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If you're reading this, you got real lucky: Crime, punishment, and luck

The Problem of Giving a Moral Justification for State Coercive Authority

◉ State claims authority to tell you what to do – thereby restricting your freedom -- through rules promulgated as "law"

◉ State claims this authority over broad range of activities

◉ This authority is long-term

◉ State coercively enforces the law (criminal and civil)

◉ Regardless of content

◉ Claims a (limited) monopoly on the use of force.

The Problem: How can it be "morally legitimate" for the state to do what no one else is justified in doing? This is known as the "problem of state legitimacy."

Can We Morally Justify Punishing Criminals?

- *The Nature of the Question.* The question we are asking here continues to be a question about what political morality allows us to do. The problem of justifying punishment is yet just another piece of the problem of providing a moral justification for state coercive legitimacy.

CAN WE MORALLY JUSTIFY PUNISHING CRIMINALS? PUNISHMENT AND TORTURE

- Now how would we go about answering the question of how to provide a moral justification for punishing criminals?

  - *The Nature of Punishment:* Punishment is unique among legal remedies in this sense: The immediate point of punishment is to cause something that is experienced as undesirable. This is, for example, is not true of compensation: compensation is about making an injured party whole.

    - In fact, *by definition,* punishment is the deliberate infliction of something designed to cause something experienced as unpleasant; if it does not cause something experienced as undesirable, it *cannot* be punishment. Just like if it is not unmarried, it *cannot* be a bachelor.

  - *Why Does This Special Feature of Punishment Create Moral Difficulties?*

CAN WE MORALLY JUSTIFY PUNISHING CRIMINALS?

- *A Strategy for Answering the Question:* One way to answer this question is to ask what, if any, morally justified purposes are we trying to accomplish by punishing criminals? What are the legitimizing purposes of punishing criminals?

A Distinction between Various Legitimizing Functions of Punishment

- *Backward-Looking Justification*: Retributivism holds that the legitimizing function of punishment is to give the defender the suffering that she deserves for the crime.
  - *Underlying Theory:* The idea here is that the "balance of justice" has been disturbed by a criminal act, which creates a moral debt that must be paid to restore the balance of justice.

- *Forward-Looking Justifications:* These include:
  - Protection of Society: We segregate dangerous offenders to protect society from further crime.
  - Specific Deterrence: We punish a specific offender to give that offender a coercive incentive not to commit crimes again.
  - General Deterrence: We punish a specific offender to "make an example of him" to provide other would-be criminals a coercive incentive not to commit crimes again.
  - Moral Reform and Rehabilitation: We punish to reform and rehabilitate the offender, teach him the error of his ways, get him to accept responsibility, and prepare him for a "second chance" at living a law abiding and productive life.

THE PROBLEM WITH RETRIBUTIVISM

- *Retribution and Culpability:* What one deserves as a matter of punishment corresponds to how culpable one is. One limiting principle governing punishment reflects this view:

  - The Proportionality Principle: Offenders should be given no more punishment than is proportional to the culpability of the offender.

- *Culpability and Luck:* It turns out that there is a problem in assessing culpability because the difference between people in prison and people who are not – including most everyone in this room – turns disturbingly on luck.

  - What is Luck? Luck refers to elements of situations that are beyond a person's free choice. These elements can be desirable or undesirable.

- *Two Stories of Luck*

RETRIBUTION, CULPABILITY, AND LUCK

- There are a number of different types of luck here that cause problems.

  - *Luck of Consequences:* Luck with respect to the consequences of an act.
    - Kant claimed that the consequences of an act are always beyond our control and hence a matter of "luck."

    - Example: The difference between a successful murder attempt and an unsuccessful murder attempt depends on consequences beyond the control of the agent – that is to say luck.

  - *Circumstantial Luck:* Luck with respect to what situations you find yourself having to make decisions about what to do. People find themselves in situations they did not choose and then make decisions about what to do that are morally significant.

    - Example: A soldier in wartime breaks under the stress, and kills civilians.

Retribution, Culpability and Luck

- *Constitutive Luck.* There is a much more serious problem of luck that causes problems for the culpability judgments on which a retributivist justification depends. It has to do with luck of character and there are two different dimensions. That is, what kind of person you become is not within your direct control. I will illustrate this by a very famous capital punishment case in California.

- The case in point is that of Robert Alton Harris who was executed for a particularly callous murder.

   - PART 1: He shot two kids in the head point blank in an automobile at a fast-food restaurant then calmly ate their sandwiches while sitting in a car that was splattered with blood and brains. He was sentenced to death, and everyone seemed content. Even death penalty opponents were rather quiet about this sentence until the details of Harris's life began to emerge.

Retribution, Culpability and Luck

The case in point is that of Robert Alton Harris who was executed for a particularly callous murder.

- PART 2: The death sentence was uncontroversial until the details of his life came out. Harris's mother drank excessively during the pregnancy, causing fetal alcohol syndrome, that many neurologists testified caused "organic brain damage" and affected Harris's ability to empathize with other people. (See Time Magazine; available at http://www.time.com/time/magazine/article/0,9171,975376,00.html?promoid=googlep).

