Law and the Individual
Chapter 5

**Quote**

“Law is the embodiment of the moral sentiment of the people.”

- William Blackstone, English jurist, 1723-1780

**Paradigms of Law**

- The law serves as a written embodiment of society’s ethics and morals.
- It declares correct behavior and serves as a tool of enforcement.
- Law is both a prohibition and a promise.
Two Theories of Law

- **Natural Law**: Law that is inherent to the natural world
  - Can be discovered by reason
  - Some behavior is intrinsically wrong (*Mala in se*)
- **Positive Law**: Laws written and enforced by society
  - Of human construction, therefore it is fallible
- Law is used to control or change behavior

Three Paradigms of Law

- **Consensus Paradigm**
- **Conflict Paradigm**
- **Pluralist Paradigm**

A paradigm is a “fundamental image of the subject matter within a science... It subsumes, defines, and interrelates the exemplars, theories, and methods/tools that exist within it.”

Consensus Paradigm (I)

- Society is a community consisting of like-minded individuals who agree on goals important for ultimate survival
  - Functionalist view - law is an aid to societal growth/survival
- An action is defined as criminal because the majority of the populace holds the opinion that it is wrong
**Consensus Paradigm (II)**

- **Organic solidarity (Durkheim):**
  Individuals perform different functions as part of a whole
  - Individuals exist, but they are tied to a society and its common conscience
  - Each individual’s moral beliefs are indistinguishable from the society

**Consensus Paradigm (III)**

- **Law unifies society:** It reinforces social cohesion and emphasizes our “we-ness” by illustrating deviance
  - *Repressive* (criminal) law enforces universal norms and maintains social cohesion
  - *Restitutive* (civil) law addresses the division of labor and interests in society

**Consensus Paradigm (IV)**

- Criminal law is a manifestation of consensual norms
  - An act is criminal because a majority think the act is wrong
  - The law is compilation of the do’s and don’ts that we all agree on
  - Thus the law is representative
Conflict Paradigm - Quote

“Written laws are like spiders’ webs, and will like them only entangle and hold the poor and weak, while the rich and powerful easily break through them.”

Anarcharis, Scythian philosopher, c. 600 B.C.

Conflict Paradigm (I)

- Law is used by dominant groups to maintain the status quo
- Three parts of the Conflict Paradigm
  - Criminal definitions are relative
  - Those who control major social institutions determine how crime is defined
  - The definition of crime is fundamentally a tool of power
- Law is seen as restrictive or repressive vice being representative

Conflict Paradigm (II)

- The state is organized to serve the interests of the economic elite
- Criminal law is used to perpetuate the existing social and economic order
- Crime control in a capitalist society is accomplished by agencies administered by a government elite
- Laws serve to control the poor and minorities, who suffer the greater penalties
Examples of Differential Definitions and Enforcement

- Numbers running vs. horseracing
- Heroin/cocaine vs. Valium/alcohol
- Crack vs. powder cocaine
- “Blue-collar crime vs. “white-collar” crime
  - Mafia vs. Enron

Pluralist Paradigm

- Law is influenced by interest groups whose power levels rise and fall
- Laws are written by the group that is most powerful at any particular time
- The definition of crime may change, depending on which interest groups have the power to define criminal behavior
- Law reflects what is currently perceived to be in the best interests of the most powerful groups

Justifications for Laws

- The major justification for corrective (criminal) law is the prevention of harm
  - Social Contract Theory: Law is a contract—each individual gives up some liberties, and, in return, is protected from others who have their liberties restricted as well
  - The dilemma:
    - How much liberty should be restricted?
    - What behaviors should be prohibited?
Justifications for Laws

- **The harm principle**: to prevent harm to persons other than the actor when probably no other means are equally effective.
- **The offense principle**: to prevent serious offense to persons other than the actor.
- **Legal moralism**: to prohibit conduct that is inherently immoral.
- **Benefit to others**: to provide, through prohibition of an action, some benefit to persons other than the actor.
- **Legal paternalism**: to prevent harm—physical, psychological, or economic—to the actor.

Legal Paternalism

- **Legal Paternalism** justifies law based on the view that laws should protect people from doing harm to themselves (Ethics of Care).

