

## CHAPTER 3 – Justice and Law

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### CHAPTER 3 CONTENTS

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### LEARNING OBJECTIVES

1. Describe the three themes included in the definition of justice.
2. Define Aristotle's distributive and corrective justice.
3. Distinguish between substantive justice and procedural justice, including how procedural justice impacts wrongful convictions and perceptions of racial discrimination.
4. Explain the concept of restorative justice and the programs associated with it.
5. Describe civil disobedience and when it may be appropriate.

### CHAPTER SUMMARY

Professionals in the criminal justice system serve and promote the interests of law and justice. An underlying theme of this chapter is that the ends of law and justice are different—perhaps even, at times, contradictory. Although criminal justice professionals use the word justice all the time, it may be the case that they are not at all familiar with the philosophical foundations of the concept.

### CHAPTER OUTLINE

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#### I. Introduction

- What is *just* and what is *good* are not always the same.
- When discussing justice, there are three continuing themes: fairness, equality, and impartiality.
- **Fairness** refers to equal shares or treatment.
- **Equality** means the same value, rights, or treatment between all in a specific group.
- **Impartiality** is related to fairness and means not favoring one party or interest over another.

## II. Origins of the Concept of Justice

**LO 1:** Describe the three themes included in the definition of justice.

**LO 2:** Define Aristotle's distributive and corrective justice.

- **Justice** originated in the Greek word *dike*, which is associated with the concept of everything staying in its assigned place or natural role.
- Plato associated justice with maintaining the societal status quo. Justice is one of four civic virtues, the others being wisdom, temperance, and courage.
- Aristotle said the lack of freedom and opportunity for slaves and women did not conflict with justice, as long as the individual was in the role in which, by nature, he or she was best suited.

### Class Discussion/Activity

Where did the concept of justice originate? What are its themes?

### What If Scenario

What if someone asked you to give your definition of justice? What would you tell them?

See Assignment 1

## III. Distributive Justice

- Aristotle distinguished between two types of justice: distributive justice and corrective justice.
- **Distributive justice** concerns what measurement should be used to allocate society's resources.
- **Corrective justice** concerns unfair advantage or undeserved harm between people.
- The concept of the appropriate and just allocation of society's goods and interest is one of the central themes in all discussions of justice.
- The goods that one might possess include economic goods, opportunities for development, and recognition.
- Two valid claims to possession are *need* and *desert*.
- Lucas identified distributions based on need, merit, performance, ability, rank, station, worth, work, agreements, requirements of the common good, valuation of services, and legal entitlement.
- The difficulty in distributing society's goods lies in deciding the weight of these criteria. The various theories can be categorized as follows:
  - Egalitarian theories: distribution should ensure equal shares for all.
  - Marxist theories: distribution should be based on need.
  - Libertarian theories: distribution should take place without government interference.
  - Utilitarian theories: distribution should maximize benefit for society.
- CEO compensation is, on average, 200 times that of average worker's compensation.
  - Egalitarian systems would pay people equally, or at least equal people doing equal work would get paid equally.
  - Marxist systems propose we pay people based on need. In that, a person with two children needs more than a person with no children.
  - Libertarian advocates would argue that vast disparities in economic

remuneration are acceptable and should be left to the free market. High salaries promote competition and competition promotes quality.

- Utilitarian systems would allow disparities if they contributed to the greater good.
  - Minimum pay laws can be justified under a utilitarian system but not a libertarian one.
- Universal healthcare has become a divisive controversy.
  - Criticism of the Affordable Care Act comes from both sides.
    - The right believes that government should not be involved in providing health insurance (it may be a good, but it is neither a duty of government to provide it nor a right of the government to demand individuals purchase insurance).
    - The left believes that the government should be providing universal healthcare, not healthcare subsidies.
- Other arguments surround topics including opportunity and education.
  - John Rawls combines utilitarian and rights-based concepts. He proposes an equal distribution unless a different distribution would benefit the disadvantaged.
  - Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all.
  - Social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage and attached to positions and offices open to all (except when inequality is to the advantage of those least well-off).
  - Rawls uses a heuristic device that he calls the **veil of ignorance** to explain the idea that people will develop fair principles of distribution only if they are ignorant of their position in society.
- Criticisms of Rawls' theory of justice include the following:
  - The veil of ignorance is not sufficient to counteract humanity's basic selfishness.
  - Rawls' preference toward those who are least well-off is contrary to the good of society.
  - Rawl is wrong to ignore desert in his distribution of goods.
- There is a connection between distributive justice and corrective justice.

