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CHAPTER 21

Legal Punishment

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I INTRODUCTION

In this chapter we critically explore the central moral justifications of legal punishment. Legal punishment is, roughly, the state's intentional imposition of hard treatment upon citizens consequent to a law having been broken, where hard treatment includes at least jail or imprisonment, fines and labour. We focus on theories that answer these questions: Whom is the state permitted or obligated to punish? Why may the state rightly punish them? How much punishment is it entitled to impose?

These issues of sentencing differ from related topics that we do not thoroughly address in this chapter. For instance, we set aside other uses of coercion by the state such as deadly force, pre-trial detention and psychiatric institutionalisation, which are not squarely punitive. For another case, although ascertaining why people should be punished bears on determining for which actions they should be punished, we play down the latter issue of just legislation.[1] In addition, while we ask how much punishment should be imposed, we do not ask who ought to have the political authority to establish this, i e whether the legislature or judiciary primarily ought to assign penalties to crimes. Finally, we do not take up the matter of how the courts ought to verify whether someone is liable for any punishment; we do not focus on issues of criminal prosecution such as access to counsel, plea bargaining and standards of proof.

We seek to answer the questions of why punish, whom to punish and how much to punish in the context of the South African legal system. We begin by examining the differences between forward- and backward-looking moral theories of legal punishment, their strengths and also their weaknesses (see parts II and III). Then, we ascertain to which theory, if any, South Africa largely conforms (see part IV). Finally, we discuss several matters of controversy in South Africa in the context of forward- and backward-looking theories (see part V). By the end the reader should be in a position to

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[1] The question of what people should be punished for having done is systematically taken up in chapter 15.

understand and appraise South African sentencing policies from a variety of philosophical perspectives.

II FORWARD-LOOKING THEORIES

Philosophical theories of punishment differ most fundamentally in terms of whether they take a penalty to be warranted in virtue of facts that obtained prior to its imposition or facts that will obtain after its imposition. In this part we analyse forward-looking theories, views that punishment is morally justified because it will (likely) have certain long-term results. If punishment were expected to have no good consequences in the future, or if its good consequences would not outweigh its bad ones, then forward-looking theories all entail that punishment would be unjustified.[2]

Forward-looking theories vary in terms of exactly why punishment's consequences morally matter. They propose competing accounts of which results count and of why the state should seek to promote them. In the rest of this part, we explore the three most influential rationales.[3]

(a) Samaritanism

The first and probably most common forward-looking rationale for legal punishment says that it is justified because the state has a basic duty to help its citizens. This is the principle of beneficence or what is sometimes called 'samaritanism,' after the biblical parable of the good Samaritan (*Luke* 10: 25–37). The most familiar species of samaritanism is utilitarianism, the view that the state has most moral reason to do whatever will maximally benefit the community. The classic British philosopher Jeremy Bentham is well known for being one of the first to systematically articulate a utilitarian justification of punishment.[4] Other views maintain that instead of maximally promoting

[2] Consequentialism is not the same as forward-looking theory as such, but is instead one kind of forward-looking theory. Consequentialism (as discussed in chapter 8) says that an action or policy is right because it promotes a certain type of consequence, namely, the satisfaction of intrinsic desires or the realisation of intrinsically desirable states of affairs. A forward-looking theory of punishment says that punishment's consequences are what make it right, but it need not hold that the only morally relevant consequences are inherently valuable ones. For example, a forward-looking theory could recommend punishment as a way to protect rights or liberties (which need not be conceived as intrinsic values).

[3] One thoughtful rationale that we do not explore is the idea that punishing an offender is a way of making him pay restitution to the community. When the offender committed his crime, he made citizens fearful and gave them reason to spend money on alarms, gates and the like. By punishing him, other offenders are deterred from committing crime, thereby reducing citizens' fear and giving them less reason to take protective measures. For this view, see M Holmgren 'Punishment as Restitution' (1983) 2 *Criminal Justice Ethics* 36–49.

[4] J Bentham *An Introduction to the Principles of Morals and Legislation* (1823).

well-being in people's lives, the state is obligated to protect their rights or liberties to a substantial degree.[5]

These different varieties of samaritanism have different implications for what kinds of things should be criminalised. For instance, if punishment is justified as a way to improve people's lives, then punishing someone for not wearing a seatbelt when driving might be permissible. In contrast, criminalising such an action would be impermissible if punishment were justified solely as a way to protect people's rights, for not wearing a seatbelt need not violate anyone's rights. While samaritan views differ over precisely which results matter and hence over which actions should be criminalised, they all concur that legal punishment is morally justified at least because it will efficiently prevent 'serious crimes' such as violence and theft. Since punishing in order to reduce the occurrence of harm to others is common ground among not merely samaritan views, but all important theories of punishment, we focus on it.

Samaritan views are also united when it comes to the issue of how punishment can be expected to reduce serious crime. Specifically, they all maintain that legal punishment should prevent actions such as murder, kidnapping, assault, rape, vehicle hijacking and robbery by deterring and incapacitating. Using punishment as a deterrent (in the narrow sense used here) is a matter of imposing it so as to instil fear in would-be offenders or to make them refrain from criminal behaviour because they do not want to experience a negative sanction. Special deterrence involves threatening the person punished so that he will not commit crime again, while general deterrence is a matter of punishing one person so that the public at large is threatened. Incapacitation, in contrast, does not aim to prevent crime by frightening people or getting them to refrain from crime so as to avoid a negative sanction. Instead, it simply removes the opportunity for would-be offenders to commit crime, typically by imprisonment, but possibly by house arrest as well. Deterrence uses a stick, incapacitation a cage.

Samaritan views all hold that the morally right amount of punishment for someone is whatever will most deter and incapacitate in the long run with the lowest costs, where costs include, among other things, financial expenses and harm to the person punished. If a court were to strictly adhere to samaritanism, judges would probably be permitted broad discretion over sentencing.[6] A judge would try to ascertain which penalty would produce the most benefits with the least costs in each case, which might entail imposing different penalties for the same crimes. If one burglar is remorseful and

[5] Since these rights or liberties need not be conceived as intrinsic values, not all forms of samaritanism are necessarily consequentialist (in the sense discussed in chapter 8).

[6] Unless mandatory sentences passed by a legislature happened to deter substantially.

another is unrepentant, samaritanism could well instruct a judge to impose a lighter penalty for the former, since he is less likely to commit crime again.

A common objection to samaritanism is that it absurdly entails that it is permissible to punish the innocent. Although it is probably permissible to harm the guilty in order to help the innocent, samaritanism does not make any essential reference to punishing only the guilty. All it says is that the intentional imposition of hard treatment is justified when and because it helps citizens. But sometimes citizens could be substantially helped if parties known to be innocent were punished.

Here is a classic hypothetical case. Imagine that a horrible crime has been committed in a community and that citizens will riot, killing many innocent people, unless the death penalty is imposed for the crime. The sheriff cannot find the actual perpetrator, but he is in a position to get away with framing and putting to death an innocent person with neither *actus reus* nor *mens rea*. Suppose that the only way to prevent the riot in which several murders would take place would be for the sheriff to commit this one murder. On the face of it, samaritanism would permit, and could well require, the sheriff to punish the one innocent for the greater good of the community.

There are several responses that samaritans make to this objection. One response is that the hypothetical case is unrealistic in the sense that it is very unlikely to occur. However, this claim neither seems true nor is particularly relevant. Even if the riot scenario has never happened in practise, other real-life cases surely exist. For example, deterrence might well be achieved with strict liability, punishing someone for breaking a law that she could not have avoided breaking. Many states punish citizens for possessing stolen property, even if they could not have known it was stolen and hence lacked *mens rea* and were not at fault. This policy encourages citizens to take extra precaution not to possess it. In addition, the objection says that *if* punishing the innocent on occasion were to protect society, then samaritanism would absurdly permit it. When constructing a philosophical theory of legal punishment's justification, we want one that deals adequately with all the cases that we could face, not merely those we are most likely to face.

A second response on behalf of samaritanism is that if it were indeed true that the only way to prevent several murders would be to commit a single murder oneself, then that would be the morally right thing to do. Here, samaritans draw analogies between the riot case and other cases where it appears permissible to sacrifice innocents. For example, many believe it can be right to quarantine or even kill an innocent carrier of an infectious deadly disease, if necessary to protect the lives of many others. Perhaps there is no relevant difference between the riot case and this Ebola case.

