

SECTION D. PUNISHMENT

Several decades of theoretical discussion concerning the concept and social function of punishment within society have yielded a number of important principles, leading to a reasonable understanding of punishment. These principles are explicated in this section, and include: the proportionality principle (in which the punishment must fit the crime), elements of deterrence (as in the consequential or utilitarian approaches), and humane treatment of convicts. However, several marginal and problematic situations still remain where additional considerations must be entertained, situations that vex the ethicist bent on making theory adhere to praxis. One acute problem in the current practice of punishment is that it is imposed by imperfect legal systems, whose obligation is first and foremost toward the rule of law, and not necessarily to moral or ethical considerations. This may cause distortions in the implementation of punishment, such as overly lenient penalties (in domestic abuse, for example), and exceedingly severe ones (such as the death penalty for the mentally retarded). I examine the complexity of these issues in the different cases I bring up in this section.

CHAPTER 11: PUNISHMENT OF SEX OFFENDERS

This chapter first discusses general characteristics of punishment as a whole as the background for the expectations we have for the punishment of sex offenders. These characteristics include the proportionality principle in which the punishment must fit the crime. However, I take into consideration that our usual guidelines regarding punishment are somewhat insufficient when we discuss punishment for

sex crimes, due to the propensity of these types of crimes to arouse extreme emotional reactions.

I discuss two aspects of punishing sex offenders. The first deals with the outrageously mild punishments that are meted out to sex criminals in Israel, both in length of incarceration and in severity of punishment (sometimes minimized to community service), particularly to teenage sex offenders. This strikes at our deepest instincts regarding the proportionality principle in which the punishment must fit the crime. It also begs the question whether the tacit acceptance of society of these mild punishments, indicates that society accepts these values and norms behind the punishments involved. Do most people agree that men are superior to women, and that violence is a legitimate means for achieving men's goals and desires? If society itself does condemn such offences, then it follows that the courts that represent this society, should impose much more severe penalties for sex crimes.

The second aspect deals with the offering of plea bargains by the prosecution, in which curative treatment to the sex offender is a stipulation for reduced punishment. It is a relatively new idea of mitigated punishment pending the criminal's consent to chemical castration. In this case I argue that rehabilitation is not part of the prosecution's role as a legal authority.

CHAPTER 12: PUNISHMENT AND DOMESTIC VIOLENCE

Domestic violence is not just a sub-category of violence in general. It is inherently complex because there is an unclear border or thin line between punishment (disciplining children) and actual violence (beating children). Another problem is that when the offender is a parent, for example, then punishing him or her is likely to harm the family at large, such as by taking away their means of support. These complex issues are often used by the authorities as an excuse to abstain from pursuing and punishing offenders. Consequently, they renege on their two obligations—to punish criminals and protect the weak. I present the argument in this chapter that the privileges of autonomy and non-interference generally accorded to the family by the State, are privileges that are conditional on the proper functioning of the family. When domestic violence rears its head, these privileges of autonomy are cancelled and the family is, indeed, subject to State control and interference.

The second problem, more specific to Israel, is the intolerable laxity with which domestic violence is treated by institutions in Israel, most notably by the legal and law enforcement systems. In general, the legal system in Israel exhibits outrageous clemency toward criminals in general, and for domestic violence in specific.

CHAPTER 13: CAPITAL PUNISHMENT AND THE MENTALLY RETARDED

In this chapter I focus not on the general debate regarding capital punishment, but on applying the death sentence to mentally retarded or mentally ill criminals. One of the most relevant terms for discussing the legal and moral accountability of the mentally retarded is that of *mens rea* (intent required to commit the crime). I argue that this notion of diminished responsibility should preclude the imposition of capital punishment on mentally retarded and mentally ill people, without entering into the ideological dispute regarding capital punishment per se.

Examples are given to illustrate the troublesome phenomenon of Texas courts that are not much swayed by the impaired mental condition of offenders when deciding to impose capital punishment on them. I conclude that even those who support capital punishment should demand that it be imposed not only on those who deserve the most severe penalty allowed by society, but also those with the highest level of *mens rea*. Thus when trying mentally retarded or insane criminals, their mental state should be considered as a mitigating factor in reducing the death penalty to life imprisonment.