#### **Class Discussion/Activity**

Should money be spent to reduce college tuition or keep students safe? Students should discuss their preferences and explain their decisions.

#### **IV. Corrective Justice**

**LO 3:** Distinguish between substantive and procedural justice, including how procedural justice impacts wrongful convictions and perceptions of racial discrimination.

- Corrective justice is concerned with dispensing punishment.
- **Substantive justice** involves the concept of just deserts, or how one determines a fair punishment for a particular offense. **Procedural justice** concerns the steps we must take before administering punishment.

## A. Substantive Justice

- Just punishment is one that is proportional to the degree of harm.
- Two *philosophies* are applied to how to punish: retributive justice and utilitarian justice.
  1. **Retributive Justice**
    - This requires balance and proportionality.
    - The offender must suffer a pain or loss proportional to what the victim was made to suffer.
    - According to Rawls, retributive punishment is limited to what benefits the least advantaged; in this philosophy of justice, the offender is punished until the advantage changes and the offender becomes the least advantaged.
    - Mercy is different from just deserts.
    - **Sanctuary** is an ancient right based on church power that allowed a person respite from punishment if he or she was within the confines of church grounds.
  2. **Utilitarian Justice**
    - This only supports punishment if it benefits society.
    - Punishment is to deter offenders from future crime.
    - Cesare Beccaria & Jeremy Bentham (**hedonistic calculus**—measure the potential rewards of a crime so the amount of threatened pain could be set to deter people from committing that crime)

## B. Procedural Justice

- Law includes the procedures and rules used to determine guilt, decide punishment, or resolve disputes.
- Justice can be thought of as the concept of fairness, while law is a system of rules.
- “Moral rights” may differ from “legal rights,” and “legal interests” may not be moral.
- **Due process** exemplifies procedural justice.
  - Notice of charges
  - Neutral hearing body
  - Right of cross-examination
  - Right to present evidence
  - Representation by counsel
  - Statement of findings
  - Appeal
- 1. Procedural Justice Research
  - It illustrates the importance of procedural justice as it affects the legitimacy of the entire justice system.
  - Two criteria must be present for the process to be perceived as fair: voice (an individual’s ability to have a say during proceedings) and control (the ability or power to have some influence over the outcome) (Thibaut and Walker).
  - Procedural justice includes four elements: voice, neutrality, respect, and trustworthiness (Tyler).

### Media Tool

What concept of justice is represented by this judge's punishments?

<https://www.youtube.com/watch?v=pZSTu98-Cus>

### What If Scenario

What if someone killed your best friend? What concept of justice would you like to see? What punishment would you like to see?

### Class Discussion/Activity

Ask students which matters more to them, substantive or procedural justice? Ask them if being the victim of a crime or being the perpetrator matters in their evaluation.

See Assignments 2 and 3

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## V. Wrongful Convictions

- The **Innocence Project** identifies cases where people may have been falsely convicted.
- Reasons for false convictions are as follows:
  - False confessions
  - Defense lawyers' incompetence
  - Suppression of exculpatory evidence
  - False/mistaken eyewitness identification
  - Invalid forensic science
  - Informant/jailhouse informant perjured testimony
  - Government misconduct
  - Bad lawyering
- **Confirmatory bias** is when investigators focus on a suspect and ignore contradictory evidence.
- In cases of true innocence, the actual perpetrator may go on to commit more crimes.
- The growing body of information on wrongful convictions illustrates the fact that procedural safeguards to minimize error and promote procedural justice can be put in place, but these rules and procedures can be subverted consciously or unconsciously by police and prosecutors who are pursuing a conviction.

### Class Discussion/Activity

Is the incarceration of even one innocent person too much? Would students advocate a different standard of determining justice?

