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24.235J: Philosophy of Law

The Punishment That Leaves Something to Chance Leaves Something Out
A Response to "The Punishment That Leaves Something to Chance" by David Lewis

Introduction

In his paper "The Punishment That Leaves Something to Chance", David Lewis looks for a

justification for differential punishment. For the purpose of this paper, I will consider

differential punishment to be punishment, or a policy of punishment, that punishes attempts at

criminal acts differently than successful criminal acts.

Lewis argues that the current (American) system of differential punishment is a

"disguised form of a *penal lottery*", in which a convicted criminal's punishment is determined by

chance (Lewis 58). Lewis does not claim that either a system of punishment based on a lottery

or the current system of differential punishment is just; nor does he claim that either is unjust.

He claims that if and only if a penal lottery is just, is our current system of differential

punishment[1] just.

In this paper, I will briefly discuss moral luck and penal lotteries, and reconstruct Lewis's

argument that there is no relevant difference between a penal lottery and our current system of

punishment. While I am sympathetic to the similarities Lewis points out, I will argue that there

is a significant difference between a penal lottery and American differential punishment, which

justifies differential punishment but not a punishment lottery.

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[1] Only our system of differential punishment: the aspect of our penal system that punishes attempts differently
than successes. Other parts of our system, including how it is determined whether the suspected criminal is guilty,
must be justified by other means, and that aspect of our legal system is beyond the scope of this paper. From here
on, when I say current system of punishment, I mean current system of differential punishment.

Moral Luck

It seems unjustified to punish a person based on whether they are lucky or unlucky. Consider the following situation, where the only relevant difference between a criminal act being an attempt and being a success has to do with "luck". Two agents both shoot a victim at point-blank range. The agents acted with the same intent, had the same marksmanship, used equally deadly guns, etc. The only difference is the first agent's victim is saved by an unlikely, unrelated act: a bird flies between the criminal and the victim and ends up absorbing the bullet. This unlikely act seems to be an instance of luck (or lack thereof) for the criminal agent. Both criminals acted with the same malicious intent to kill, are equally dangerous or "wicked" and therefore seem to deserve the same punishment (Lewis 53-54). This raises the question of focus: is differential punishment justified, and if so, on what grounds?

Punishment Lottery

In this section I will reconstruct Lewis's concept of a penal lottery. The severity of the punishment assigned to a convicted criminal is determined by chance, a lottery, if you will. In a penal system based on a punishment lottery, instead of definitely punishing a convicted criminal, he or she is only put *at risk* of punishment (Lewis 58). He distinguishes between a pure and impure penal lottery. In a pure penal lottery, any convicted criminal who "wins" the lottery does not suffer *any punishment* (Lewis 58). In an impure penal lottery, the losers and winners of the lottery both suffer, but the loser is subject to worse punishment (Lewis 58). Lewis points out that a penal system based on a punishment lottery does not need to specify the mathematical risk of punishment, so long as it is common knowledge that committing prohibited acts implies *a risk* of punishment (Lewis 58).

Iterative Process from Punishment Lottery to American System of Punishment

Lewis argues that there is no difference in the justness between an impure penal lottery and our current system of differential punishment (Lewis 63-66) by iterating through several schemes of punishment, making small changes to the punishment process in each step. A similar but simplified version of his argument is presented below. To make the argument less confusing, I use murder as a specific crime for which a criminal is on trial; this should be acceptable because the justness a policy of differential punishment should not depend on the crime. It also should not matter if the lottery is a pure or impure punishment lottery[2], so I will begin with an impure punishment lottery where the winner of the lottery is still punished, perhaps significantly, but not as much as the loser of the lottery.

1. Start with an impure penal lottery. When a person is found guilty of attempting murder or actual murder, he or she must draw straws to determine if he or she will receive the more severe punishment for murder, or the less severe punishment for attempted murder. So that the punishment fits the crime, proportion the criminal's chances of more severe punishment to the risk of death that the criminal brought upon the victim. This risk shall be determined by the court.

2. Same as (1), but instead of the criminal drawing a straw, use a random number generator. If the generated number is greater than the risk to which the criminal subjected the victim, the criminal wins the lottery and is punished less severely. Note that the generator can generate the number before or after the trial, though the risk inflicted on the victim is determined as part of the trial.

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[2] Lewis's main justification for using an impure penal lottery is pragmatic. Using an impure penal lottery assures the court takes its job in determining guilt seriously, so that society may express its disapproval of the criminal act, even if the criminal is not subjected to punishment (Lewis 64).

3. Same as (2) but instead of a random number generator, use a simulation of the actual crime. If the victim in the simulation dies, the criminal loses the lottery. This removes the requirement that the court must determine the exact numerical risk of death inflicted on the victim, and must only determine how the crime happened (Lewis 65).

4. Same as (3), except replace reenactment (the simulation) by enactment, the actual (prior) act of the crime. Since it is equally just in case (2) to run the generator before or after the trial, the practical requirement that the act come before the trial should not make the outcome any less just. Then, the same "luck" the victim had in regard to being murdered is the luck the criminal has in regard to being punished more severely; that is, the criminal's "chance" of receiving the more severe punishment and the victim's chance of dying/risk of death are exactly the same.

Justness of Differential Punishment

Lewis argues that differing luck makes no difference in appeals to retribution, expression, deterrence or defense (Lewis 54). He claims that differential punishment is not just on retributive grounds, because the person who attempted and person who succeeded are equally "wicked", and therefore equally deserving of severe punishment (Lewis 54). By determining someone guilty and giving him or her some punishment (be it the more or less severe), society is still able to express its distaste with the criminal's action. Lewis claims that deterrence is also not a valid justification because is it desirable to deter all attempts, whether they end up (by chance) to be successful or unsuccessful (Lewis 54).

Lewis may be correct that all of these justifications for punishment do not support differentiating between the successful and unsuccessful criminal, but I believe there is an additional purpose of punishment that justifies differential punishment. I think that what actually

happened matters, not solely a criminal agent's intention. This is based on a more consequentialist view. A justification for punishment that seems to justify differential punishment is an appeal to reparation – correcting the harm caused by the criminal.

Consider the brakes failing on a new care while driving, and the driver crashes and is injured. He or she can sue the car manufacturer for his or her suffering, regardless of whether the manufacturer intended to sell the consumer a defective product. However, if the brakes failed while teaching someone how to drive in a parking lot, while the car owner may be able to get the manufacturer to replace the car or fix the brakes, the car owner cannot sue the manufacturer for his or her pain and suffering, because there is no real pain or suffering. This suggests that, in civil cases, we may be able to punish people differently based on what actually happens as a result of their actions.

I do not see justification for criminal cases to be treated differently. If a criminal attempts to murder someone and fails, he or she should be punished, but only for attempted murder. If the criminal actually murders someone, he or she should receive the punishment for murder. The criminal must correct the harm he or she caused to the best of his or her ability, and since no one can raise someone from the dead or turn back time, we punish criminals by giving them jail (or death) sentences. Both the successful and unsuccessful criminals are equally detestable, equally "wicked" or wrong, and from the criminal's perspective, equally deserving of punishment. However, from the perspective of the victim's family or society as a whole, the two criminals are not seen as deserving the same punishment, because one criminal harmed their victim and the other did not.

Lewis predicts my objection and includes an argument against justification based on reparation. He suggests that while it may be advisable to do what society or the victim's family

wants, that does not *justify* a different punishment (Lewis 54). However, I do not think that we

punish criminals *because* that is what society or particular members of society want. Maybe they

desire such punishment because the punishment is just.

Bibliography

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