

## Lecture 18: Morality and the Law

### Morality and Crime: Male reasoning

#### Kohlberg (moral dilemma test on males):

Preconventional: reasoning based on own needs and perceptions

Stage 1: punishment and obedience Stage 2: instrumental stage

Conventional: reasoning based on the need for social order and social conformity

Stage 3: good boy/girl Stage 4: law and order

Postconventional: reasoning based on personal principles that transcend social rules and norms

Stage 5: social contract Stage 6: universal ethical principles

Movement through stages requires appropriate intellectual and social maturity which are achieved through maturation and socialization. Exposure to peers is essential.

Most repeat offenders stuck in stages 1-3. Many gang members may be stuck in stage 4 or 5 and socialized to the rules of the gang which acts as a cult.

Most non-delinquent males stuck in 4 and 5 and socialized to obey society's laws

Most males socialized to believe that transgression of the social rules requires punishment (retribution perspective of justice)

### Morality and Crime: Female reasoning

#### Gilligan (moral dilemma test on females):

Preconventional: caring is survival

Stage 1: caring for self as means for survival Stage 2: feeling that self caring is selfish

Conventional: caring is altruism

Stage 3: caring for others and self-sacrifice Stage 4: search for equilibrium and fairness

Conventional: caring is prevention and restoration

Stage 5: minimize interpersonal friction Stage 6: interdependency and restoration of social equilibrium

Movement through stages requires appropriate intellectual and social maturity which are achieved through maturation and socialization. Exposure to peers is essential.

Most repeat offenders stuck in stages 1. Many gang members may be stuck in stage 4 or 5 and socialized to the rules of the gang which acts as a cult.

Most non-delinquent females in 4, 5 and 6 and socialized to be society's peacemakers

Most females socialized to believe that transgression of the social rules requires restoration of social equilibrium (restorative perspective of justice)

### Morality and Crime: Perspectives and the Law

#### Retribution model goals

The focus is on the perpetrator: perpetrator of a crime must be punished

Reduce probability of repeat offence, Act as deterrent to others

Once punishment is enacted, justice is served and matter closed

#### Restorative model goals

The focus is on reintegrating all victims and the perpetrator to the social equilibrium that had existed before.

Encounter, Allocution and amends, Reintegration, Inclusion

Correctional approaches:

Retribution model: Prisons, Boot camps, Labour camps, Capital punishment

Restorative model: Victim impact statement, Victim offender mediation, Conferencing

Healing circles, Community service, Victim and offender assistance programs

## **What is Restorative Justice? Handout**

Restorative justice is a new movement in the fields of victimology and criminology. Acknowledging that crime causes injury to people and communities, it insists that justice repair those injuries and that the parties be permitted to participate in that process.

Restorative justice programmes, therefore, enable the victim, the offender and affected members of the community to be directly involved in responding to the crime. They become central to the criminal justice process, with governmental and legal professionals serving as facilitators of a system that aims at offender accountability, reparation to the victim and full participation by the victim, offender and community. The restorative process of involving all parties – often in face-to-face meetings – is a powerful way of addressing not only the material and physical injuries caused by crime, but the social, psychological and relational injuries as well.

When a party is not able, or does not want, to participate in such a meeting, other approaches can be taken to achieve the restorative outcome of repairing the harm. In addressing offender accountability these approaches can include restitution, community service and other reparative sentences. In addressing victim and offender reintegration they can include material, emotional and spiritual support and assistance.

A definition of restorative justice that emphasizes the importance of both restorative processes and outcomes is the following:

**Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behaviour. It is best accomplished when the parties themselves meet cooperatively to decide how to do this. This can lead to transformation of people, relationships and communities.**

Restorative justice is different from contemporary criminal justice in several ways. First, it views criminal acts more comprehensively -- rather than defining crime as simply lawbreaking, it recognizes that offenders harm victims, communities and even themselves. Second, it involves more parties in responding to crime -- rather than giving key roles only to government and the offender, it includes victims and communities as well. Finally, it measures success differently -- rather than measuring how much punishment is inflicted, it measures how much harm is repaired or prevented.