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## VI. Race, Ethnicity, and Justice

- There is a large difference in the perceptions of blacks and whites regarding the criminal justice system.
- Race permeates the criminal justice system:

- The disproportional representation of blacks in certain crime categories
- Racial profiling by police
- Lack of access to competent attorneys
- Disparate sentencing
- It is difficult to extricate the effects of race from other factors such as living in a high-crime area and poverty.

### Media Tool

What racial justice issues are at the core of the protests in this video?

<https://www.youtube.com/watch?v=v4fTESehfu8>

### Media Tool

Stop and frisk? What is it? The New York Police Department said its controversial policy kept the streets safe, but critics claim it is harassment. What arguments can you think of to counter them? Is stop and frisk harassment?

<https://www.youtube.com/watch?v=8jqXeW5C324>

## VII. Restorative Justice

**LO 4:** Explain the concept of restorative justice and the programs associated with it.

- **Restorative justice** is a term used to describe programs that seek to move compensation back to center stage in the justice system, instead of retribution.
- Restorative justice includes programs that require the offender to face the victim and provide compensation and programs that place the victim in the middle of the process of deciding how to punish the offender.
- The propositions of the movement are as follows:
  - Justice requires restoring victims, offenders, and communities who have been injured by crime.
  - Victims, offenders, and communities should have the opportunity to be a fully active part of the justice process.
  - Government should restore order, but the community should establish peace.
- The roots of restorative justice can be found as far back as Roman and Grecian law.
- In the 1970s, a trend toward “community justice” was part of the larger movement of community empowerment and development.
- Hallmarks of community justice models include the following:
  - The process of justice employs local leadership, is informal, and invites participation from community members.
  - The goal is to repair the harm done to a community member by another community member in a way that will restore the health of the community relationship.
  - Customs and traditions accepted by all members create the authority employed to resolve disputes.
- In community or restorative justice models, crime is viewed as a natural human error that should be dealt with by the community.
- Types of restorative justice programs include victim–offender mediation schemes, conferencing based on the ancient concepts held by the Aboriginals in Australia and the Maoris in New Zealand, peace circles, and the realm of international crimes.

- There are potential problems with, and some criticism of, these types of programs. For instance, victims may feel pressured to forgive before they are ready. There can also be unequal punishments given out for identical offenses.

#### **What If Scenario**

What if you saw someone hurt another person, how would you react? Is there a circumstance where you would do nothing? Would you have a minimal response?

#### **What If Scenario**

What if you destroyed your computer on purpose? Would you consider restorative justice to be a better option than other forms of punishment? Why?

See Assignment 4

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### **VIII. Immoral Laws and the Moral Person**

**LO 5:** Describe civil disobedience and when it may be appropriate.

- The most common example of immoral laws are those that deprive certain groups of liberty or treat some groups differently, giving them either more or fewer rights and privileges than other groups.
- Boss described unjust laws as having the following characteristics:
  - They are degrading to humans.
  - They are discriminatory against certain groups.
  - They are enacted by unrepresentative authorities.
  - They are unjustly applied.
- Most ethical systems would condemn such laws.
- The religious ethical framework would probably not provide moral support for such laws because they run contrary to some basic Christian principles; ethical formalism could not be used to support this law because it runs counter to the categorical imperative that each person must be treated as an end rather as a means.
- **Civil disobedience** is the voluntary disobedience of established laws based on one's moral beliefs. Rawls defined it as a public, nonviolent, conscientious, yet political act contrary to law and usually done with the aim of bringing about a change in the law or policies of the government.
- There is a widespread belief that law is synonymous with morality and that as long as one remains inside the law, one can be considered a moral person.

See Assignment 5

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### **VIII. Conclusion**

- Justice includes the concepts of fairness, equality, and impartiality.
- Justice can be further differentiated into distributive justice and corrective justice.
- Corrective justice is further divided into substantive and procedural issues.
- Substantive justice is justified by retributive and utilitarian rationales.

- Restorative justice is a new approach that actually has ancient roots and focuses attention on the victim rather than the offender.

