JURISPRUDENCE

CRIME & PUNISHMENT 5

1. Introduction — Why Punish? 7
2. Criminal v Civil Law — Key Distinctions 8
3. Mens Rea, Actus Reus, and the Problem of Moral Luck 8
4. The Three Theories of Punishment 9
5. Retribution 10
6. Deterrence 12
7. Rehabilitation 14
8. Mixed Theories, HLA Hart, and Rawls 15
9. Punishment, Time, and Personal Identity 17
10. The Forfeiture Rule — Wrongdoers Not Profiting from Their Crimes 17
11. Sentencing — Veen v The Queen and s 3A 18
12. Restorative Justice and Circle Sentencing 19
13. Synthesis — Applying the Theories 19

DUTY TO OBEY THE LAW 21

1. Framing the Question — Obligation and Its Sources 23
2. The State of Nature — Why Law Was Needed 24
3. Group 1: Coercion — Austin and Bentham 24
4. Group 2: Social Contract and Consent Theories 25
5. Group 3: Integrity — Dworkin 27
6. Group 4: Natural Law and Morality 28
7. Group 5: There is No General Obligation — Raz and Wolff 29
8. Conclusion — Sources of Obligation and the Central Question 30

Exam Tips 30

LIBERALISM: LOCKE, RAWLS, AND THEORY OF JUSTICE 32

1. Liberalism — The Framework 38
2. Social Contract Theory 39
3. John Locke — Liberal Social Contract Theory and Natural Law 39
4. John Rawls — Justice as Fairness 41
5. Robert Nozick — Entitlement Theory and Libertarianism 43
6. Walzer — Spheres of Justice 44
7. Distributive Justice and the Law 45

Exam Tips 45

RAWLS' & NOZICK'S THEORY OF JUSTICE 47

1. Rawls' Two Principles — Recap 51
2. The Two Normative Arguments for Rawls' Theory 51
3. Argument 1: The Intuitive Equality of Opportunity Argument 51
4. Argument 2: The Social Contract Argument (Original Position) 52

CRIME & PUNISHMENT

Overview:

This lecture examines the philosophical foundations of criminal law, the doctrines of *mens rea* and *actus reus*, the problem of moral luck and free will, and the three major theories of punishment: retribution, deterrence, and rehabilitation, together with mixed and teleological accounts.

The central organising image is the scales of justice: punishment is justified only to the extent that it restores the equilibrium of benefits and burdens disrupted by the offender's choice to exercise their free will in a way that others, bound by the duty of obedience, refrained from doing.

Key Cases Referenced

Case	Relevance / Principle
Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147	Origin of the forfeiture rule. The court held that a woman convicted of murdering her husband could not claim the proceeds of his life insurance policy. Per Lord Justice Fry: 'No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.' A wrongdoer cannot profit from their own wrong.
Edwards v Edwards [2023] NSWSC 1067	Applied the forfeiture rule in a NSW context. Joint tenancy between spouses — a husband convicted of his wife's murder was prevented from acquiring the property through the right of survivorship. Illustrates how the principle that a wrongdoer may not benefit from their wrong applies to property law.
Veen v The Queen (No 2) (1988) 164 CLR 465	High Court. Sentencing must be tailored to the individual before the court — a 'blanket approach' is impermissible. The purposes of punishment enumerated by the High Court in Veen have since been codified in s 3A of the Crimes (Sentencing Procedure) Act 1999 (NSW). One of the most cited High Court cases ever.
House v The King (1936) 55 CLR 499	One of the most cited High Court cases. Sets out the narrow grounds on which an appellate court may interfere with a sentencing judge's exercise of discretion: (1) identifiable specific error of fact or law; (2) taking into account irrelevant matters; (3) failure to take into account necessarily relevant matters; or (4) a result that is plainly unjust or unreasonable. Otherwise the sentencing discretion belongs to the trial judge.

Key Thinkers

Thinker	Key Position
Aristotle *384–322 BC* Greek philosopher	**Favoured retribution. Justice is corrective** — punishment restores the equilibrium of advantages disrupted by the offender. Proportionality is essential: punishment must not be excessive. Strict reciprocity (lex talionis) was an advance on disproportionate revenge. Divided justice into distributive (fair allocation of resources) and corrective (remedying inequality created by wrongdoing).
Cesare Beccaria *1738–1794*	**Utilitarian**. On Crimes and Punishments (1764). **Criminal justice depends more on certainty of punishment than severity**. Opposed capital punishment on both moral

Nagel & Williams *(20th C)* Moral philosophers	Both wrote essays titled 'Moral Luck'. Argued that luck can never be entirely eliminated from moral or criminal responsibility — illustrated by the paradox of different penalties for the same dangerous driving depending on whether an accident occurred.
Derrick Parfit *(20th C)* Oxford philosopher	Reductive theory of personal identity: **we are not a single indivisible entity throughout our lives** but a series of closely connected 'phases'. Raises the question: should an offender who has changed radically — or suffered amnesia — be punished to the same degree as one caught immediately after an offence?