## **Victim, Offender & Community Meetings**

Meetings between victims, their offenders, and members of the affected community are important ways to address the relational dimension of crime and justice. It is accepted that the following three methods are hallmarks of restorative justice. Each requires that the offender admit responsibility for the offence. Each is limited to parties who volunteer to participate.

Victim offender mediation. This is a process that provides an interested victim the opportunity to meet his offender in a safe and structured setting, engaging in a discussion of the crime with the assistance of a trained mediator. The goals of victim offender mediation include: permitting victims to meet their offenders on a voluntary basis, encouraging the offender to learn about the crime's impact and to take responsibility for the resulting harm, and providing victim and offender the opportunity to develop a plan that addresses the harm.

There are more than 300 victim offender mediation programmes in North America, and over 500 in Europe.

Research on such programmes has found higher satisfaction among victims and offenders who participated in mediation, lower fear among victims, a greater likelihood that the offender will complete a restitution obligation, and fewer offenders committing new offences, than among those who went through the normal court process.

Family or Community Group Conferencing. This process brings together the victim, offender, and family, friends and key supporters of both in deciding how to address the aftermath of the crime. The goals of conferencing include: giving the victim an opportunity to be directly involved in responding to the crime, increasing the offender's awareness of the impact of his or her behaviour and providing an opportunity to take responsibility for it, engaging the offenders' support system for making amends and shaping the offender's future behaviour, and allowing the offender and the victim to connect to key community support. Conferencing was adapted from Maori traditional practices in New Zealand, where it is operated out of the social services department, and was further modified in Australia for use by police. It is now in use in North America, Europe, and southern Africa in one of those two forms. It has been used with juvenile offenders (most New Zealand juvenile cases are handled by conferencing) and with adult offenders. Research on such programmes shows very high degrees of satisfaction by victims and offenders with the process and results.

Peacemaking or Sentencing Circles. This is a process designed to develop consensus among community members, victims, victim supporters, offenders, offender supporters, judges, prosecutors, defence counsel, police and court workers on an appropriate sentencing plan that addresses the concerns of all interested parties. The goals of circles include: promoting healing of all affected parties, giving the offender the opportunity to make amend, giving victims, offenders, family members and communities a voice and shared responsibility in finding constructive resolutions, addressing underlying causes of criminal behaviour, and building a sense of community around shared community values. Circles were adapted from certain Native American traditional practices, and are being used throughout North America.

### **Repairing the Harm Caused by Crime**

Each of the hallmark restorative justice processes -- victim offender mediation, community or family group conferencing, and peacemaking or sentencing circles -- ends with an agreement on how the offender will make amends for the harm caused by the crime. Four kinds of reparation frequently appear in these agreements..

Apology: An apology can be written or verbal. The three parts of apology are acknowledgement, affect, and vulnerability. With acknowledgement, the offender accepts responsibility for hurting the victim by his/her actions. The offender also accepts that there was real harm caused by this conduct. Finally, the offender accepts that the harm caused was experienced by another human being who did not deserve the harm.

Affect goes beyond acknowledgement of guilt to remorse or shame by the offender for what he/she has done. Regret may be expressed verbally or through body language. Witnessing offenders express regret can be healing for victims. However, the offender may feel deep regret but be unable to express it in ways that can be appreciated fully by the victim.

Vulnerability has to do with a shift in power between the offender and the victim. One of the realities of crime is that the offender has asserted control over the victim in order to commit the crime. In apologizing, the offender gives control to the victim, who can decide whether or not to accept the apology. The offender cannot know what the victim will do before offering the apology. In offering the apology, the offender cedes to the victim the control and power over himself/herself.

Restitution is the payment by an offender of a sum of money to compensate the victim for the financial losses caused by the crime. It is justified in a restorative perspective as a method of holding offenders accountable for their wrongdoing, and as a method of repairing the victim's injury. Restitution can be determined in the course of mediation, conferencing or circles; it can also be ordered by a judge. In other words, it is a potentially restorative outcome that may result from either a restorative or a conventional process.