## KEY TERMS

**fairness:** The condition of being impartial, the allocation of equal shares or equal opportunities.

**equality:** The same value, rights, or treatment between all in a specific group.

**impartiality:** Not favoring one party or interest more than another.

**justice:** The quality of being impartial, fair, and just; derived from the Latin *justitia*, concerning rules or law.

**distributive justice:** Concerns what measurement should be used to allocate society's resources.

**corrective justice:** Concerns when unfair advantage or unjust enrichment occurs (either through contract disputes or criminal action) and what the appropriate remedy might be to right the wrong.

**veil of ignorance:** Rawls' idea that people will develop fair principles of distribution only if they are ignorant of their position in society, so to get objective judgments, the decision maker must not know how the decision would affect him or her.

**substantive justice:** Concerns just deserts—in other words, the appropriate amount of punishment for a crime.

**procedural justice:** The component of justice that concerns the steps taken to reach a determination of guilt, punishment, or other conclusion of law.

**retributive justice:** The component of justice that concerns the determination and methods of punishment.

**sanctuary:** Ancient right based on church power; allowed a person respite from punishment if he or she was within the confines of church grounds.

**utilitarian justice:** The type of justice that looks to the greatest good for all as the end.

**hedonistic calculus:** Jeremy Bentham's rationale for calculating the potential rewards of a crime so that the amount of threatened pain could be set to deter people from committing that crime.

**due process:** Constitutionally mandated procedural steps designed to eliminate error in any governmental deprivation of protected liberty, life, or property.

**Innocence Project:** An organization ([www.innocenceproject.org](http://www.innocenceproject.org)) staffed by lawyers and students who reexamine cases and provide legal assistance to convicts when there is a probability that serious errors occurred in their prosecution.

**confirmatory bias:** Fixating on a preconceived notion and ignoring other possibilities, such as focusing on a specific suspect during a police investigation.

**restorative justice:** An approach to corrective justice that focuses on meeting the needs of all concerned.

**civil disobedience:** Voluntarily breaking established laws based on one's moral beliefs.



## **ETHICAL DILEMMAS**

### **Situation 1**

You are serving on a jury for a murder trial. The evidence presented at trial was largely circumstantial and, in your mind, equivocal. During closing, the prosecutor argues that you must find the defendant guilty because he confessed to the crime. The defense attorney immediately objects, and the judge sternly instructs the jury to disregard the prosecutor's statement. Although you do not know exactly what happened, you suspect that the confession was excluded because of some procedural error. Would you be able to ignore the prosecutor's statement in your deliberations? Should you? Would you tell the judge if the jury members discussed the statement and seemed to be influenced by it?

### **Situation 2**

In your apartment building, your neighbors are a Hispanic family of a mother, father, and two sons. You do not know them well, but you say hello when you see any of them, and they seem pleasant. One day there is a commotion in the building and, asking around, you find out that the father and oldest son have been taken away by ICE because they are in this country illegally. You find out from other neighbors that only the youngest son, who is 12, is in the country legally because he was born here. During the next several days you find out that the father and son will most likely be deported. Several neighbors have organized to try and help them. They ask you to sign a petition, come to a rally in front of the federal courthouse, and donate money for their legal defense. Would you agree to any of these actions? Why or why not?

### **Situation 3**

You are serving on a jury for a murder trial. The evidence presented at trial was largely circumstantial and, in your mind, equivocal. During closing, the prosecutor argued that you must find the defendant guilty because he confessed to the crime. The defense attorney immediately objected and the judge sternly instructed you to disregard the prosecutor's statement. While you do not know exactly what happened, you suspect that the confession was excluded because of some procedural error. Would you be able to ignore the prosecutor's statement in your deliberations? Should you? Would you tell the judge if the jury members discussed the statement and appeared to be influenced by it?

### **Example of Analysis:**

**Moral Judgment:** You should ignore the reference and decide based on the evidence and report any juror who did not.

**Moral Rules:** One should always follow the law.  
After taking an oath, one should do one's duty.  
One should not hold oneself as more important than the law.

**Ethical system:** The moral rules above are consistent with ethical formalism and the categorical imperative which emphasizes duty and acting in a way that you would want people to always act.