However, objectors can point out plausibly relevant differences. For one, a person infected with Ebola would be an active cause of harm to others,

whereas the framed innocent person would not. Another relevant difference might be the numbers involved; it is one thing to kill an innocent to protect an entire city from Ebola, and another to kill an innocent to save the lives of only a handful who would die in a riot.

A third response on behalf of samaritanism is to adopt a constrained version of the theory, one saying that punishment is justified because it harms the *guilty* in order to benefit the community. Critics reply that this an *ad hoc* manoeuvre; there is nothing inherent to the samaritan perspective warranting such a restriction. In any event, the next forward-looking theory provides what *prima facie* appears to be a more principled reason for punishing only the guilty when seeking to protect society from serious crime.

(b) Self-defence theory

According to the present theory, state punishment is morally justified because those who are to blame for having created a situation in which a group faces unavoidable harm should be the ones who suffer the harm. Considerations of self-defence entail that the state is permitted to punish an offender insofar as he has injured innocents and punishing him will help protect innocents from injury by incapacitating him and deterring other would-be offenders. The state is, further, obligated to do so since it claims a monopoly on the use of force, thereby preventing citizens themselves from distributing injury away from the innocent and toward the aggressors. Self-defence theorists have different conceptions of injury, but, like samaritans, they all agree that punishment must have the function of at least reducing the serious crimes of violence and theft. The right amount of punishment for the state to impose is whatever will most protect the innocent from such aggression, subject to certain constraints, eg the punishment must be the least amount necessary to protect the innocent.[7]

Self-defence theory is like samaritanism in that it views deterrence and incapacitation to be the primary means by which punishment should be used to control serious crime. However, the two theories provide different rationales as to why deterrence and incapacitation are justified. Samaritanism says they are justified because they benefit society, whereas self-defence theory says they are justified because they make aggressors undergo burdens that would have otherwise been suffered by innocents.

Self-defence theory seems to be an improvement over samaritanism since it inherently provides a reasonable explanation of why it would be wrong to punish the innocent when doing so would protect society. Self-defence

[7] Other common constraints include: the guilty's punishment may not be greater than the harm the innocent would suffer without it, and no significant burdens may be visited on innocent third parties.

theory says that doing so would be wrong because the innocent have not forfeited their rights not to be harmed. Only culpable aggressors have done so. Samaritanism, in contrast, says merely that the state should punish because doing so will prevent crime and thereby benefit society; this rationale says nothing fundamental about punishing the guilty in particular.

However, critics wonder whether self-defence theory is truly any improvement over samaritanism in this regard. Most believers in self-defence deem it permissible to harm innocent attackers, ie those with *actus reus* but not *mens rea*. For example, suppose that someone attacks you with a knife and that he is sleepwalking, insane or temporarily deranged. Most think that it would not be wrong of you to seriously injure him, if necessary to protect yourself. However, since he is lacking competence or capacity (and could not have prevented it, let us assume), he is morally innocent. The logic of self-defence does not therefore easily justify a prohibition on punishing the innocent when necessary to protect other innocents. Although the theory says that only *culpable* aggressors should be harmed, this appears to be an *ad hoc* restriction.

A reasonable way for the self-defence theorist to respond is to draw a distinction between two types of innocent parties. On the one hand, the state might punish people who have faultlessly broken the law or harmed others, ie those with *actus reus* but no *mens rea* (eg the sleepwalker case). On the other, it might punish those who have not broken the law or harmed others at all, that is, those with neither *actus reus* nor *mens rea* (eg the riot case). The self-defence theorist might grant that the latter is beyond the pale, but maintain that the former is not obviously wrong. After all, states often employ strict liability so as to deter citizens from possessing stolen property, having sex with minors and selling alcohol to them. Many criminal justice systems punish for these actions even if the people who did them tried very hard not to do them and did them unwittingly. And it appears that self-defence theory permits punishing innocents only for such faultless law-breaking, since its logic permits the state to punish only aggressors; self-defence theory would not permit punishing in the riot case since that innocent is not an aggressor.

Furthermore, one might think that self-defence theory provides the right explanation of why it is permissible to punish faultless law-breaking. The best explanation seems to turn on a need to prevent certain acts that will harm innocents. It is arguably permissible to punish an innocent aggressor if necessary to prevent aggression toward those innocent of any aggression. In any event, this explanation is more promising than other suggestions about why strict liability is permissible, such as the idea that one ultimately could have avoided breaking the law or should have known better. One might therefore conclude that self-defence theory accounts well for our intuitions about the proper candidates for punishment.

These are fair responses. However, strict liability for punishment (along with punishment for negligent acts) is one the most controversial elements of criminal law. Although it might not be as objectionable as punishing someone who has not broken the law at all, many are inclined to think that, at best, strict liability is appropriate only for civil suits, not for criminal prosecution. If it were truly an unavoidable accident that a person broke the law, it is hard to say that punishing him would be justified, even if doing so would protect others. It is worth exploring whether there is some other forward-looking theory that permits neither strict liability nor more egregious forms of punishing the innocent.

(c) Moral education theory

Moral education theory, sometimes also known as the 'penance theory,' claims that legal punishment is justified because it promises to improve the character of the person punished. Specifically, this view maintains that intentionally inflicting a deprivation on someone is justified because it will make him less likely to commit crime for a particular reason, namely, because he believes it would be wrong. Moral education theory says that the right amount of punishment is whatever is most likely to reform those punished. In the Western tradition, Plato is known for having first spelled out this view with care.[8]

Punishment promises to reform a person's character in the following ways. First off, it might change his judgments or perceptions in making him aware not only that the relevant action is forbidden, but also why (since the punishment he undergoes could resemble the crime his victim suffered). Second, punishment might alter the person's emotions, so that he feels guilt or remorse for what he has done. Third, punishment might affect a person's motivation in that he repents, finds resolve not to repeat the crime and decides not to do the crime since it would wrong to do so.

Moral education theory differs in two major respects from samaritanism and self-defence theory. First, it maintains that punishment is permissible primarily because it is a desirable thing for the person punished, not (or only secondarily) because it is a benefit to the general public. Moral education theory says that punishment would be desirable either for making the person punished better off (more happy) or for making him a better person (more virtuous). Regardless of how the valuable outcome is construed, moral education theory maintains that although punishment intentionally inflicts harm on a person, the expected gain to him makes it on the whole something desirable (even if he does not in fact desire it). And it is largely the fact that

[8] See eg Plato's *Gorgias*. For discussion in an Eastern context, see chapter 19 on Confucian punishment.

punishment promotes values in the life of the person punished, something for which he should 'be thankful later,' that justifies imposing it on him. Moral education theory hence differs substantially from samaritanism and self-defence theory, both of which focus on the good that punishment will do for society as a whole.

The second major difference between the present theory and the other two forward-looking theories concerns the way that punishment would be used to control crime. Moral education theory rejects deterrence and incapacitation and instead favours rehabilitation. Rather than using punishment to scare people from committing crime or to deprive them of the opportunity to do so, moral education theory prescribes using punishment to literally 'teach a lesson' to those punished. It recommends tailoring punishment so that it is likely to make those punished reflect on their behaviour and have a change of heart.

Does this view provide an attractive explanation of why it is wrong to punish the innocent? It might seem so. The moral education theorist can argue that those who either have not broken the law or have done so faultlessly do not need any change of character. And she can point out that her theory prevents punishing the innocent in order to teach the broader community a lesson, since it recommends punishment for the good of the person punished, not for the greater good.

However, objectors worry that the logic of moral education theory in fact permits punishing certain innocent parties. Imagine someone whose character is evil but who has not yet conspired to commit, attempted to commit or actually committed a serious crime. So, think of someone with *mens rea* but no *actus reus*. On the face of it, moral education theory prescribes punishing this individual so to produce moral reform, at least if it is likely that he would otherwise commit a crime in the future.[9] If being someone disposed to commit crime is bad for him or makes him a bad person, then considerations of moral reform would seem to recommend helping him to change sooner rather than later. The present theory suggests that, before he has actually committed a crime, he should be made to, say, undergo psychotherapy (which would count as 'punishment' if partially intended to deprive the sentenced person of liberty or make him suffer discomfort).

It might be tempting for the moral education theorist to argue that punishing an as yet innocent party would not morally educate him since such punishment would be immoral. However, she may not so argue, for that would be to invoke an alternative theory of the morality of punishment. A stronger response is to say that it would be hard in practise to know whether

[9] See the movie *Minority Report* for a vivid illustration of punishing people for crimes that they would have done but did not in fact do. However, in this film punishment is not imposed for the sake of moral reform.

someone has a bad character apart from any wrong actions. The surest way to know that someone's attitudes need changing is to see them acted on.