Examples of laws that try to protect people from their own behavior:

- Seat belt laws
- Motorcycle helmet laws
- Speed limits
- Drug laws
- Licensing laws
- Alcohol consumption and sales laws
- Smoking prohibitions
- Laws limiting certain types of sexual behavior.
**Legal Paternalism**

- Legal paternalism relies on the belief that individual actions almost always affect others
  - Tries to balance individual liberty and government control
- Legal paternalism is in direct contradiction to libertarian views that support virtually no government interference with private decisions

**Justifications for Limited Legal Paternalism**

- Appropriate when an individual's capacity to make decisions is impaired somehow—lack of knowledge or competency
  - Child labor laws
  - Minimum drinking age
- Restriction limited to the minimum necessary to obtain the goal of protection
  - Drinking alcohol is legal but driving over a certain limit is prohibited
  - Cigarettes are legal for adults, but not juveniles
- Laws should only seek to prevent a serious and irreversible error
  - Death from DUI
  - Accident on an icy road

**The Ethics of Legal Paternalism**

- Ethics of care
  - **OK** – behavior is “good” for the subject even though he or she may not agree
- Utilitarianism
  - **OK** – such laws reflect the public good
- Ethical Formalism
  - **NOT OK** – violates the concept of treating all with regard
Legal Moralism

- **Legal Moralism**: The law acts as the moral agent of society
- Laws exist to reinforce society’s definitions of moral behavior (even in areas where there is no agreement)
- Crimes are considered to be actions that harm community standards of morality, even if they are otherwise considered victimless
  - Sodomy Laws
  - Pornography Laws
- Can change over time

Legal Moralism - Example

**Pornography**

- Studies have not consistently shown that pornography leads to other crimes (although many believe that it does)
- Under legal moralism, pornography is prohibited simply because it is immoral by certain standards
- In the past, pornography has been banned because it depicted graphic sexuality in violation of social conventions
- More recently, graphic sexuality has become more acceptable, but pornography has been criticized as being degrading to women and perpetuating negative stereotypes
  - *Should pornography be banned?*

Legal Moralism - Example

**Hate Crimes**

- Recently standard crimes have been reclassified as “hate” crimes if they are motivated by hatred for a protected class
- This is legal moralism, based on the belief that hating others because of their race or sexual orientation is wrong
- If one advocates the *consensus view* of law, legal moralism is justified because society believes that there are limits to acceptable behavior
- If one advocates the *conflict view*, legal moralism is a way in which constraints are placed on dissidents
  - *Should hate crimes be punished differently?*
Legal Moralism

- Limited Legal Moralism would support moral justifications for laws only if the moral standard violated was a universal standard.
  - Problem: What behaviors meet this universal standard? Almost all behaviors are acceptable to some people.
- Critics of Legal Moralism would argue that just because an action may be considered immoral by society, does not necessarily mean that it should be defined as a crime.

Criminal & Moral Culpability

- **Culpability** can be defined as legal responsibility.
- **Legal responsibility** relates to the formal rules and decisions that have defined the limits of what a person will be held legally responsible for.
- **Moral responsibility** is a concept that derives from ethical analysis.

Criminal & Moral Culpability

- Criminal “blameworthiness” or culpability is based on the assumption that the accused acts rationally.
  - **Problem**: This is not always a valid assumption.
  - Historically, the mentally ill and the young have not been considered culpable for their crimes because they were not considered to be capable of rational thought.
Arguments Against Punishing The Insane

- Humanitarian/Mercy
- Can’t help themselves
- Retributive goals not met
  - They don’t appreciate their suffering
  - They can’t spiritually prepare for death, so it is cruel to execute them
- Deterrence value is ineffectual
- They cannot assist in their own defense

Criminal & Moral Culpability

- The McNaughten Rule defines criminal insanity as “the inability to distinguish right from wrong”
  - Accused must be unaware of his or her actions, or that they wrong
  - Creates a high standard for the insanity defense
  - Burden is on the defense
  - Compulsion or diminished capacity not recognized
    - May be recognized as a mitigating factor in some states

Criminal & Moral Culpability

- Should an irrational person be punished the same as a rational one?

- Recently, the Supreme Court ruled that it was unconstitutional to execute the mentally handicapped
### Criminal & Moral Culpability

- Andrea Yates, Houston, TX, 2000
  - 36 year old mother of five: 6 mos to 7 yrs old
  - Systematically drowned all of the children, and then called the police
  - Lawyers argued that she was under psychiatric care for postpartum depression, and that she was suffering from postpartum psychosis
  - 2002: Yates is not acquitted by reason of insanity and is sentenced to life in prison
  - 2006: Original verdict overturned; Yates found not guilty by reason of insanity; sentenced to confinement in a secure mental hospital until cured

### Criminal & Moral Culpability

- The law does allow for a defense based on diminished capacity for crimes of passion committed by otherwise rational people
  - Holds to a much stricter standard for those who are mentally ill as the result of parental abuse or other prior victimization
  - The law also dictates that those suffering from developmental or mental disabilities should also be considered as less than fully capable for their actions, however it is not always the case

### Juveniles

- Juveniles are another group that has been historically treated by the law as less culpable for their actions
  - This historical trend of treating children as less than fully rational beings under the law has shifted in recent years
    - Nathaniel Brazill, 13
    - Lionel Tate, 12
Juveniles