Ethical system: Act utilitarianism might be able to justify considering a confession if there was overwhelming evidence of guilt and only for that one case. On the other hand, rule utilitarianism would be closer to ethical formalism because if jurors routinely ignored the rules of the court and the judge's instructions, it would have a negative consequence for us all.

#### **Situation 4**

You are a probation officer who must prepare sentencing recommendation reports for the judge. The juvenile defendant to be sentenced in one case grew up in a desperately poor family, according to school records. He had a part-time job in a local grocery store, stocking the shelves and providing general cleanup. The store owner caught him stealing meat. This is the second time he has been caught stealing food. The first time he shoplifted at the store, the deferred adjudication included his commitment to work for the store owner. He explained that he was trying to help his mother, who could not provide enough food for his family. In general, failure to succeed at deferred adjudication results in a commitment to a juvenile facility. What would you recommend to the judge?

#### **Situation 5**

You are an ardent liberal who believes that President Trump's election was tainted by Russian interference. You plan to participate in a march in Washington, D.C., to oppose the President and his policies. At the march, several individuals plan to jump the fence of the White House and stage a sit-in. You know that the planned activities will constitute trespass and you will be arrested. Would you participate? Why or why not?

### **CLASSROOM ASSIGNMENTS**

1. Have students get into groups and complete any of the exercises in the chapter. (LO 1)
2. Read the excerpt in the chapter from *The Merchant of Venice*, and discuss how Shakespeare views justice. (LO 3)
3. Read any of the cases cited and discuss how the Supreme Court views procedural justice and ask students to discuss them. (LO 3)
4. Present different examples of restorative justice programs. Ask students to consider the pros and cons of such programs. You can also ask students to consider the type of victims and offenders that are best suited for such programs or ask them to develop a restorative justice program for particular crimes, offenders, and victims. (LO 4)
5. In class, have students do one of the exercises below. (LO 1–5)

### **EXERCISES**

#### **EXERCISE 1**

##### **How Much Are They Worth?**

Determine the fair salary for these professions and occupations. Propose an average salary, balancing such factors as seniority and education.

Nurse:

Electrician:

Elementary schoolteacher:

Sanitation worker:

Police officer:

Corrections officer:

Probation officer:

College professor:

Software engineer:

City council member:

Lawyer:

Secretary:

Judge:

Waitstaff:

Now compare your responses to those of others. Is there general consensus on salaries for these positions? Compare your responses to published figures (you can find this information in a library or at the career center of your university).

## **EXERCISE 2**

### **Who Should Be Promoted?**

You are on a promotion committee to recommend to the chief of police a candidate for a captain's position. All are lieutenants and have received similar scores on the objective tests available for the position. The following are the candidates:

1. A thirty-nine-year-old woman who has been with the police department for nine years. She has obtained a college degree and a master's degree by going to school at night. She has spent relatively little time in her career on the street (moving quickly to juvenile, community service, and DARE positions).
2. A forty-six-year-old white male who has also had experience in command positions in the army before joining the police force. He has fifteen years of experience—all in patrol positions—and has a college degree.
3. A forty-year-old Hispanic male with ten years of experience. He has been very active with the community. Several community groups have endorsed him, and they demand that there be Hispanic representation on the command staff. He also has strong support among Hispanic officers, serving as their association president. He has a two-year college degree.

***Whom would you endorse? Why? If you need more information, what type of information would you want? Explain how you would use this information. Finally, if this information were unavailable, how would you make a decision?***

### **EXERCISE 3**

#### **Determining Severity**

Rank the following crimes in order of seriousness, with 1 being the most serious and 14 being the least serious. Compare your rank orderings with those of others.

Sexual assault (with force)

Death caused by drunken driving

Embezzlement of \$15,000

Tax evasion of \$15,000

Shoplifting (\$15,000)

Assault (broken bones)

Robbery of \$15,000

Sexual molestation (no penetration)

Toxic waste dumping (unknown damage)

Murder (during a barroom brawl)

Drug possession (marijuana)

Perjury

Murder in the heat of passion

Solicitation of murder