However, objectors claim that there are times when one can in fact know that someone is likely to commit crime even though he has not actually done it yet. After all, parents think they know that when a teenager starts hanging around criminals and adopting their values and attitudes, chances are he will adopt their actions as well. Perhaps something more scientific is possible, so that information about one's family, wealth, education and neighbourhood would indicate the likelihood that one will commit certain types of crime. Furthermore, the objection is ultimately one of principle; it says that *if* the state could tell that a person were disposed to commit crime without having yet committed one, then it would be wrong to punish him.

Here is another response on behalf of moral education theory to the problem of punishing the innocent. Perhaps an essential point of punishment should be to get an offender to repent for his wrongdoing. Those who have done no wrong have no need to repent, and hence warrant no punishment.

However, such a restrictive version of the theory seems poorly motivated. If the state is concerned to see that offenders repent for their wrongdoing, surely this is because of a more general interest to improve their moral character. But an interest in improving people's moral character seems to justify penalising those with bad characters who have not yet done any wrong acts.

(d) Problems with forward-looking theories

Although there are problems specific to each of the forward-looking theories, we focus here on problems that all three share. We have already discussed the serious problem that the theories too easily permit punishment of the innocent, those lacking *mens rea*, *actus reus*, or both. It is hard for forward-looking theories to provide a rationale as to why it is wrong to punish the innocent, for sometimes doing so would most efficiently achieve the goal of reducing serious crime.

A related problem that forward-looking theories face is that they entail that it is permissible to punish the guilty more harshly than intuitively seems right. Samaritanism could recommend harsh penalties for trivial crimes, if a small number of the former would prevent a large number of the latter. For instance, samaritanism could prescribe the death penalty for taxi drivers who change lanes without indicating, if this would indeed prevent so many accidents as to outweigh the costs of killing a few people. Self-defence theory could recommend stiff penalties for people who are minimally culpable. For example, if you negligently threaten someone, self-defence permits her to direct the harm to you just as much as if you intentionally threatened her.

Hence, self-defence cannot entail that those who intentionally harm others (trying to run someone over) warrant a greater punishment than those who negligently harm others (having forgotten to check the brakes). Finally, moral education theory could recommend inappropriately severe penalties when necessary to improve the offender's moral character. Someone who speeds 10 kilometres over the limit might be unrepentant, requiring years in jail to get her to change.

The forward-looking theorist can in one fell swoop resolve the problems of punishing the innocent and punishing the guilty too harshly, but doing so comes at a price. What she can do is place constraints on her theory, holding, roughly, that punishment should be used to control serious crime as much as possible while neither punishing the innocent nor punishing the guilty more than is proportionate to the crime. Placing restrictions on the ways the state may use punishment to achieve the goal of reducing serious crime enables forward-looking theories to avoid absurd implications. However, the cost of this manoeuvre is an inability to explain why the implications are absurd. The restrictions are external impositions, ie they do not flow from forward-looking considerations themselves. It would be more elegant if a rationale for punishment itself explained why only the guilty are proper candidates for it and why their punishment should not be disproportionately high. As we see in the next part, this is precisely the advantage claimed for backward-looking theories.

Even if constrained forward-looking theories can avoid entailing that the innocent may be punished and that the guilty may be punished in a disproportionately harsh way, they cannot avoid entailing additional counterintuitive claims. Forward-looking theories invariably prescribe not punishing those guilty of serious crimes, when punishing them is not necessary to prevent other serious crimes. They also recommend punishing those guilty of serious crimes with trivial penalties, if this would be sufficient to prevent other serious crimes. Such prescriptions seem absurd, as the German philosopher Immanuel Kant contended long ago.[10]

Here is a case in which forward-looking theories entail that a person guilty of a serious crime should go free (or receive a light penalty). Imagine that a man killed his innocent wife so that he could get the life insurance money and that punishing this man would not do any good, either for the man or the community. So, suppose that during the trial, the man found God and had a complete change of heart, evidenced by great remorse. If so, then moral education considerations would not recommend punishment, since it would be unnecessary to promote rehabilitation. By the same token, there is no

[10] I Kant *The Metaphysics of Morals* (1797) 332–35.

need to incapacitate the man, since we know that he will not commit the crime again.

At this point, samaritanism and self-defence theory might still recommend punishment on grounds of deterrence. However, suppose now that punishing the man would not deter others from committing crime because, say, others would do their crime regardless of whether he were punished or not. Maybe others would simply be unaware of the man's court case and so would not know one way or the other whether he had received any penalty.

Now, not only would it do no good to punish this man, but it would in fact do only harm; it would cost a lot of money to punish him and would prevent the man from contributing to society at his job. Under these conditions, all forward-looking theories would instruct a judge to acquit the man or give him a suspended sentence. Or if the conditions were such that the man would be reformed and crime would be deterred upon imposition of, say, a few months in jail, a small fine or some community service, then the forward-looking theories would all prescribe such a mild penalty. Many find these to be implausible implications.

Some might be tempted to think that they are not implausible, since the offender was *ex hypothesi* rehabilitated. However, it is important to see that the current problem also obtains in cases where criminals are incorrigible. If we somehow knew ahead of time that no punishment would change an offender's heart (and perhaps that some non-punitive measure would), then moral education could not prescribe punishment. And if we knew both that the offender would harm more guards in jail than citizens in society and that other penalties would not deter others, then neither samaritanism nor self-defence could prescribe punishment. If you think that it is precisely such a hardened criminal whom the state would have strong reason to punish (and should punish severely), even if it would not do any good for him or society, then you will be sympathetic to the backward-looking theories we now explore.

III BACKWARD-LOOKING THEORIES

Forward-looking theories by definition say that, for legal punishment to be morally justified, it must (be expected to) have desirable consequences. Requiring that punishment have good results is of course what makes it impossible for them to entail that the state may (severely) punish an individual guilty of a serious crime, when doing so would have no good results.

One might wonder what moral justification there could be for punishment, if it truly would not have any good results (or would produce more bad results than good ones). However, a variety of backward-looking theories do not have us look into the future in order to know whether punishment is

permissible. They instead urge us to look back to the nature of the criminal and his crime. Whereas the forward-looking theories say that the correct amount of punishment for a person is roughly whatever will most reduce crime in the future (perhaps subject to certain constraints), backward-looking theories say that the right amount of punishment for a person is that which is proportionate to the crime that he committed in the past. Backward-looking theories differ over what it is about the crime that warrants proportionate punishment and over how to understand proportionality. In this part we examine the three most important rationales.

(a) Desert theory

The most famous backward-looking theory is desert theory. Sometimes this view is called 'retributivism' (literally, the pay back theory). However, since the term 'retributivism' is sometimes used to refer to backward-looking theories generally, we avoid using it here and stick to 'desert theory.' For an agent to deserve something is, roughly, for her to warrant something of the same kind and in the same proportion as some personal feature that she manifested in the past. For example, a student who has done well on an exam deserves the positive response of a good mark; the better her exam, the higher the mark she deserves. The desert theory of punishment, then, maintains that the state must punish a person because he warrants hard treatment due to, and in proportion to, his offence. The worse his offence, the harsher his penalty should be.

There is some dispute among desert theorists about how to unpack 'offence' and the punishment that 'fits' it. Long ago, desert theorists understood the relevant offence to be more or less harm to others forbidden by a moral or religious code, and they took punishment proportionate to it to be an action identical to the harm done to the victim. This is the *lex talionis* version of desert theory, expressed by the biblical phrase, 'an eye for an eye, a tooth for a tooth' (*Exodus* 21: 24).

However, most desert theorists now reject the *lex talionis*, for several reasons. One is that *lex talionis* permits barbaric punishments: if someone has tortured a person, this version of desert theory would have the state torture him in the very same way he tortured his victim. A second problem is that *lex talionis* does not take into account degrees of culpability. There are morally relevant differences between intentionally harming someone, negligently doing so and doing so by no fault of one's own. *Lex talionis*, however, draws no distinction between these scenarios, recommending the same amount of punishment for all of them if the same amount of harm has been done. A third objectionable feature of *lex talionis* is that it cannot prescribe punishment for conspiracy or attempts. If you try to kill someone and fail, causing no harm, then you deserve no punishment on this version of desert theory.

To deal with these problems, leading desert theorists have adopted a view that we may, following Robert Nozick, abbreviate 'R × W = P,'[11] where 'R' stands for responsibility, 'W' represents wrongful behaviour and 'P' means punishment. The basic idea is that the amount of punishment one deserves varies in proportion to the degree of the offender's culpability and immorality.

