiar with such responses, having given and received similar ones ourselves, and, in each case, an implicit appeal is made to the formal principle of justice.

Yet this principle only tells us that like cases should be treated alike and unlike

cases, unlike. It does not say which are like cases and which cases are unlike. This principle demands that we be consistent, but we can be consistent and still be unethical.

For instance, if some colleagues were consistently treating clients differently because of their skin color, they would satisfy the formal principle of justice. They would be treating like cases alike and unlike cases unlike because, on their racist view, persons of the same color are alike and persons of different color are different.

We may ask what good the formal principle of justice can be when it is consistent with such injustice. How can the formal principle be important for justice if we can satisfy it and still have racism, for instance? The answer is that treating like cases alike and unlike cases unlike is necessary for justice, but not sufficient. We need to add a substantive principle of justice to tell us what we are to count as like and unlike.

But the formal principle of justice has an ethical bite even without the addition of a substantive principle of justice. Thus, one implication of it is that whenever you make a decision, you have to worry not simply about making the right decision in the particular case you are concerned with, but also in all relevantly similar cases. So if you grant an exception to a client, saying, for instance, that the client does not need to list all resources for a particular form, you have to worry, first, about what has happened in the past in similar cases and, second, about what will happen in the future in similar cases.

The first worry is that those who were treated differently in the past will have a right to complain. Is the present case different enough to justify having treated them one way while treating the present client a different way? If not, they have an ethical claim against you, and unless you have some additional ethical reason for treating the present case differently, you are ethically wrong to make an exception.

The second worry is that those whom you will see in the future, and those who will see other caseworkers in similar organizations under the same laws, will have a just claim that they also should be granted an exception. Individual practice creates precedents. So whenever you are working with an individual client, you need to consider past practice in relevantly similar cases and to consider that you are setting a precedent for the future.

The formal principle of justice has an ethical bite, that is. It requires consistency and thus implies that if we treat similar cases differently, or treat dissimilar cases the same, we are *prima facie* ethically wrong. That is, we must have a very compelling ethical reason or set of reasons for denying what seems to contravene the formal principle of justice.

b. Substantive principles of justice

But to be just, it is not sufficient only to treat like cases alike and unlike cases unlike. The formal principle of justice needs to be supplemented with a substantive principle of justice. A substantive principle tells us which cases to count as like and which as unlike, and there are as many substantive principles, for as many kinds of things as can be distributed, as there are ways of sorting people out. So when someone claims to be treating like cases alike and unlike cases unlike, we need to ask a series of questions:

- (a) Because anything that can be distributed can be distributed justly or unjustly, we need to ask, 'What are you distributing?'
- (b) Because what is being distributed can be distributed to some people and not to others, we need to ask, 'Who is getting what?'

- (c) And because what matters in determining whether a distribution is just or unjust is the reason for the distribution, we need to ask, 'What is your reason for treating those people in that way and others differently?'

These questions force out the basis the person has for distinguishing people and thus force out the substantive principle of justice being assumed so that it can be assessed.

We can see how these questions operate in the simplest of cases -- ones in which we might not think justice an issue. Anything that can be distributed is subject to some substantive principle. If you give yourself the best seat in your office, the one with the best view, for instance, you are committing yourself to distributing the seating in your office in a way that benefits you in respect to having the best view and so burdens your clients with less than the best view. So the answer to (a) is that you are distributing seats in your office and so views in your office. The answer to (b) is that you are distributing views to you and to your clients, and the answer to (c) might be that because you must sit in your office all day and your clients only sit there for short periods of time, you deserve having the best view. The substantive principle of justice is what is called a principle of desert. Who gets what depends on who deserves it, and you are claiming that you deserve the best view and your clients do not.

It is another question whether you are ethically right in distributing views in your office in that way. Some may think that it matters ethically how we distribute views in our office; others may think it not important. But because anything that can be distributed can be distributed justly or unjustly, we are committed to some substantive principle of justice for any benefit or burden we distribute -- some basis for distribution -- whether we are self-conscious about that or not. We might not think about views in our office as being something we distribute, and it may not matter ethically, but we distribute smiles, we distribute irritation, we may distribute welfare payments, eligibility for other benefits, and so on. In each case, there is a basis for our distribution, whether we are conscious of it or not. To determine what that basis is, to determine if we are acting ethically, we need to ask the questions we have identified.