- Harris was born three months prematurely after his father kicked his mother in the stomach. (See http://review.ucsc.edu/summer.00/crime_and_punishment.html).

- He was physically abused during most of his life, beaten severely by parents and siblings; indeed, his father once chased him around a table with a loaded gun when Harris was 2 years old, claiming that he would kill Harris. The results were both psychological and, if you believe many advocates,,caused damage to areas of the brain having to do with personality. In 1992, Harris was executed after then-governor Wilson revived the death penalty. Wilson himself rejected Harris's appeal for clemency, even while observing that Harris's life was "a living nightmare" (Time, above).

RETRIBUTION, CULPABILITY AND LUCK

- The Robert Alton Harris case makes a couple of important points about luck of character and the relationship between the physical brain and moral character, desires, intentions, etc.

  - *Luck of Drawing Good Parents.*

  - *Luck of Genetics.*

- What do we make of this? It seems to me that judgments of culpability on which retributivist justifications depend are much more complicated than they might ordinarily appear – and that seems to cause problems for the retributivist idea that punishment is justified because it is deserved.

The Relevance of Reasonableness

- CULPABILITY AND REASONABLE ACTS. In general, we tend to think a person does not deserve punishment for doing something if nearly everyone in the same situation would do the same thing.   The argument, briefly stated, is this:

  1. An act is reasonable in a situation if nearly everyone would do the same thing in that situation.
  2. Reasonable acts do not deserve punishment.
  3. Therefore, an act does not deserve punishment if nearly everyone would do the same thing in that situation.

Extending the Argument to Cover All Relevant Features of a Situation

- When we make these judgments of reasonableness, we include a very limited number of features of the situation. We do not include those features of a situation that are the result of constitutive and circumstantial luck.

- The question is "Why not?"

EXTENDING THE ARGUMENT

* **Walking in Harris's Shoes.** One interesting feature of the Robert Alton Harris case is that it is plausible to think that anyone who was born into the life that Harris was born into would wind up doing roughly the same thing.

* **Reasonableness and Culpability.** But if most people would do the same things if in Harris's shoes, it is hard to see how Harris is uniquely or distinctly culpable. He just did what just about any of us would do in his shoes. This, however, makes his act seem *reasonable under the circumstances, and what is reasonable is not culpable.*

The Relevance of What Most People Would Do in Similar Circumstances in Determining Culpability

- **Generalizing The Problem.** Consider, again, the case of a soldier who breaks under the pressure of the stress of war.

- **The General Problem.** When we put ourselves in the shoes of other people who commit crimes, inheriting the same circumstantial and constitutive luck, it starts to look like we would do the same things that they did. But this makes all such acts seem *reasonable under the circumstances, and what is reasonable is not culpable.*

PROBLEMS WITH OTHER JUSTIFICATIONS

- **General Deterrence:** We punish a specific offender to "make an example of him" to provide other would-be criminals a coercive incentive not to commit crimes again.
  - Kant's 2nd **Categorical Imperative: "Always treat humanity as an end-in-itself, and not merely a means to an end."**
  - Making an example of someone by inflicting suffering on them seems to be using that person as if a thing.

- **Protection of Society:** We segregate dangerous offenders to protect society from further crime.
  - The problem of incarcerating non-violent offenders. 55% of inmates in U.S. prison are non-violent offenders (i.e. drug-related offenses).
    - In *2007,* Department of Justice study showed that 5% of inmates *reported* being raped during a 12-month period – a crime that is likely underreported. Indeed, Congress has officially endorsed the "conservative" estimate that 13% of inmates are raped at some point while in prison.
    - In 2000, studies estimated that 300,000 prisoners, out of a state and federal prison population of 1,316,333, were victims of violent assaults approximately 23% of the prison population. If this is accurate, then 23% of inmates are assaulted in prison *every year*.

- **Specific Deterrence:** We punish a specific offender to give that offender a coercive incentive not to commit crimes again.
  - Is this sufficient to prepare offenders for a fair second chance?
  - Does this really work? Recidivism rate in US is 67% within 3 years after release.

Moral Reform and Rehabilitation

- To give offenders a fair second chance, prisons must provide opportunities for moral reform and education.

  - 97% of all inmates in the US will eventually be released.

  - The national average recidivism rate is 67%.

  - Studies show that earning the equivalent of a high school diploma in prison, plus getting a full-time job, lowers recidivism rate to 33%.

  - Studies show that earning a bachelor's degree in prison reduces recidivism rate, depending on the state and prison studied, to between 1 and 15%!!

  - University Beyond Bars offers enough college course work for inmates at Washington State Reformatory to earn an associate's degree in 2 years.

    - Cost of providing enough coursework over two years for associate's degree is $4,800.
    - Cost of incarcerating inmate at Washington State Reformatory for two years is $84,440.

Conclusion

- The most convincing justification for punishment is moral reform and rehabilitation.

- Reform and rehabilitation are two of the legitimizing purposes of state punishment.

- The state should fund all elements of the legitimizing purposes of state punishment.

- Therefore, the state should provide a college education to all inmates who will reenter society.

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