More specifically, the degree of responsibility or culpability for committing a crime ranges from 0 to 100, with a completely accidental or uncontrollable action receiving a 0 and a premeditated action performed by a fully competent adult getting a top score of 100. The degree of wrongdoing also ranges from 0 for a permissible action up to 100 for, say, the widespread and systematic rape, torture and murder of a group of people because of their ethnic characteristics. Of course, there will be competing accounts of wrongdoing, but, as with forward-looking theories, all desert theorists will agree that at least actions involving violence, substantial theft or the attempt to do these things are wrong. Now, the punishment a person deserves is fixed by the degree of his responsibility multiplied by the degree of his wrongdoing. If someone receives a 0 for either factor, ie is lacking either *mens rea* or *actus reus*, then the person deserves no punishment at all (0 times any number is 0). If, in contrast, someone receives the highest score of 10,000 (100 × 100), then she deserves the most severe punishment available to the state.

Note that on the R × W formula, the most severe punishment need not be identical to what the offender did to his victim. Instead, this formula prescribes a ranking of punishments that are roughly comparable to the crime. The death penalty or life in prison without parole would plausibly be the harshest punishment that a person could deserve from the state, on this version of the theory.

The R × W = P version of desert theory (which we now label simply 'the desert theory') is clearly backward-looking; for whether a person should be punished and how much are fixed by facts about the crime that he committed in the past. On this view, whether punishment of a person has a tendency to reduce crime in the future in no way determines the justification of his punishment. This feature of desert theory gives it certain apparent advantages relative to forward-looking theories. For instance, desert theory easily accounts for the intuition that it is wrong to punish the innocent. The innocent either have not done anything wrong (no *actus reus*, so that W = 0), or, if they have performed a wrong action, they are faultless for having done so (no *mens rea*, so that R = 0). Hence, desert theory entails that it would be immoral for the state to punish in the riot case, to adopt strict liability or to punish those with bad characters who have performed no wrong acts. And

[11] R Nozick *Philosophical Explanations* (1981) 363–97.

unlike constrained forward-looking theories, desert theory also provides an inherent explanation of why punishing the innocent in these cases would be immoral: they do not deserve it.

In addition, desert theory on the face of it both entails and explains why it would be wrong for the state not to punish those guilty of serious crimes or to punish them with trivial penalties. Letting the very guilty go free or giving them light sentences fails to give them the punishment they deserve. If their R × W formula is high, then they deserve a severe punishment, and desert theory says that punishment should be fixed by what people deserve. This arguably explains why it would be wrong not to punish in the murder for insurance money case discussed above.

However, critics of desert theory question whether it can truly claim all these advantages. It is particularly unclear whether the logic of desert truly prescribes punishing those guilty of serious crimes with severe penalties in all relevant cases. Consider that punishing people who deserve it often harms those who do not deserve to be harmed. For example, family members usually suffer emotional and financial harm when their guilty relatives are imprisoned. Now, harming those who do not deserve to be harmed seems morally worse than not punishing those who deserve to be punished. If so, the logic of desert entails that the state should not punish the guilty when punishing them would harm the innocent. Hence, desert theory would appear to require the state not to punish a rapist who has killed his victim if doing so would make the rapist's innocent family suffer psychologically or economically.

Desert theorists respond that the incidental undeserved suffering caused by punishing the deserving is not relevant to properly conceived considerations of desert. However, critics retort that it is difficult to see why not. For instance, South African judges may tailor the punishments they impose so as to minimise the harm done to innocent family members. Specifically, the law permits judges to do the following: impose periodic punishment, requiring a breadwinner to serve time only on weekends; postpone a sentence, permitting an offender to get his family affairs in order before being imprisoned; and sentence an offender to correctional supervision such as house arrest, community service and work programmes, enabling him to continue to live with his family.[12] These policies seem well explained by a need to avoid causing undeserved suffering. Hence, in those cases where punishing the guilty cannot avoid harming the innocent, it appears that desert does not easily justify punishing those who deserve it.

At this point, the desert theorist might argue that, at least in cases of serious crimes, her theory can entail that punishment is warranted. Perhaps

[12] Sections 276(1)(*h–i*), 276(A), 285 and 297 of Criminal Procedure Act 51 of 1977.

indirectly causing a minimal amount of undeserved suffering is permissible if necessary to directly impose a substantial amount of deserved suffering. So, considerations of desert seem to justify severely punishing a rapist who has killed his victim, even if this causes his family members some grief. The injustice of letting the killer go would outweigh the injustice of making his family unhappy.

This response is reasonable, but it cannot solve a related problem for desert theory. Imagine that on the way to the courthouse a serial rapist were accidentally hit by a bus or shot by his victim. Supposing that the rapist survived, it would seem that he has received his just deserts. If the state were now to punish him for his crimes, he would receive *more* than he deserves, meaning that desert theory entails that it would be wrong for the state to punish him. Desert theorists naturally respond that the rapist cannot truly receive what he deserves from bus accidents or vigilante activity. However, this strikes many as an unprincipled claim, and the burden is on desert theorists to explain why it is not. After all, consider the reactions of millions of movie-goers who think to themselves at the end of the film that the bad guy 'got what he deserved' when harmed in extra-judicial ways.

Desert theory might show that the state has a strong moral reason to (severely) punish the very guilty better than any forward-looking theory. However, it is worth seeing whether there is another backward-looking theory that can do better still.

(b) Fairness theory

Fairness or fair play theory maintains that state punishment is morally justified because it will restore an equitable balance of burdens and benefits among citizens. This account is both less familiar and more complex than desert theory.

Fairness theory conceives of the maintenance of government as a co-operative scheme in which certain benefits go to society as a whole if and only if some subset of the total population undergoes certain burdens. The primary benefit of government is an orderly society, which benefit extends to all citizens, so long as enough citizens undergo certain burdens. In particular, obedience to law is a key burden that a sufficient number of citizens must bear in order to keep a government functioning; imagine the chaos that would ensue if everyone routinely broke the law.

Now, if a person were to receive the benefit of an orderly society without undertaking the burden of obedience to law necessary to generate this benefit, then he would be taking a 'free ride' at the expense of law-abiding citizens. He would benefit without undergoing his fair share of sacrifice. Fairness theory says that punishment would be justified for this person, because it would take away the unfair advantage that disobeying the law gave

him at the expense of law-abiding citizens. Punishment would restrict his liberty, so that he no longer gets the benefit of government without his fair share of the cost needed to produce it.

The right amount of punishment, for fairness theory, is whatever will eliminate the offender's unfair advantage, ie make the offender's ratio of benefits and burdens equal to that of the innocent. The more unfair advantage taken in breaking the law, the more punishment that is needed to correct the unfairness. Fairness theorists disagree about how to measure the degree of unfair advantage obtained by criminal activity. Some measure it by borrowing the desert theorist's R × W formula; the greater the culpable wrongdoing, the greater the liberty taken at the expense of law-abiding citizens. In contrast, the most influential fairness theorist, Michael Davis, maintains that a crime takes more unfair advantage of law-abiding citizens, the more that they would have been willing to pay in a hypothetical auction for a licence from the state granting permission to commit the crime.[13] Notice that however unfair advantage is measured, the amount of punishment is determined strictly by the crime the offender has already committed, and has nothing to do with whether it will prevent any crime in the future.

Fairness theory and desert theory both deny that the permissibility of state punishment is contingent upon its results, but they differ with regard to legal punishment's proper function. According to fairness theory, the point of state punishment is to correct exploitation on the part of the offender. One who violates the law has obtained a benefit at the expense of law-abiding citizens, and state punishment imposes a cost on him, so that his ratio of benefits and burdens better approximates, if not equates, that of the innocent. In contrast, for desert theory, the point of legal punishment is to give the guilty the harm they deserve for having culpably broken a just law. What makes murder warrant a stringent penalty, according to fairness theory, is that the offender has taken a great liberty at the expense of those who have not committed murder. In contrast, desert theory maintains that stringent punishment is required because of what the offender has done to the murdered party.

Does the explanatory difference between the two theories better enable fairness theory to account for considered judgments about whom to punish and how much? It appears not. Fairness theory does seem to rule out punishing the innocent.