Legislation Referenced

Provision	Effect / Summary
Crimes (Sentencing Procedure) Act 1999 (NSW), s 3A	Codifies the seven purposes of sentencing identified in Veen v The Queen (No 2): (a) adequate punishment; (b) deterrence (specific and general); (c) protection of the community; (d) rehabilitation; (e) accountability; (f) denunciation; (g) recognition of harm to victim and community.
NSW Crimes Act (dangerous driving)	Illustrates the problem of moral luck: up to 10 years for causing death/serious injury while driving dangerously; much lesser summary offence for the same dangerous driving that causes no death/injury. The different consequences are largely a matter of chance, not of greater criminal intent.
Forfeiture Act 1995 (NSW)	Modifies the common law forfeiture rule so it no longer applies absolutely. Grants the Supreme Court discretion to modify the rule where justice requires — taking into account the circumstances of all parties including victims (relevant in domestic violence and self-defence contexts) and the interests of affected third parties such as children.
Confiscation of Proceeds of Crime Act (NSW)	Statutory scheme enabling confiscation of proceeds of crime from offenders — a further expression of the principle that wrongdoers should not profit from their crimes.

1. Introduction — Why Punish?

Philosophy provides foundational theories about the nature of criminal responsibility and the justification of punishment. Crucially, these two questions are interlinked: the nature and amount of punishment we consider appropriate is shaped by the reasons we believe people should be held responsible in the first place.

Four framing questions:

- Why do we punish?
- What gives society the right to punish?
- What do we hope to achieve by punishing?
- What do the greatest minds in history say about it?

The scales of justice as organising metaphor: Justice requires equilibrium. If a criminal is not punished, they have taken an unfair advantage over the entire law-abiding community. If punished too harshly, the system becomes barbaric. Justice demands punishment calibrated to the gravity of the offence — restoring the disrupted balance of social life.

This assumption is significant for two reasons:

- **Deterrence:** It makes sense to deter people only if they are capable of choosing to act differently in response to incentives.
- **Retribution:** It only makes sense to hold someone morally responsible — and therefore deserving of punishment — if they could have chosen not to commit the offence.

The challenge: Science presents a picture of a universe governed by physical law, in which there may be no room for unconstrained free will. If our choices are ultimately determined by prior causes (genetics, upbringing, brain chemistry), the philosophical foundation of criminal responsibility is called into question.

3.3 The Problem of Moral Luck — Nagel & Williams

Moral luck refers to the phenomenon whereby outcomes that are the product of luck — not of the actor's intention — nonetheless affect how we apportion moral or legal responsibility.

Classic illustration: The NSW Crimes Act provides a penalty of up to 10 years for causing death or serious injury by dangerous driving, but only a lesser summary offence for dangerous driving that happens not to result in death. Yet whether anyone dies is largely a matter of chance — the level of criminal intent is the same in both cases.

Nagel and Williams (both: 'Moral Luck'): We can never entirely eliminate luck from moral or criminal responsibility. This is a structural feature of our system — not merely a drafting anomaly.

> **Exam note:**
> The problem of moral luck is directly relevant to any question about proportionality and why the same mental state attracts different penalties depending on consequences. It also intersects with debates about free will and determinism as preconditions for criminal responsibility.

---

4. The Three Theories of Punishment

The three main theories are retribution, deterrence, and rehabilitation. The table below provides a comparative snapshot before each is analysed in depth.

RETRIBUTION	DETERRENCE	REHABILITATION
Backward-looking; restores moral equilibrium	Forward-looking; prevents future crime by example	Forward-looking; treats crime as a curable condition (medical)
Requires punishment proportional to offence	Proportionality not required — only deterrent effect matters	Proportionality replaced by therapeutic need
Only the guilty may be punished (explains innocence protection)	In theory, does not preclude punishing the innocent if effect is achieved	Focuses on offender's capacity to reform, not guilt per se

FREE SAMPLE | LPAB24 Jurisprudence: Full Exam Notes | Sample page 4 of 4 | Full version: 139 pages