Studies have shown that restitution increases victim satisfaction with the justice process. Some studies have shown that the use of restitution was associated with reductions in recidivism. Other studies have shown that when restitution is determined during mediation, it is more likely to actually be paid than when it results from court order alone.

Changed Behaviour: At the most basic level, changed behaviour by the offender means not committing crimes. This is why negotiated agreements will include elements such as changing the offender's environment, helping the offender learn new behaviours, and rewarding positive change. Attending school and not hanging out in old haunts are ways to change the environment. Drug treatment programmes, anger management classes, and educational and job training programmes are ways that offenders learn new behaviours. Follow-up meetings to the encounters may be used to monitor the offender's progress in trying to change and give him/her positive reinforcement on progress made.

Generosity: But the outcomes of restorative processes suggest that victims and offenders may move beyond simply balancing the books. Offenders may offer to perform services that are not related to the crime or to the victim, but that are understood by the victim as evidence of a sincere apology. For example, the offender may agree to perform community service at an agency the victim chooses.

### **Restorative Justice around the World**

Although restorative justice is about 30 years old, its influence has spread around the world at a remarkable speed. We can track international development in two basic categories: innovation by countries in their use of restorative justice, and integration by countries of restorative ideas into their justice systems.

Innovation. Following are examples of innovative restorative practices: *Indigenous or customary practices are being adapted* for use in the criminal justice system. Examples of this include conferencing and circles.

*Victim-offender encounters are taking place inside prisons* in Europe and North America. In some instances this involves victims meeting with their offenders in a kind of "post sentencing mediation;" it is even used in this way on death row in Texas.

In other instances the meetings involve groups of unrelated victims and offenders. These "surrogate" encounters may be used because the actual victim or offender is unknown or unavailable, or as a preparatory step toward a meeting of the person with the actual victim or offender.

"Circles of Support" in Canada *work with serious sexual offenders* (often guilty of paedophilia) released into fearful communities at the conclusion of their sentences. The programme increases safety of the public by establishing a reintegration plan with the offender, by regularly monitoring the behaviour of the offender, and by ensuring that community resources needed by the offender are made available. It ensures the safety of the offender by offering a forum for community members to voice their concerns, by intervening with community members when necessary, and by working with the police and other authorities to provide protection and services as needed.

*Unique prison regimes* have developed in Latin America and elsewhere in which prisoners volunteer to stay at facilities run largely by volunteers and the prisoners. The regimes establish a particular spiritual or cultural ethos that involves learning through example and apprenticeship.

*Victim-offender-community meetings are being done at many phases of the justice process.* They are run by police prior to charge, by probation officers and on occasion by parole officers in Canada. This is in addition to the rich tradition of NGO provision of community-based victim-offender-community meetings.

Restorative processes are being used to *address conflict between citizens and the government.* Examples include the Truth and Reconciliation Commission in South Africa and the Treaty of Waitangi Commission in New Zealand.

Integration. There are also signs that restorative approaches are joining the mainstream of justice around the world.

*Legislative action* has reduced legal or systemic barriers to the use of restorative programmes, created legal inducements for using restorative programmes, guided and structured restorative programmes, and protected the rights of offenders and victims.

*Funding and staff for programmes is expanding.* Belgium, for example, has adopted a "Global Plan" to fight unemployment and to change certain aspects of criminal justice. Municipalities receive funding for programme staff if they agree to help carry out certain penal sanctions and measures such as police-based mediation.

*Jurisdiction-wide planning* is incorporating restorative principles in a systemic framework. This has been done at the state and provincial level, and on a national level in some countries. The purpose of the exercise is to involve criminal justice professionals and members of the community in a process that leads to a plan for implementation and expansion of restorative approaches.

*The number of restorative programmes is growing.* There are more than 500 mediation programmes and projects in Europe, and over 300 in the US. A Canadian survey of restorative programmes and projects in that country resulted in over 100 listings.

*Intergovernmental bodies* are taking note of restorative justice. In 1999 the Committee of Ministers of the Council of Europe adopted a recommendation on the use of mediation in penal matters. The UN's International Handbook on Justice for Victims notes that "the framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred. Victim compensation has become a key feature of restorative justice in many developed countries."