A person without *actus reus* has not broken the law and thereby obtained benefits without her fair share of the burdens. A person with *actus reus* but lacking *mens rea* might have a lesser share of burdens than law-abiding citizens, but he has not really 'taken advantage' of them or 'exploited' them

[13] M Davis *To Make the Punishment Fit the Crime* (1992).

in the standard senses of these terms. However, like desert theory, fairness theory has problems entailing that state punishment of the very guilty is justified in the range of cases in which we intuitively think it is. Two illustrations of this problem follow.[14]

First, imagine that a citizen of another country intentionally dropped a bomb on Johannesburg from an aircraft. Suppose that this person had spent no time in South Africa; he merely flew over the territory in order to commit the crime. Since this alien had not received the benefits of South African government and, hence, did not exploit fellow citizens in breaking the law, fairness theory fails to justify his punishment. However, punishment would surely be justified for such a breach of the law against murder.

One might try to defend fairness theory by saying that there is a worldwide cooperative scheme, even if not a world-government. Even if there were such a scheme, so that the bomber exploited the world's law-abiding citizens, this would not solve the deep problem; for punishing the bomber surely would have been permissible prior to the emergence of any global cooperative scheme. Furthermore, considerations of globalisation will not solve the next instance of the problem facing fairness theory.

Here is a second scenario in which punishment of a certain person seems warranted although he has not taken unfair advantage of law-abiding citizens. Suppose a person had been convicted of housebreaking when he was in fact innocent of having committed any crime. Imagine that he received three years of jail, which is, let us assume, the amount of punishment fairness theory prescribes for housebreaking. Finally, suppose that, after serving three years, the person then decided to break into a house. Fairness theory apparently cannot prescribe state punishment of this person for actually having broken into a house, since the person already unfairly lost three years of liberty which fits that crime. Of course, sympathy and compensation are due to the wrongly convicted person. However, few accept that the state would have no moral reason to punish him for committing the crime, something fairness theory evidently entails.

It remains to be seen whether any of the extant accounts of legal punishment can account for the intuition that the state always has some strong moral reason to punish those guilty of serious crimes and to do so in a severe way. Let us now consider the third important backward-looking theory of punishment in the literature.

[14] See T Metz 'Censure Theory and Intuitions about Punishment' (2000) 19 *Law & Philosophy* (2000): 491–512. This article informs much of this chapter's discussion about which theory of punishment best accounts for the judgment that the state always has strong moral reason to punish those guilty of serious crimes and to do so with severe penalties.

(c) Censure theory

Censure theory, also known as 'expressivism,' maintains that state punishment is justified because it is the right way for it to express disapproval of those who have culpably broken just laws. Almost no thorough articulations of this view say that the state has moral reason to express disapproval of injustice simply for its own sake. Most instead maintain that expressing disapproval of injustice by means of punishment is the only or right way for the state to discharge other expressive obligations it has. For example, censuring injustice with hard treatment is arguably the way to treat offenders as responsible moral agents; to affirm the value of victims in the face of mistreatment by offenders; and to disavow wrongful actions. To refrain from punishing crimes would not fully treat offenders as persons who made a choice to act immorally; would respond to victims as though they are unimportant; and would make the political community complicit in crimes.

The right amount of punishment, on this view, is whatever is proportionate to the seriousness of the offence. Proportionate censure of an offence requires (or is identical to) proportionate punishment of it. Most censure theorists adopt the desert theorist's R × W account of how serious an offence is. The more culpable the offender for the act, and the worse the act's immorality, the more serious the offence. And the more serious the offence, the stronger the censure of it must be, and hence the harsher the penalty for it must be.

Let us contrast censure theory with the other two backward-looking theories. As we have seen, fairness theory says that murder warrants punishment because the murderer has exploited those who have not murdered. In contrast, censure theory sides with desert theory in saying that the explanation of why murder warrants punishment has to do with the way the murderer treated the murdered person. Censure theory and desert theory differ, however, in terms what it is about this treatment that justifies legal punishment. Desert theory says that the state should punish the killer because he deserves it for culpably wronging his victim, whereas censure theory says these kinds of things: the state should punish the killer in order to affirm the worth of the victim or to treat the killer as responsible for his wrongful treatment of the victim.

Censure theory's account of why punishment is justified seems to enable it to account for intuitions about punishing the guilty better than desert or fairness theory. Since proportionate censure of serious crime requires (or simply is) proportionate punishment, and since all those guilty of serious crime warrant proportionate censure from the state, the state always has a strong moral reason to punish those guilty of serious crime and to do so severely.

Desert theory and fairness theory share a feature — lacking in censure theory — that prevents them from entailing that all the (very) guilty pro tanto warrant (severe) punishment. The problem common to fairness theory and desert theory is that they make the justification of legal punishment depend on its being proportional to something beyond guilt that obtained in the past. Fairness theory justifies punishment only if it corrects unfair advantage, where unfair advantage is a function of benefits and burdens the offender had prior to the breaking the law. Similarly, on the straightforward understanding of desert theory, punishment is justified only if it matches the amount of harm a person has coming when taking into account past harm he may have suffered.

Censure theory, however, does not tie the permissibility of punishment to the degree to which the offender has been benefited/burdened in the past: all that matters from the past for censure theory is the bare fact of culpable wrongdoing. Censure theory requires legal punishment merely to express disapproval in proportion to the seriousness of the offence. Since all offenders are proper candidates for proportionate censure from the political community, which, by hypothesis, must take the form of punishment, all offenders are proper candidates for proportionate legal punishment.

So far we have noted that censure theory apparently best captures the intuition that it is wrong not to punish the very guilty and or to punish them with a light penalty. Censure theory also does well at accounting for the judgment that it is wrong to punish the innocent; the innocent have committed no offence warranting censure and hence warrant no punishment.

However, it may be questioned whether censure theory forbids punishing the innocent in all the cases where it seems impermissible. For instance, the view might licence collective punishment, in which innocent relatives of an offender are punished. Imagine that the state sought to express disapproval of an offender by punishing not him, but his daughter. Censure theory has a hard time explaining why this would be immoral, for it appears to be one straightforward way of censuring the offender.

Censure theorists may respond that punishing the daughter for the father's crime is not to express disapproval of the father, but rather of the daughter alone. But this is not obviously true. One could express one's love of the father by helping to pay for his daughter's university education. By analogy, it would seem that the state could express its disapproval of the father by harming his daughter.

A stronger response would probably grant that it is possible to express disapproval of a person by harming his innocent relative, but maintain that this form of censure would not discharge the expressive obligations that underlie the state's duty to censure. Recall that one major reason censure

theorists say the state has a duty to censure an offender is that it must treat him as a responsible agent. Now, suppose the state must treat everyone, not merely offenders, as responsible agents. Such a general duty to treat people as responsible agents would presumably forbid censuring an offender by punishing his innocent daughter. A related manoeuvre would be to maintain that the state must treat everyone as having an equal intrinsic worth, something it would be failing to do if it treated an innocent daughter merely as a means to express disapproval of her guilty father. Both duties to treat people as responsible agents and to treat people as equally valuable likely spring from the more basic duty to treat the dignity of persons with respect.[15]

(d) Problems with backward-looking theories

In this and the previous part, we have been assuming that it is a strike against a theory if it cannot entail that there is always some strong moral reason for the state to punish those guilty of serious crimes and to do so severely. Reflection on the murder for insurance money case supports such an assumption. Since the backward-looking theories (and specifically censure theory) seem to account for this assumption better than the forward-looking ones, we have considered the former to be more attractive in this respect. However, forward-looking theorists would have us reconsider the assumption that it is wrong for the state not to punish (severely) those guilty of serious crimes, in those cases where punishing would not have good results.

For example, it might seem pointless to intentionally inflict hard treatment on a person if the state expected no good to come from it for him or the community. If it were really true that the husband in the murder for insurance money case were reformed prior to sentencing, then it would be gratuitously cruel for the state to inflict suffering on him. Or if this offender were incorrigible but would do the least harm if acquitted, then it would be irrational for the state to let him do more harm by punishing him. Or so forward-looking theorists suggest.

Backward-looking theorists respond by reminding us that we often think it right to act for the sake of desert, fairness and censure in areas of life other than punishment, even when doing so comes at the cost of harm. For instance, if a student did poorly on an exam, few people believe that it would be right for the instructor to secretly award her a high mark. Most believe the teacher should give a low mark, even if doing so would cause the student and her family a lot of misery.

Forward-looking theorists often respond here by suggesting that considerations of harm in fact underlie this kind of judgment. For example, it might be other students that would likely learn about the unearned mark and be

[15] This Kantian moral principle is discussed in chapter 15.

very upset, or perhaps the student's unearned mark would enable her to take other courses in which she would fare poorly. It is worth thinking about whether forward-looking considerations ultimately provide adequate justification for what appear to be backward-looking ones.

