

Session 16 Lewis, “The Punishment that Leaves Something to Chance”

I. What Is Punishment?

To assess theories of just punishment, we first need to understand what they are theories of.

- Punishment involves harm.
 - That is, it usually leaves the person who is punished worse off. But we can imagine cases where an offender offends because he wants the punishment (e.g., the homeless man who breaks a window each winter in order to spend the colder months in jail).
- It is a response to an offense (in the central case we’re interested in – a legal offense).
 - Forced quarantine does not constitute punishment.
- It is inflicted upon an actual or supposed perpetrator.
 - Is it right to speak of punishing the innocent? What if the official doing the punishing doesn’t even believe the person he’s punishing to be guilty of a crime? (E.g. angry mob case)
- It is intentionally administered by someone other than the offender.
 - At least in the case of legal punishment.
- In the case of legal punishment, it must be imposed/administered by an authority constituted by a legal system against which the offense is committed.¹
 - A perpetrator who has already been subjected to shunning or even physical violence by his associates cannot claim in court that he has already served part of his sentence. *Q: Why not?*
- Punishment must express disapproval.²
 - Feinberg adds this as a further necessary feature of punishment, beyond those given by Hart (the list above). He says it’s necessary to distinguish punishment from mere penalties (like fees for filing your taxes late). (Consider, e.g., the difference between suspensions and foul-shots in basketball...)
- Difficult cases:
 - *People v. Levy*: is Levy’s confinement to San Quentin, for the purpose of curing him and protecting society, punishment?
 - *Helling v. McKinney*: Should the second-hand smoke McKinney is involuntarily exposed to while in prison be considered a part of his punishment?

II. Theories of Punishment

- *Why punish criminals?*
 - *Retributivists* say punishment is justified because the person being punished is guilty of a (past) crime, and so *deserves* the punishment – *backward-looking*.
 - Punishment as *deserved* by the wrong-doer.

¹ Hart, *Punishment and Responsibility*.

² Feinberg, “The Expressive Function of Punishment”

- What determines the appropriate *level* of punishment on this view?
- Does this view require (legal) punishment/degrees of punishment we intuitively feel is objectionable?
- *Utilitarians* say punishment is justified if it will leave society better off as a whole (either by deterring enough future crimes to cancel out the harm to the perpetrator, or preventing the perpetrator from committing crimes in the future, or by rehabilitating the perpetrator, which may benefit everyone... Utilitarian (or more generally, consequentialist) theories of punishment are *forward-looking*.
 - Deterrence; defense; rehabilitation; revenge-prevention...
 - What determines the appropriate level of punishment on this view?
 - Does this view require punishment/degrees of punishment we intuitively feel is objectionable?
- *Punishment as reparation* – on this view, the purpose of punishment is to, as far as possible, correct the harm caused. This assimilates punishment (for criminal wrongs) to the compensation model we’ve discussed in the context of civil liability.
 - What determines the appropriate level of punishment on this view?
 - Can it capture enough cases?
- *Punishment as expression* – on this view, punishment primarily serves the purpose of expressing societal disapproval for the punished act/agent.

III. Legal Luck

What might justify punishing successful crimes more severely than unsuccessful ones?

- There is no *deterrence*-based justification for punishing attempts less severely than successes – we have just as powerful an interest in deterring attempts.
- At least when success or failure is due only to luck, there is no *defense*-based justification for locking up successful criminals longer than unsuccessful ones (if anything, this consideration seems to way the other way – since the unsuccessful criminal might be tempted to try again).
- Perhaps there would be general outrage if we treated the successful criminal the same as the unsuccessful one. This may make differential punishment “prudent.” But, Lewis says, it hardly makes it just.
- It seems like we should be just as interested in expressing disapproval of failed attempts as of successful ones.
- What about deterrence? Perhaps we should aim at the least amount of punishment that serves as a successful deterrent, and since all criminals aim to be successful in their attempts, we will secure this just by ensuring that crime never pays. So we needn’t punish unsuccessful attempts.
 - But this ignores the other purposes of punishment, e.g., defense and expression.
 - Also, we can’t insure that crime never pays, since some criminals are not caught. And criminals will be less effectively deterred from their crime if they know that unsuccessful attempts will go unpunished (since they know they might not succeed).