- The juvenile justice system was structured with a dual goal:
  - to determine responsibility for wrongdoing
  - to protect children’s best interest
- In recent years this dual goal has been viewed as being lenient—largely due to media attention to serious juvenile crimes
  - Public perception that juvenile is increasing and becoming more violent
  - 2002 violent crime arrests for juveniles decreased 47% from 1994 levels

Juveniles

- School “zero tolerance” policies have sometimes resulted in absurd outcomes
- In 2005, the Supreme Court held that execution for a crime committed before age eighteen was unconstitutional

White Collar Criminals

- White Collar Criminals are often considered less culpable than other types of crimes
  - Criminal prosecution difficult; usually unclear who in the corporation is ultimately responsible for criminal activity
    - Ford Explorer tires
    - Ford Pinto
Immoral Laws & The Moral Person

- When law and morality conflict, a moral person is confronted with the dilemma of which should prevail
  - Nazi Germany’s laws that demanded that Jews be transported to concentration camps are representative of an immoral regime
  - Laws in the US that allowed segregation
  - Internment of Japanese-Americans during WWII

- Is one obligated to obey laws that he or she deems immoral?
  - **Consensus view.**
    - YES: Socrates refused to flee Athens even though he held the moral position
    - Even if we disagree, we have a duty to obey the law
  - **Conflict/Pluralist view.**
    - NO: Henry David Thoreau and Martin Luther King Jr. believed civil disobedience could be moral
    - If a law is essentially immoral, we have a duty to disobey it

- When individuals feel that a law violates morality they may choose to engage in **civil disobedience** (the voluntary disobedience of established laws based on one’s moral beliefs)
  - Gandhi and Martin Luther King, Jr. perceived themselves as following the higher law of God

What would happen to the stability of society if moral people disobeyed laws?
Immoral Laws & The Moral Person

- The issue of disobeying laws one disagrees with is particularly relevant to CJ Professionals
- Soldiers are sometimes ordered to perform immoral acts by their supervisors, and questions then arise of who is morally responsible for committing those acts
- Police and corrections officers work in paramilitary organizations and are faced with similar ethical dilemmas

Immoral Laws & The Moral Person

- In their roles on the front lines, law enforcement officers are often put in the position of balancing law and justice
- Law enforcement officers decide what laws to enforce and which to ignore (can be considered *de facto* lawmakers)
- Officer’s discretion influenced by:
  - Their own personal definitions of morality
  - Societal definitions of morality
- Criminal justice professionals are more likely to use their discretion in an ethical manner if their beliefs are in line with the stated goals of the system

Victims Rights

- Originally, all law addressed the relationship between individuals
- During the *common law period*, criminal law was shifted from the characterization of crime as harm to the *victim* to the characterization of crime as harm to *society*
- Today, criminal law addresses wrongs against society and civil law addresses wrongs against individuals
  - One act may be treated as both a violation of criminal law and a cause for civil action
Victims Rights

- The recent development of a victims rights movement insists that victims be included in the criminal prosecution and sentencing of the criminals who harmed them.
- Victimology is a specific discipline that focuses on the needs of victims of crime.

Victims Rights

- Victim's Bill of Rights is becoming a more and more common piece of legislation.
  - Being present at trial
  - Being notified of any hearing dates and plea-bargain arrangements
  - Submitting victim impact statements to be considered during the sentencing decision
  - Being treated courteously and compassionately by all law enforcement and justice system personnel
- Victim-compensation programs and restitution programs are also advances that the victims' rights movement has influenced.

Victim Precipitation

- Victim precipitation is a concept that considers the victim's role in causing the crime.
  - Victim precipitation should not be confused with victim blaming
  - Instead, the concept of victim precipitation should be understood as an attempt to breakdown the false dichotomy between purely innocent victims and purely evil perpetrators.
**Concept of Restorative Justice**

- The **Restorative Justice** movement represents a shift in how we perceive the criminal justice system.
  - Emphasizes compensation over retribution as the focus of the criminal justice system.
  - Focuses on the victims' rights and needs, rather than the criminal's rights.
  - Integrates victims, offenders, and communities more fully into the justice process.
  - Also called peacemaking justice, it seeks to restore the relationship between victim and the offender and peace within the community.

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**Retributive Justice vs. Restorative Justice**

- **Retributive Justice**
  - Who did it?
  - What laws were broken?
  - What should the punishment be?

- **Restorative Justice**
  - What is the harm?
  - What needs to be done to repair the harm?
  - Who is responsible for this repair?

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**Community Justice Models**

- Involve partnership between community and justice system to control crime.
- Are informal and invite participation from the community members.
- Aim to repair harm done to the community member by another member and maintain healthy overall relations in community.
- Derive their authority from customs and traditions accepted by all members.