In addition to punishing the guilty too much on certain occasions, critics object that backward-looking theories would punish the guilty too little on others. Specifically, backward-looking theories are thought to punish repeat offenders too lightly. Suppose someone steals a car, receives the proportionate punishment and then steals a car again. All backward-looking theories seem to entail that this offender may not receive a harsher punishment the second time. Instead, since the penalty must fit the offence, and since the second offence is the same as the first offence, the second offence should receive the same penalty as the first one. However, many find this to be an objectionable feature of backward-looking theories; surely, critics say, a judge has strong reason to punish someone more severely for committing the same crime a second time. And forward-looking theories easily explain why a repeat offender should be punished more harshly: he obviously requires a greater punishment if he is going to be deterred, incapacitated or reformed.

Backward-looking theorists respond to this problem in different ways. Michael Davis argues that fairness permits punishing recidivists more harshly since, in 'going back for seconds,' they have taken advantage of their fellow citizens in an additional way.[16] In contrast, desert and censure theorists usually invoke the R × W formula, arguing that the offender's responsibility is greater when he commits the same crime a second time; he should know better by then. Other backward-looking theorists simply bite the bullet and maintain that punishment should not increase for recidivists. They say that taking previous convictions into account is an unjust form of double jeopardy, a matter of punishing people again for a crime for which they have already been punished. Forward-looking replies to these claims are of course forthcoming.

A third objection to backward-looking theories of punishment is that they clash with our most promising theories of the state. If one poses the question of why the state should exist at all, most answer by saying that, of any alternative arrangement, having a state does the best job of protecting people from both foreign invasion and domestic crime. Or, if one assumes that a state should exist and asks what its proper function should be, an almost universal answer is that it ought at least to fight serious crime. These accounts of the state's legitimacy and purpose do not jibe well with backward-looking theories of legal punishment. Backward-looking theories deny that punishment (perhaps a defining feature of the state) is morally justified because it

[16] M Davis 'Harm and Retribution' reprinted in A Simmons et al (eds) *Punishment: A Philosophy and Public Affairs Reader* (1995) 188–218.

promises to prevent crime. They maintain that legal punishment's aim should instead be to respond proportionately to crime that has already been committed. While there might not be a logical contradiction here between a forward-looking account of state action and a backward-looking account of legal punishment, there is certainly an apparent tension.

In response, backward-looking theorists can point out that even if state action must be oriented toward reducing crime, it does not follow that all of it must be. Perhaps the legislature could adopt policies that would prevent people from becoming criminals, while the judiciary could focus on giving people who have become criminals the punishment proportionate to their crimes. In addition, backward-looking theorists can note that if two different penalties would equally fulfill the demands of desert, fairness or censure, then judges may pick the penalty that would do the best job of deterring, incapacitating or reforming. For instance, if five months of imprisonment is equivalent to a fine of R10,000, if either sentence would be proportionate to the crime, and if imprisonment would protect society more than a fine, then backward-looking theories would permit a judge to opt for imprisonment. Forward-looking theorists naturally reply that these responses are inadequate; legal punishment, they say, is the state's most effective crime fighting technique. If the point of having a state is to fight crime, then it must be allowed to use its foremost weapon without backward-looking constraint.

In sum, backward-looking theories might objectionably punish the guilty too harshly (when a proportionately severe penalty would have no good results), punish the guilty too lightly (when they are recidivists), and be inconsistent with commonly held views of what a state is for (crime control). The strength of these objections has to be considered and then compared with the strength of the objections facing forward-looking theories, that these theories cannot adequately explain why it is wrong to punish the innocent and that they entail that there is sometimes no moral reason for the state to punish those guilty of serious crimes. Instead of coming to some conclusion about whether forward- or backward-looking theories are more attractive, we now consider which theory, if any, best captures South Africa's sentencing policies.

IV SENTENCING IN SOUTH AFRICA

The theories we have explored in this chapter are idealisations. They maintain that a single principle suffices to answer the questions of why punish, whom to punish and how much to punish. There is no country in the world in which any one of these theories is strictly followed. Although there are theorists who believe that one of these principles is the whole story about the moral justification of punishment, there are others who hold that the principles should be tempered and combined. In particular, there are those

who hold that legal punishment is justified because of a combination of forward- and backward-looking considerations. As we see below, South Africa's sentencing policies have this kind of hybrid character.

South Africa's sentencing policies are relatively uncodified. Judges by and large have discretion over the penalties they impose.[17] What explicit and presumptive law there is, however, indicates that the judiciary punishes based on both 'the interests of society' (forward-looking) and 'the nature of the crime' (backward-looking).[18] Clearly backward-looking elements include the following: punishment of those known to be innocent is forbidden by the Constitution[19]; disproportionately high penalties are generally avoided,[20] as are disproportionately low ones[21]; and there is a presumption that two offenders should receive comparable sentences for the same offence.[22] Manifestly forward-looking factors in South African sentencing policies include these: offenders with previous convictions are often punished more severely than those without[23]; punishment is routinely increased if the crime in question is prevalent in society[24]; and indeterminate sentences are employed.[25]

Most of these diverse elements of South African sentencing can be unified if we say that punishments are largely forward-looking subject to the backward-looking constraint that punishment not be grossly disproportionate. In our broad use of the phrase here,[26] 'grossly disproportionate' sentences include the following: punishing a person innocent of any *actus reus* or punishing a guilty person not at all, *much* too lightly or *much* too harshly given the nature of the crime. Avoiding such sentences of course does not itself constitute the adoption of any full-blown backward-looking theory; a backward-looking theory recommends *exact* proportionality in sentencing

[17] An important exception is the mandatory minimum sentence law, discussed below.

[18] Both are deemed relevant in *S v Maarman* 1976 (3) SA 510 (A).

[19] Republic of South Africa Constitution Act 108 of 1996 (1996 Constitution) chapter 2.

[20] It is deemed unjust to impose overly harsh penalties for the sake of deterrence in *S v Sobandla* 1992 (2) SACR 613 (A).

[21] A suspended sentence and fines for thefts totalling R300 000 is overturned and substituted with four years' imprisonment in *S v Sadler* 2000 (1) SACR 331 (SCA).

[22] The principle of equal punishment of equal offences is invoked in *S v Marx* 1989 (1) SA 222 (A).

[23] Section 271 of Criminal Procedure Act 51 of 1977 permits courts to become aware of previous convictions when sentencing. For discussion on harsher sentences for repeat offenders, see *S v Nuggel* 1998 (2) SACR 414 (C). The principle of equal punishment of equal offences is considered defeasible in light of previous convictions in *S v Arendson and Another* 1999 (1) SA 454 (C).

[24] The prevalence of armed robbery is deemed good reason to impose a stiff sentence for it in *S v Valley* 1998 (1) SACR 417 (W).

[25] Sections 286, 286A and 286B of Criminal Procedure Act 51 of 1977 permit a court to declare offenders to be 'habitual' or 'dangerous' criminals and on this basis to detain them indefinitely (up to 15 years for habitual criminals).

[26] When courts speak of 'gross disproportionality', they usually mean overly harsh sentences alone.

and does not prescribe any penalty fundamentally to prevent crime. The South African judiciary, in contrast, routinely imposes what backward-looking theorists would deem to be penalties that are disproportionate to the crime in order to deter, incapacitate and reform, while largely avoiding *grossly* disproportionate penalties.

Besides capturing the sundry maxims that lower courts often use to guide their sentences, this hybrid account of legal punishment[27] accords well with principles explicitly articulated in several higher court rulings. For example, when indeterminate sentencing policies have been challenged as unconstitutional, the Supreme Court of Appeal and the Constitutional Court have held that they legitimately safeguard the interests of the community while not violating principles against overly harsh penalties given the nature of the crime.[28]

Pure theorists would object in different ways to South Africa's hybrid model. Forward-looking theorists would recommend differential sentences for the same offences, or grossly disproportionate sentences, if they would be more likely to prevent crime by, say, deterring would-be criminals. And backward-looking theorists would say that it should be irrelevant whether many others are committing the offender's crime, for this has nothing to do with its inherent nature. Let us turn now to some additional differences between these two camps.

V APPLYING THE THEORIES

In this final part, we examine what the two major perspectives on legal punishment would likely say about pressing issues facing the South African criminal justice system. As elsewhere in this chapter, the aim is not to come to a conclusion about what should be done; it is instead to help the reader make an informed judgment.