- Perhaps we should punish successful crimes more because their success is evidence of a more whole-hearted criminal?
 - But it's at best very weak evidence of that, and so cannot justify differential punishment.
 - However, it seems appropriate to often punish harmful acts more severely than less harmful, apparently similar ones (e.g., the drunk driving case), since the latter case, we cannot know the perpetrator would have gone through with the act (e.g. hit the girl, pulled the trigger).
 - Of course, there will be cases, like the imaginary one Lewis considers, where this won't be true – it's clear the failure is purely the result of luck.
- What about punishment as reparation? This seems like a more promising way of justifying differential punishment – since successful (i.e. genuinely harmful) crimes have victims in need of compensation, whereas failed crimes may not (or at least, the victims need *less* compensation)...

IV. Penal Lotteries

- *Does the penal lottery serve the purpose of punishment?*
 - Defense: a pure (impure) penal lottery would get some dangerous criminals off the streets forever (or for a very long time) and let others go free at once (or after a short sentence). A penal system punishing all (equally "hearted") attempts the same amount would let everyone go free after a fairly lengthy prison term (possibly reformed, possibly embittered). It's an open empirical question which method would do a better job of preventing repeat offense.
 - Deterrence: It's an empirical question whether the risk of more severe punishment would deter more or less effectively than the (relative) certainty of a moderate prison term (bear in mind that no punishment is ever certain, since the criminal may not be caught).
 - Expression: Lewis argues that a penal lottery would serve the expressive function of punishment well, since it constitutes a kind of "poetic justice" – the punishment nicely fits the crime...
- *What about desert? Are penal lotteries just?*
 - In a sense, they treat all perpetrators of equally blameworthy crimes (we're assuming here that there is no moral luck) equally: they're all subjected to the same odds of punishment.
 - But the result is that some people who attempt murder are severely punished, and others set free – how is that fair?
 - Consider other cases in which we take equal chances to count as fair – consider, for example, actually lotteries, or gambling, or drawings to determine who gets subsidized housing, or the green-card lottery...
 - Philosophers distinguish between brute luck and option luck – intuitively, we feel like differential fortunes that result from brute luck should be corrected, but those that result from option luck should not – that's why we think we should compensate people for, e.g., natural disasters (if insurance wasn't available, say) but not for gambling losses, or losses they incurred as a result of not buying insurance when it was readily available and affordable.

- Criminals opt in to the risk of punishment. So their differential fortunes seem to be a case of option luck. Does this make the result just?
- Some people resist the idea that we should never compensate people for bad option luck: they think that there are some harms which no one should be made to bare (and perhaps some benefits no one is entitled to, at least in conditions of scarcity?), even if they resulted from option luck. We could imagine a mirror-image view of punishment – perhaps there are some harms anyone who commits a certain crime should be made to bear, even if the difference in harms they bear would be the result of option luck.
- One case in which we intuitively feel we treat people fairly by giving them an equal chance at some good/harm is when the good/harm is a limited and indivisible resource. (Think of the case of Solomon’s decision concerning the splitting of the baby.) But that justification doesn’t apply to punishment, which isn’t a limited or indivisible resource/harm.
- We might feel, intuitively, the punishment is at best an example of what Rawls called “imperfect procedural justice” – our procedures are just only to the extent that they produce outcomes (crime deterrence, people’s getting what they deserve, etc.) that are independently just. But the outcomes of punishment lotteries, if they are just, are examples of what Rawls called “pure procedural justice” – the outcomes can be just only if and because they resulted from a just procedure – they aren’t independently just. That is, the very same outcome might have been unjust if it had resulted from a different (less just) procedure (e.g. a rigged lottery). But
- This invites an important worry – Lewis concludes that our actual system of punishment is a covert penal lottery – it is just if and only if penal lotteries are just (which he’s ambivalent about). But even if Lewis is right that a covert penal lottery would look like our system of punishment, it’s much more questionable whether thinking like Lewis’ actually underlies/motivates our system of punishment. It’s more plausible that we punish murder more severely than attempted murder because we (or at least most people with influence) take murder to be morally worse, and so more deserving of punishment, than attempted murder. Or alternatively, they may fall prey to the kinds of mistaken arguments for why considerations of deterrence warrant unequal punishment that Lewis dismisses.
- So does that make our system unjust, even if it could be just if it were motivated as Lewis suggests? Are we treating murderers fairly by punishing them more, just because we could be treating them fairly while implementing a punishment policy that looks the same from the outside?

V. The Enactment Lottery

How should the punishment fit the crime?