What we shall discover is a wide variety of substantive principles that people have used, and people argue ought to be used, to distribute benefits and burdens. Because any distinction can be used as a reason for distributing benefits and burdens, the range of substantive principles is as wide as the range of distinctions between people -- gender, race, height, or whatever. Most of these substantive principles will not withstand ethical scrutiny, even for views in your office, but among all the possible substantive principles, there are some strong contenders, even for such major social goods as liberty, wealth, and income.

Some -- Marxists -- argue that benefits and burdens ought to be distributed 'from each according to their ability, to each according to their needs.' Others argue that the distribution should be on the basis of merit. Others argue that it should be on the basis of intrinsic worth as an individual. We shall examine two of these substantive principles, one that emphasizes individual liberty, but accepts wide disparities in how individuals are to be treated in society, the other of which emphasizes the essential equality of individuals, and ensures that each will be benefitted by any gains of society as a whole, with one consequence being that everyone's basic needs will be met. We shall not examine all the main contenders among substantive principles, but the two we shall examine articulate incompatible ideals that arguably lie behind all other substantive principles -- except, perhaps, the Marxist view, which we will examine briefly at the end of this chapter.

c. Using principles of justice

If we return now to 'Still waiting after all this time,' with questions (a) through (c) in hand, we can get a better understanding of the ethical situation the agency's taking on EAP clients has produced. We are able to see where the harms lie.

David is distributing places in line among EAP clients and the agency's traditional clients. He claims that with the EAP everyone is treated the same way as before. We need to ask, 'In what respect are they being treated the same? What, in short, is being distributed?' He says that if the traditional clients were on a waiting list, if they were in line, that is, they still are.

Yet EAP clients go to the head of the line, in front of those who may have been waiting for some time for help. If a client who is not an EAP client is tenth in line, he or she might expect to be served after the nine in front are served. But at any time any number of EAP clients may jump in front. So though David is right that the former clients are on a waiting list, as they were before, he is wrong in implying that they are not being harmed by the agency's taking on EAP clients. They are being harmed in two ways. First, they may have to wait much longer for service, and, second, they are not being served in the order in which they have lined up. They are being treated as second-class clients, pushed aside if a 'full-cost reimbursement' client shows up. So the agency's clients are being treated the same way they were before in respect to waiting in line, but they are being treated differently in respect to being served, in a timely way, in turn (see the Code of Ethics 6.04(a) & (b) & 3.07(b)).

The agency's original clients have been harmed by the agency's taking on EAP clients, and the agency thus faces an ethical problem. Ought it to take on EAP clients, which provide assured funding for the agency, or ought it to refuse to do so and make sure that its former clients are served in a timely way in their proper turn? Or ought they to try to ensure somehow that EAP clients -- despite presumably paying for preferential treatment -- take their turn in line?

d. The agency's role

However we answer that question, taking on an EAP raises another issue about the agency's role. Taking on EAP clients and putting them at the head of the line means that of the two groups of clients the agency now serves -- those employees from businesses which have contracted with the agency and the traditional clients of the agency -- those likely to have the most resources are being served first. The agency's traditional clients are low-income people with limited access to the sort of counselling the agency provides, but they are being treated as second-class clients because the agency is taking on EAP clients who are employed and would normally, but for their employers' contracts with the agency, seek private help.

So by taking on EAP clients, the agency is helping those less needy than its traditional clients and in helping them and, indeed, helping them before it helps its traditional clients, it is shifting somewhat the focus of the agency away from its traditional role of providing help for the needy who are unable to seek outside help because of limited resources (see the Code of Ethics 6.04(b)). That the agency has made no clear decision to change its focus does not mean that the focus is not changing. Indeed, taking on EAP clients may require the agency to provide such services as stress-management and retirement management, thus shifting the focus of its resources from mental health problems to issues of more

immediate concern to businesses.

What ethical justification could there be for the agency's taking on EAP clients, given the harms to their traditional clients and this worrisome shift in the agency's focus? It may be that the agency is so underfunded that it needs to take on an EAP to continue to provide service to its existing clients. We cannot know without further information, but if that is the case, we have a question of tradeoffs. Justice is not the only value, and David would need to argue that the agency must compromise what it takes to be its mission in order to continue its mission.

As usual, trying to understand a particular issue in a case has revealed other issues - including an issue of what is called procedural justice.

e. Procedural justice

Let us look at a case which raises the issue of how those in line should be considered for help.

6.2 The waiting list

There is a waiting list for service in a mental health agency. The list never gets shorter, only longer, and people stay on it 'just in case.' People are taken by priority of need, not the time they spend on the waiting list, and priority of need is determined by, for example, whether a person needs hospitalization.

