

## **CHAPTER 3 – Justice and Law**

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### **CHAPTER 3 CONTENTS**

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### **CHAPTER OBJECTIVES**

1. Describe the three themes included in the definition of justice.
2. Define Aristotle's two forms of justice described in the chapter.
3. Under corrective justice, distinguish between substantive 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**



#### **I. Origins of the Concept of Justice**

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

**CO 2:** Define Aristotle's two forms of justice described in the chapter.

- Justice is not something for which we should feel grateful, but rather, something upon which we have a right to insist.
- Justice is the result of a logical and rational acceptance of the concept of fairness in human relations.
- Definitions of justice include fairness, equality, impartiality, appropriate rewards or

punishments.

- Walsh said justice might be “hardwired” in humans (cheaters and suckers).
- Justice concerns rights and interests more often than needs.
- Justice originates in the Greek word *dike*, which is associated with the concept of everything staying in its assigned place or natural role.
- Plato said justice consists of 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 belonged.
- Aristotle distinguished distributive justice from rectificatory justice.

### Class Discussion/Activity

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

### What If Scenario

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

See Assignment 1

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## II. Distributive Justice

- *Distributive justice* concerns what measurement should be used to allocate society’s resources.
- According to one writer, justice always involves *rightful* possession.
- The goods that one might possess include: economic goods, opportunities for development, and recognition.
- Two valid claims to possession are *need* and *desert*.
- Lucas: distributions are 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:
  - 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.
    - John Rawls’s combines utilitarian and rights-based. 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
  - That the veil of ignorance is not sufficient to counteract humanity's basic selfishness.
  - Rawls's preference toward those least well off is contrary to the good of society.
  - That it is wrong to ignore desert in his distribution of goods.
- The ethics of care is consistent with a Marxist theory of justice, since both emphasize need.
- Utilitarian theories try to maximize societal good, so some balance of need and merit would be necessary to provide the incentive to produce.
- Ethical formalism is solely concerned with rights; thus, issues of societal good or others' needs may not be as important as the individual's rights.
- 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.

9-12

### **III. Corrective Justice**

**CO 3:** Under corrective justice, 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**

- A *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:*** (consider the following)
    - Balance and proportionality (*lex talionis & lex salica*).
    - The offender must suffer a pain or loss proportional to what the victim was made to suffer.
    - Reform or rehabilitation may be a laudable goal, but it has no place in a retributive scheme of justice.
    - Consideration must be given to intent, capacity, and victim precipitation.
    - 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—different from desert.
  2. ***Utilitarian Justice***

- Punishment is to deter offenders from future crime.
- Cesare Beccaria & Jeremy Bentham (hedonistic calculus)
- Measure to determine the amount of punishment needed to deter

## **B. Procedural Justice**

- Law includes the procedures and rules used to determine 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

### **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 you 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

13-14

## **IV. Wrongful Convictions**

- Innocence Project identifies cases where people may have been falsely convicted.
- Reasons for false convictions, also mentioning:
  - Mistaken eyewitness testimony
  - Perjury by informants
  - Police and prosecutorial misconduct
  - False confessions
  - “Junk science”
  - Ineffective assistance of counsel
  - Racial bias
  - Confirmatory bias

**Class Discussion/Activity**

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

**V. Race, Ethnicity, and Justice**

- 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
- Blacks are disproportionately responsible for crime leads to:
  - Racial profiling
  - Saturation patrols
  - Stop-and-frisks

**Media Tool**

What racial justice issues are at the core of the protests in this video?  
<https://www.youtube.com/watch?v=v4fTEShfu8>

**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>

**VI. Restorative Justice**

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

- *Restorative justice* is a term used to describe a number of 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, by 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.
- The authority of the justice is through the customs and traditions accepted by all members.
- 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, reparative boards, family group conferencing, circle sentencing.
- 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

17-18

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

**CO 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 their action because it runs 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

### **VIII. Conclusion**

- Justice is a philosophical concept concerned with rights and needs. Law is the administration of justice.
- Justice can be further differentiated into distributive justice and corrective justice.
- Corrective justice 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; from the Latin “jus.” 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’s idea that people will develop fair principles of distribution only if they are ignorant of their position in society, so in order 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.

**lex talionis:** A vengeance-oriented justice concerned with equal retaliation (“an eye for an eye; a tooth for a tooth”).

**lex salica:** A form of justice that allows compensation; the harm can be repaired by payment or atonement.

**sanctuary:** Ancient right based on church power; allowed a person respite from punishment as long as 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 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 law 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 in regard to 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 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?

Ethical 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 be a negative consequence for us all.



## CLASSROOM ASSIGNMENTS

1. Have students get into groups and complete any of the exercises in the chapter. (CO 1)
2. Read the excerpt in the chapter from *The Merchant of Venice* and discuss how Shakespeare views justice. (CO 3)
3. Read any of the cases cited and discuss how the Supreme Court views procedural justice and ask students to discuss them. (CO 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. (CO 4)
5. In class, have students do one of the exercises below. (CO 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:

Wait staff:

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 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 barroom brawl)  
drug possession (marijuana)  
perjury  
murder in heat of passion  
solicitation of murder