- Lewis suggests that the punishment lottery should subject the perpetrator to the same probability of harm as the probability of harm to which his criminal action subjected his victim. But, as Lewis acknowledges, it’s unclear what this means: what kind of probability are we interested in tracking? Lewis considers for possibilities:

- (i) the *objective* probability that harm will result from the action
 - (ii) the reasonable degree of belief that harm will result for a hypothetical observer in possession of all the relevant information
 - (iii) the reasonable degree of belief that harm will result for a hypothetical observer in possession of the same information as the actual perpetrator
 - (iv) the wrongdoer's actual degree of belief that harm will result from his action, whether or not that belief is reasonable/supported by the evidence.
- Question: *which of these (if any) do you think determines an agent's blameworthiness?*
 - (i) seems questionable, since sometimes actions we have no reason at all to believe will result in harms do result in harms. Also, sometimes actions that have no objective chance of resulting in harm nonetheless seem very blameworthy, since the wrongdoer had every reason to believe his act would be harmful (consider, e.g., and FBI sting operation, where an agent manages to replace a potential killer's bullets with blanks). So (i) seems at times too strict, and at times too lenient.
 - (ii) seems questionable, since we're sometimes blamelessly ignorant of some of the relevant facts about the harm-causing potential of our acts. (Also, does (ii) differ from (i)? It seems to depend on how narrowly we understand "all the relevant information" – if that includes information about what will actually happen, then (ii) seems to collapse into (i)...). Also, like (i), (ii) suggests implausibly that the potential killer in the sting case I imagined isn't blameworthy (since someone in possession of all the relevant information (including the fact that the bullets are blanks) would believe his actions would not result in harm. So (ii), like (i), seems sometimes too strict and sometimes too lenient.
 - (iii) may also be problematic: sometimes we are to blame for lacking some relevant information – we didn't exercise due diligence. (E.g., we didn't have the breaks on our car checked regularly...) In that case, our ignorance of some relevant information doesn't seem to absolve us of guilt.
 - (iv) has the same difficulty as (iii) – a drunk driver who doesn't believe she's unsafe isn't absolved of guilt, since she should have known better. In this way, (iii) and (iv) may be too lenient.
 - Is (iii) in some ways too strict? Is it wrong to treat two actions as equally blameworthy even though the agent of the first action actually believed her act would be harmful, while the agent of the second action merely should have believed her act would be harmful? Is it less blameworthy to drive drunk when you don't know this is risky, even though you should know it is?
 - (iv) may also sometimes strike us as too strict – consider a firm believer in voodoo dolls, who is subjectively certain that she can torture her victim by sticking pins in a doll – intuitively, is she as blameworthy for sticking pins in the doll as she would be for actually torturing the victim? Perhaps we think her less blameworthy because we think her less morally competent?
 - We might want to consider a variation of (iii), (iii)*: blame/punishment should reflect the reasonable degree belief that harm will result from the action that a

hypothetical observer would have if she was appropriately responsive to all the evidence she should have (if she exercised due diligence). (iii)* may still be too strict, in not differentiating between the malicious and the culpably ignorant agent...

- *Lewis argues that one important advantage (in addition to considerations of efficiency and accuracy) that the enactment lottery (which takes the crime itself to be the lottery that determines the punishment) has over any kind of reenactment lottery, or straw-pulling, is that it spares us from having to decide which notion of probability of harm we want our lottery to match. Is this right?*
 - There's one sense in which it seems clearly right: the enactment lottery will subject the criminal to the same objective probability of harm as the objective probability of harm he imposed on his victim, as well as the same subjective probability of harm in each of senses (ii)-(iv) (e.g., (to take case (iii) the degree of belief that his action would lead to harm that the agent would have if he was reasonable, given the information he actually possesses, is matched by the reasonable degree of belief that he would be punished, given the information he actually possesses.)
 - But there's another sense in which the model doesn't allow us to assign a criminal the degree of probability of harm we might feel is intuitively appropriate – intuitively, we might want to subject the criminal to an objective, or subjective-(ii) degree of probability of punishment that matches the subjective-(iii) or subjective-(iv) degree of probability of harm he imposed on his victim.
 - Consider, e.g., the FBI sting case I imagined. The enactment lottery will always let this guy off the hook: his objective probability of punishment will be zero, since this was the objective probability of his harming his victim (given that he was firing blanks). But we don't feel he should automatically get off the hook – if his behavior had, say, a 70% chance of leading to the death of his victim relative to the information he actually possessed (subj. probability (iii)), then we might feel intuitively that he should fact a 70% obj-(i) or subj-(ii) probability of suffering punishment....

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