Some of those on the list injure themselves to get services, act out, 'or whatever' to be sure they are hospitalized, and Michael Jones, the person at the agency in charge of taking cases, must sort out those who are in real need from those who are not.

By the time a decision must be made because of an overdose, for instance, Michael has met with the prospective clients three or four times and so has some basis for judging whether they are a danger to themselves or others. In addition, he asks questions to determine the seriousness of the situation.

The most difficult cases are those in which the patient is borderline, enough of a problem to risk harm to those around and to themselves, but not enough to get hospitalized. Michael says he 'puts those through their paces.' If they want treatment, for example, they must come to therapy, three days a week for six months. If someone will follow through, then Michael will let them in.

He says he is right 60% of the time, and the rest of the time 'we won't know what they will do.' The decisions are complicated because the patients are very sophisticated in manipulation. One patient, Martha, wrote letters every three months asking for treatment, and Michael's assessment is that she wants to form more dependency-type roles.

A waiting list implies that one's entry into the system is determined by a wait. So if you were on such a list, you would presume that you would get treatment and that your getting it will be determined by your position on the list.

But the 'waiting list' does not serve that function at this agency. Some on the list will never get service because it has been determined that they do not need it, and some not on the list will get service ahead of those on the list because it has been decided they need it right away.

In Still waiting after all this time, the procedure adopted by the agency for serving its clients appeared to be first-come, first-served when it was not. The agency really had two lines -- one for the EAP clients and one for its regular clients -- and a rule that said EAP clients get served first, regardless. So the agency knew what it wanted and devised a procedure to get it.

The agency thus followed what is called perfect procedural justice. Perfect procedural justice occurs when, for instance, each of two children should get half the dozen cookies one has. We simply divide the dozen in half -- 'one for you, and one for you,' and so on. The procedure is simple and effective. Similarly, if we are concerned that those who get to a store or a bus stop are served in the order in which they arrive, having a line is a simple and effective procedure to guarantee that -- provided no one crashes the line and no one in line lets another in who came later.

What marks perfect procedural justice is that one knows ahead-of-time what a just distribution would be and can figure out how to achieve it. The difficulty with Still waiting after all this time, as we noted, is that the Director was mistaken in thinking he knew ahead-of-time what was just.

In The waiting list the situation is different. The 'waiting list' does not line clients up for service in the order of their arrival. It does not line them up in any way because the agency takes whichever client it judges is most in need, regardless of where that person is on the list and even whether that person is on the list. What the agency wants is to serve those clients most in need and to rank clients in a way that matches up to their need for the agency's services. Having a waiting list is no help to that end. First, new more needy cases can occur at any time and will not go to the end of the list. And, second, being on the list is no guarantee that the agency will agree that the person truly needs the agency's services.

The agency would like to select out from all who apply for its services all who truly need help and only those who need help. If it fails to help some who need help, or helps some who do not truly need it, it will have failed in obtaining its end. But the best it can do is to devise an imperfect procedure and then, as the agency sees how the procedure works in practice, fine-tune it to get closer and closer, if possible, to achieve the end of sorting out all and only those who need help.

The agency has a set of problems that make that end difficult to achieve. On the one hand, even if everyone with a borderline personality disorder needs help, the agency must sort out those with a borderline personality from those who do not have a borderline personality disorder, but, as it were, border on it or are just faking it. On the other hand, the agency will not be able to help all those who clearly have a borderline personality disorder, but distinguishing within the group with a borderline personality disorder those who are most in need is itself difficult, requiring, if one is to be sure, just the sort of intensive examination received by those who are judged most in need and are taken on by the agency. In short, the agency cannot be sure it is making the right judgments about who is most in need and who is not unless it takes on everyone, and it cannot do that.

The agency is thus faced with designing a procedure that will be imperfect -- just as are the judicial hearings that so concerned Mary in 1.2 Dancing the legal dance. The agency knows that what would be just would be a procedure that sorts out for help all and only those who truly need help, but it cannot design a procedure that will ensure that result. So it must draw a line somehow, and it can weigh its line either towards helping those who need it or keeping out those who do not. It can devise a procedure, that is, which, though not perfect, is generous and attempts to help all who need help, but will also help some who do not, or it can devise a procedure that keeps out those who do not truly need help, but risks keeping out some who do need help. Either way, the procedure will be imperfect. Ei-

ther some who do not truly need help will get it or some who do truly need help will not get it.