(a) High levels of serious crime

The fact that South Africa suffers from some of the highest rates of serious crime in the world is something that forward- and backward-looking theories address in different ways. Reported crime skyrocketed after the transition to democracy in 1994, but much of this was due to improved reporting and not more crime (before 1994 the South African Police Service did not ascertain

[27] For other hybrid models, see J Rawls 'Two Concepts of Rules' (1995) 54 *The Philosophical Review* 3–32; and P Hofer & M Allenbaugh 'The Philosophy of the Federal Sentencing Guidelines: Still Incoherent After All These Years?' (available online at *http://www.law.yale.edu/outside/pdf/centers/sentencing/Hofer-Paper.pdf*).

[28] *S v Ball and Another* 2001 (2) SACR 681 (SCA); *S v Niemand* 2001 (2) SACR 654 (CC); cf *S v Dodo* 2001 (1) SACR 594 (CC), discussed below.

crime rates for the ten black homelands, which left out close to 18 million people).[29] Even so, from 1994 until fairly recently, reported rates of many serious crimes continued to rise. In particular, the reported levels of rape, serious assault, vehicle theft/hijacking, housebreaking and robbery rose higher than the increase in population and higher than the general increase in crime.[30] Consider that in 1997 Interpol statistics showed that South Africa had the highest per capita rates of murder and rape of the 110 countries it covers;[31] in 1998 reported hijackings had more than doubled from 1995;[32] in 1999 a third of all crimes reported to police involved violence.[33] Despite recent claims that the most serious crime rates have levelled off or are decreasing, a woman still has a greater chance of being raped than of learning to read.[34] Keep in mind, too, that, except for murder and car theft, crimes are about 50 per cent underreported.[35]

Backward-looking theorists maintain that, despite these dire conditions, it would be wrong for the state to use punishment with an aim to fighting crime. It should rather adopt certain economic and rehabilitative policies that would have a good chance of reducing it, or pick those proportionate penalties that are most likely to reduce it. Forward-looking theorists maintain it is unrealistic, even naïve, to think that the state could effectively reduce crime without imposing penalties that backward-looking theorists would deem disproportionate and hence unjust.

Let us examine three specific ways in which forward- and backward-looking theories prescribe different penalties in light of serious crime in South Africa. We have already encountered one difference, regarding how prevalent a certain crime is. Take the widespread crime of housebreaking. Forward-looking theories could entail that it is permissible to give a housebreaker a very stiff sentence so as to 'make an example' of him and deter others. In contrast, backward-looking theories universally entail that the offender should receive whatever penalty fits the crime of housebreaking, regardless of what effect this penalty would have on others who are committing it.

[29] M Schönteich & A Louw 'Crime Trends in SA 1985–1998' Centre for the Study of Violence and Reconciliation (1999).

[30] C W Marais 'Safety and Security in South Africa 1999–2000' Crime Research in South Africa (2001).

[31] M Schönteich & A Louw 'Crime in South Africa: A Country and Cities Profile' Occasional Paper #49, Institute for Security Studies (2001).

[32] M Schönteich and A Louw 'Crime Trends in SA 1985–1998' (note 29 above).

[33] M Schönteich and A Louw 'Crime in South Africa' (note 31 above). The authors point out that the United States, considered a violent society, has a rate of 15%.

[34] C Dempster 'South Africans are Mobilising against Sexual Violence' *BBC News* 9 April 2002.

[35] T Leggett 'What Do the Police Do? Police Measurement and the SAPS' Occasional Paper #66, Institute for Security Studies (2003).

Another difference arises in the context of what leads people to commit crime. Suppose that, because of high unemployment, extreme poverty, rising expectations and economic disparities, a substantial minority of people have strong motivations to steal. Few legal punishment theories would entail that no penalty at all is warranted for those who steal cell phones at knifepoint (perhaps unless it were an extreme case of having to steal in order to prevent starvation). But they potentially differ with respect to the amount of punishment that should be imposed. Some (but by no means all) backward-looking theories would say that the offender's rotten social background should be a mitigating factor when it comes to punishment. That is, because South Africa's environment provides such strong temptation to commit crime, the level of responsibility for committing it is perhaps somewhat reduced, so that the R × W formula might prescribe less punishment. In contrast, some forward-looking theories could prescribe a stiffer penalty in light of rotten social background. Any strong socio-economic temptation to commit crime should be countered with an even stronger penalty, so as to make it less likely that crime will be committed.

A third difference concerns the fact that so few offenders are caught in South Africa. One major study concludes, 'For every 100 violent crimes (murder, rape and aggravated robbery) reported to the police, perpetrators in only six cases had been convicted after more than two years.'[36] The low conviction rate does not *prima facie* warrant increasing penalties for any backward-looking theory. In contrast, to a forward-looking theory it probably means that sentences ought to be disproportionately severe. It is fairly uncontroversial among criminologists that it is certainty, not severity, that largely deters. That is, the likelihood of getting caught deters much more than the harshness of the penalty. Since so few crimes are reported to police, let alone lead to arrests and convictions, penalties can deter only if their severity is so high as to make up for the lack of certainty.

Backward-looking theorists have a reputation for being tough on criminals, in part because they deny that an offender's reform merits a lighter sentence or early release. However, these three examples indicate that, at least in a South African context, the forward-looking theorist will often recommend penalties that are quite severe.

(b) Mandatory minimum sentences

According to one poll, 80 per cent of South Africans think that imposing stiffer sentences would be a particularly effective technique for reducing

[36] See the South African Law Commission 'Conviction Rates and Other Outcomes of Crimes Reported in Eight South African Police Areas' Research Paper #18, Project #82 (2000).

crime.[37] Apparently as a result of public sentiment, in 1997 the legislature enacted a statute imposing mandatory minimum sentences for many crimes (unless 'compelling and substantial circumstances' warrant otherwise),[38] which sentences are generally stiffer than what were previously imposed. For instance, a judge must imprison for life those who are found guilty of gang rape or of murder in the course of attempted armed robbery.

This law was adopted with forward-looking aims in mind, but it is not obvious whether it will help to realise them. On the one hand, it was thought that surer and stiffer penalties would act as a deterrent. Forward-looking theories might also underwrite mandatory minimum sentences on grounds of incapacitation. Criminologists believe that, in most societies, a relatively small handful of young males are responsible for a large majority of serious crimes. If the state were to succeed in putting a good portion of this group behind bars for an extended time, then crime might be expected to decrease.

On the other hand, in light of the abysmal conviction rate, it is questionable whether mandatory minimum sentences can deter. In addition, they might frustrate the aims of rehabilitation. For instance, if a person knows he cannot be released early, he has less incentive to improve himself.

Backward-looking theories could justify mandatory minimum sentences in principle, so long as the sentences fit the nature of the crimes. However, most of them entail that the particular law put into practise in South Africa is objectionable for prescribing disproportionately harsh penalties. One might find life in prison to fit the crimes of gang rape or murder. However, the law now also requires a judge to imprison for no fewer than 15 years a first-time car thief and a police officer who has stolen R10,000 for the first time. These penalties are quite likely excessive from the perspective of desert, fairness or censure.

The mandatory minimum sentence law was challenged as unconstitutional for imposing grossly disproportionate sentences, but the Constitutional Court upheld the law.[39] Roughly, the Court ruled that since judges have the discretion not to impose a mandatory minimum sentence when there are 'substantial and compelling circumstances,' and since these circumstances can include gross disproportionality, the act does not require judges to impose grossly disproportionate sentences. However, a backward-looking theorist could plausibly question this reasoning in that it treats gross disproportionality as an exceptional circumstance and not as inherent to the mandatory minimum rule itself. A 15 year sentence for the first offence of

[37] M Schönteich 'Sentencing in South Africa: Public Perception and Judicial Process' Occasional Paper #43, Institute for Security Studies (1999).
[38] Section 51 of the Criminal Law Amendment Act 105 of 1997.
[39] *S v Dodo* 2001 (1) SACR 594 (CC).

stealing R10,000 is perhaps *always* grossly disproportionate to the nature of the crime, not merely under unusual conditions.

(c) Restrictions on parole

The mandatory minimum law was not the only one passed in 1997 out of a concern to fight crime. The legislature also passed a law extending the time prisoners must serve to at least half their sentence (or 25 years) before being eligible for parole, reasoning that this would obviously provide more incapacitation and might better deter as well.[40]

Although it is reasonable to think that forward-looking accounts would approve of restrictions on parole, there are also reasons to doubt this. After all, if a person has been rehabilitated while in prison, most forward-looking theories entail that he should be released. Since reform has been achieved, it makes no sense to punish for the sake of incapacitation or special deterrence. Although others might be deterred if a reformed offender were kept in jail, others might also be motivated to reform themselves upon seeing his release. There are, therefore, some strong reasons for forward-looking theorists to be wary of the parole law.