Even if money were no object, drawing a line would not be easy. If money were no object, we might think we ought to be generous and make sure to help all who need help even though that will mean that some who do not need help will get it anyway. But giving help to those who do not need it may create just the kind of dependency that help is designed to eradicate. The best help for some prospective clients may be no help. So there are harms no matter where the line is drawn.

We have just made a distinction between two kinds of procedural justice, and it is worth making the distinction clearer. We often commit ourselves to a procedure to determine what is just and what is not. For instance, we might be committed to a substantive principle of justice that says that everyone gets a certain benefit if they deserve it, but then, because it is not obvious who is deserving and who is not, we might devise a procedure to make that determination. The procedure might consist of hearings before an impartial panel giving evidence for and against someone's deserving the benefit. Our criminal justice system is based on the substantive principle that those who commit crimes deserve punishment and those who do not do not, but because it is not obvious who has committed crimes and who has not, we have a procedure -- a criminal trial is part of that procedure -- to make that determination.

A procedure is perfect if we know ahead-of-time what is just and can devise a procedure that ensures that result. If we know that each of two persons deserves half of what is available, for instance, then we can have perfect procedural justice if we can divide the benefit in half. Unfortunately, the situations in which we know what is just and how to achieve it are rarer than we might like. We are far more likely to find ourselves having to devise a procedure that is imperfect. We have such a procedure when, as with perfect procedural justice, we know ahead-of-time what is just, but cannot devise a procedure that ensures that result. The criminal justice system is one example. The waiting list provides another. The welfare system itself provides yet another.

We would like welfare benefits to go to all those who need help and only those who need help, but we cannot design a procedure that will pick out all and only those persons. The consequence is that in drawing a line, we need to make a value judgment about which way to weigh the benefits -- to help all who need help and thus help some who do not, or to keep out those who do not need help and risk not helping some of those who need help.

In either case, we will find examples of persons who need help and do not receive it and of persons who do not need help and do receive it. It is the nature of imperfect procedural justice that there will be such examples. So one cannot properly argue that the welfare system is bad because of those who take advantage of the system for their own benefit when they do not need aid. Similarly, however, one cannot properly argue that the system is bad just because some who need help do not obtain it. To make an ethically proper argument about the welfare system, we need to begin with an examination of the relevant percentages. Of all those who need help, how many do not obtain it, and of those who do not, how many do obtain it? Then we need to examine whether the disparities can be remedied or lessened by fine-tuning the procedure in any way. Only if too large a percentage of those in need are not being helped or too large a percentage of those not in need are being helped can we proceed to object to the procedure, and, of course, people will disagree about how much is 'too large.' And only if the procedure can be fine-tuned to be more discriminating can our objections have any fruitful outcome.

f. Discretion

A last issue to examine in this section concerns discretion. In The waiting list those 'in need' get served first, but, however clearly in need some persons may be, subtle judgment is often necessary to pick out others. In any situation in which there are standards for judging, someone must do the judging, and two sorts of ethical issues can arise. On the one hand, even if the rules by which to judge are clear, the person doing the judging may not apply them correctly. Or the rules may be unclear so that their application is unsteady even when applied by the most fair-minded of persons.

In Adoptive Children, Deborah was giving some adoptive children information about their natural parents. One issue that case raised concerned whether it is ever ethical to break the law, and another concerned how we decide who gets the illegal information and who does not. Deborah was making exceptions to the general prohibition against providing information, and even if we agree with her that some sort of exceptions needed to be made, we might wonder about some of the particular judgments she made. In one instance she mentioned, she did not provide information to a brother and sister who came twice, unannounced, asking for help. She preferred, she said, that people make appointments so she could do a better job preparing, and these two were demanding.

She is engaged in risky illegal behavior and so needs to do careful screening. She needs to judge who is likely to talk and who is not. She also has concerns about the well-being of the natural parents. Who is likely to be concerned about their interests and who is not? So she might be likely to think demanding persons put her and the natural parents at risk.

Exercising discretion raises ethical issues. Because Deborah is making exceptions to a general prohibition, and she is making her own rules to guide herself, she has to be especially sensitive that she may be unjust -- either in making up the rules she applies or in applying them. They seem unclear. What does it mean to be 'undemanding,' for instance? And her application of these rules seems unclear -- how is one to determine who will not talk because they are extremely happy, or will talk because they are angry at having to go through the complicated ritual Deborah seems to be demanding?