In a perfectly backward-looking system, there would be no place for parole, even in cases of good behaviour or moral reform. If the initial sentence prescribed were proportionate to the crime, then that would be the end of the matter. As we saw above, backward-looking theorists can approve of proportionate penalties such as periodic punishment that avoid making family members and the community suffer. However, they disapprove of reducing penalties, supposing they fit the crime. The only time a strict backward-looking theorist would find parole permissible is when the sentence decreed by the judge was disproportionately harsh; then a parole board could rectify the judge's mistake and see that the offender receives a justly proportionate penalty.

(d) The death penalty

As is well known, the death penalty was declared unconstitutional for violating offenders' rights to life and to dignity.[41] Many South Africans lament its demise, with 75 per cent wanting Parliament to bring back the death penalty because they think it will deter potential criminals.[42] Laypeople often think that the death penalty is warranted on forward-looking grounds, but the Constitutional Court points out that relatively few scholars

[40] Parole and Correctional Services Amendment Act 87 of 1997.

[41] *S v T Makwanyane and M Mchunu* 1995 (3) SA 391 (CC); cf *S v Williams* 1995 (3) SA 632 (CC), in which the Court struck down laws permitting corporal punishment.

[42] M Schönteich 'Sentencing in South Africa' (note 37 above).

believe this. It is a commonplace in criminology that there are no conclusive studies showing that the death penalty deters serious crimes such as murder. The reason it probably does not deter much, if at all, is that a large majority of murders are committed in a state of mind disinclined to think about the consequences. And those murderers who do contemplate and fear the possibility of punishment cannot easily be deterred, at least in South Africa, because the chance of getting caught is so low. Another consideration from the Court is that other very stiff penalties, such as life in prison without parole, likely both deter and incapacitate nearly as well as death.

If the death penalty is justified, it is probably so on the basis of backward-looking grounds. However, the Court rejects 'retributive' arguments for the death penalty. For one, the Court denies that censure theory justifies the death penalty. Contrary to the view that death is necessary to adequately express disapproval of certain offences, the Court maintains that life in prison would be sufficient and that the community's desire to express outrage is not a value sufficient to justify violating offenders' rights to life and to dignity. For another, the Court associates 'retribution' with a desire for vengeance, holding that it is an inappropriate reason to punish in a society based on the values of freedom, equality and *ubuntu*.

Here are some ways that backward-looking theorists might respond to the Court. First, almost no backward-looking theorist maintains that revenge is a good reason for the state to punish[43]; notice that we never spoke of vengeance when critically discussing backward-looking theories in part III. These theories maintain that the right penalty is the one that is proportionate to the crime, but proportionality is not inherent to revenge.

Second, one might try to defend a censure theoretic justification for the death penalty by pointing out that expressing disapproval of offenders is not merely for the community to vent its anger. Instead, expressing disapproval of offenders is a matter of treating them as responsible and of standing up for victims, which ideals cohere with a society based on freedom, equality and *ubuntu*.

Third, backward-looking theorists who support the death penalty can appeal to desert theory, a view the Court does not sufficiently address. The desert theory seems to easily justify capital punishment. Surely some people deserve to die for their wicked crimes, so that if desert justifies punishment, the death penalty is justified. Or so the argument goes.

While a number of desert theorists believe that the death penalty is justified, some do not. Some of them deny that the death penalty is deserved for any crime. When ranking punishments, ranking crimes, and then matching them up, these desert theorists simply refrain from putting the

[43] For a notable exception, see P French *The Virtues of Vengeance* (2001).

death penalty at the top of the punishment list. Instead, they typically deem life in prison without parole to be the penalty that is comparable to the worst crimes. The trouble with this stance is that, if one believes in deserved punishment in the first place, then one will find it intuitively appealing to think that at least some people deserve to die, eg those who have actively taken part in crimes against humanity.

Other desert theorists grant that death is a penalty fitting certain crimes, but deny that it is always permissible to impose precisely the penalties that are deserved. These thinkers grant that rape would probably be a penalty deserved for the crime of rape and that torture would be deserved for torture. However, they maintain that, just as it would be objectionably degrading for the state to impose such penalties on rapists and torturers, so it may not kill killers. Such a position of course introduces an exception into the desert theorist's principle, an exception she must explain in light of her resistance to making an exception in the case of, say, parole for rehabilitated offenders.

(e) Victim impact statements

Many of those who have studied South Africa's criminal justice claim that it is not giving victims their due. One way for the courts to act for the sake of victims would be to let victims make impact statements at sentencing. Victims could be allowed to present a written or oral report to the judge about the specific ways that the crime has affected them, partly in light of which the judge would impose a sentence. Victims here are typically those directly harmed by the crime, but they usually also include witnesses who were psychologically harmed by having seen it. The South African Law Commission has recommended introducing victim impact statements into South Africa's courts.[44]

Backward-looking theorists have reasons to be suspicious of permitting victim impact statements to influence sentences. As articulated in a major Supreme Court case in the United States,[45] victim impact statements can highlight unforeseeable harm that the offender did to his victim, harm that does not obviously count as part of 'the nature of the crime.' Imagine, for instance, that someone committed armed robbery, and it so happened that the man's estranged daughter was watching from the other side of the road and traumatised by the event. Suppose that there was no way that anyone, including the robber, could have foreseen that the man's long-lost daughter would be nearby. Some backward-looking theorists deny that the offender

[44] South African Law Commission 'Sentencing (A New Sentencing Framework)' Discussion Paper #91, Project #82 (2000).

[45] *Payne v Tennessee* 501 US 808 (1991). The American Court upheld victim impact statements as constitutional.

should be punished for the harm unforeseeably done to the daughter. They generally think this because they deem it wrong to hold someone accountable for factors over which he had no control, unforeseeable harm being one such factor. Victim impact statements, however, would invite judges to sentence partly on the basis of harm that was unforeseeable to the offender.

This issue raises the tricky question of what a 'crime' essentially consists of. Does the harm done to the daughter count as part of the crime of armed robbery? More generally, does unforeseeable harm caused in the course of an illegal act count as part of the 'crime' warranting a proportionate penalty? Backward-looking theorists disagree about the answer to this question.

Forward-looking theorists can avoid these complexities, although they face others. For them, the central issue is whether permitting victim impact statements is likely to influence sentencing in such a way as to reduce crime. Presumably, victim impact statements would tend to result in somewhat stiffer sentences for offenders. It requires some subtle criminological research to know what the effects there would be on crime rates.

(f) Conclusion

In this chapter we have explored six fundamental moral reasons that have been thought to justify legal punishment. They are the views that the state should punish because it must: help society, protect the innocent at the expense of the guilty, help those punished, give people what they deserve, promote a fair distribution of benefits and burdens, and express disapproval of offenders. We have examined arguments for and against these rationales, and have applied them to contemporary moral issues in South Africa. The reader should now be in a better position to analyse and evaluate the South African criminal justice system.

QUESTIONS

(1) Sketch a scenario in which fairness theory would likely convict a person but self-defence theory probably would not.

(2) Sketch a scenario in which censure theory would probably not convict a person but samaritanism likely would.

(3) Many legal thinkers maintain that juveniles should not be punished as harshly as adults for the same criminal deeds. Why might moral education theory entail this? Why might desert theory?

(4) Suppose someone steals mobile phones, which he then sells in order to support a drug habit. What might a desert theorist say about how much punishment he should get relative to someone to steals in order to buy CDs to play on his stereo? What might a samaritan say?

(5) What do you think is the most promising response that backward-looking theorists can make to the objection that their view does not permit harsher sentences for recidivists?
(6) What is the best response that forward-looking theorists can make to the objection that their view sometimes entails that the innocent should be punished?
(7) Would it be wrong for the state to torture torturers or rape rapists? If so, would it be analogously wrong to kill killers? Why or why not?
(8) Are South Africa's mandatory minimum sentences just? Why or why not?

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Jurisprudence is a comprehensive treatment of the subject by many of the leading legal theorists in South Africa. Each of the major schools of jurisprudence, as well as a number of the major issues in jurisprudence, are discussed in a sophisticated yet accessible style. Each of the schools is assessed for its relevance to South Africa and South African law.

Further, *Jurisprudence* provides the reader with an introduction that contains a meta-theoretical approach and set of tools for systematically evaluating the many and various theoretical claims found within the book and in the subject more generally.

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