Punishment and the Arsenault Case

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Introduction

If we talk about punishment in a legal sense, it would seem to that to be clear about what we are doing we ought to ask two questions:

1. why do we punish? (We shall call this the justification question)

And

2. who do we punish? (We shall call this the allocation question).

Depending on how you answer these questions indicates, roughly speaking, whether you are retributivist about punishment or a consequentialist. This of course casts things in a rather simple light but this would seem to be the crux of the situation.

Retributivism

The retributivist answer to the justification question is that punishment is an end in itself. The situation is simply one of responsibility for actions: if a man commits a crime he is responsible for it and has to pay. To justify punishing someone for committing a crime the essential ingredient is guilt; and what is more the only ingredient required.

The retributivist answer is based, generally, upon the human desire for revenge; (the legal system taking on the role of avenger for the victim) but this can make the view seem a little hollow. As such, we feel that there ought to be other questions at play here and wider concerns addressed. For example, instead of just asking whether a crime was committed, it seems natural to ask why it was committed and it is from such questions as these that the

consequentialist answers to punishment come.

This is, as I have indicated a rather simplistic rendering of retributivist concerns but it is faithful in spirit. The main points to take are that the retributivist takes a backward looking stance, to the crime seeking 'payment' for this. We can then characterise the retributivist answer to the justification question as holding that a) Guilt is a necessary condition for justifying punishment and b) Guilt is a sufficient condition for justifying punishment.

Consequentialism

The consequentialist view of punishment can be seen as developmental corollary of Benthamite Utilitarianism and concedes that punishment is an intrinsic mischief. As such, to justify punishment we must countervail some greater mischief or evil.

For the consequentialist, punishment has to look beyond the simplistic 'payment of dues' approach to consider how we can further the interests of society as a whole by enacting punishment. Punishment ought to deter future crimes, perhaps reform the behaviour of the criminal individual or supersede primitive justice, e.g. vigilantism if we are to find any justification for it. At all times we (as consequentialists) should be looking towards the future consequences of punishing and if these promote a greater social good, then the act of punishment is justifiable. We can characterise the consequentialist response to the justification question as a) Social Utility is a necessary condition for punishment and b) Social Utility is a sufficient condition for punishment.

The answers of both retributivists and consequentialists to the justification question are straightforward enough. The principle source of tension however comes in the response to the second question, the allocation of punishment.

The Allocation Question

With regards this question the retributivist says that the consequentialist cannot give a satisfactory answer. The retributivist answer is clear enough: for him guilt is a necessary condition for punishment, so only the guilty can be allocated punishment. Not so for the consequentialist, or so the retributivist accusation goes.

For the consequentialist, social utility is essential for punishment (necessary) but is also all that is needed (sufficient). As such, the consequentialist might punish whom so-

ever he likes, just so long as the greater social good is upheld. There are a whole plethora of examples that purport to show that the consequentialist cannot restrict punishment to the guilty alone: most involve the framing of an innocent man. They are largely astute and mostly correct, however, no consequentialist worth his salt would want to endorse a view that allows the innocent to be punished. On the face of it though, these problem cases are theoretical possibilities and this would seem to undermine the consequentialist case.

There are a variety of ways of dealing with these standard objections. Some, such as definitional stops (see Hart 1968) are more sophistry than resolution and as such, I intend to leave them unexamined. There are some interesting responses though, and primarily of interest to me here is a synthesis of both theories by John Rawls (1955).

A Rawlsian Analysis

Rawls suggest that viewing punishment in purely retributivist terms or consequentialist terms is an error. Instead, we need to look at distinguishing between justification for a system of rules and legal principles and a particular action or judgement falling under those rules or practices. For Rawls, punishment is a dichotomous concept with the single act of punishment on the one hand and the general practice on the other. As such, the answer to the justification question becomes two answers to two questions.

1. *Why do punish person A for crime B?*

The Rawlsian response being that person A broke a rule or law was found guilty and suffered a legal sanction. This corresponds to the judicial decision and is where the retributivist view of punishment finds its place in Rawls' analysis. The role of the judge is to look backwards to the crime committed in the single case and punish accordingly.

2. *Why do we punish at all?*

The Rawlsian response being, that it protects good people from mischief and crime, it acts as a deterrent, it helps to reform criminal behaviour, it is better than lynch mobs etc. this corresponds to the legislative role or decision and is where the consequentialist finds his place in Rawls' analysis. The role of the legislator is to look forwards to the greater social significance of punishment.

Under Rawls' synthesis, the miscarriages of justice envisioned by the retributivist do not take place. In single cases and one off judgements, the retributivist is at the helm in the

judicial decision. Individual cases are about punishing the right man for the right crime and at a proportionate level; they are not about the greater social good or future consequences of such an action.

Rawls' analysis is fundamentally consequentialist in spirit in that takes the wider purpose of punishment to be forwards looking and it is this that makes it the best example of consequentialism in current theory, dealing with standard polemics via its division of the practice and the single act. However, I think I have something that is not a standard case.

The Problem of Scruffy

The FBI and criminal psychologists have long recognised cruelty to animals as a precursor to violence against humans. More famous examples are: Jeffrey Darma, who through out his childhood dissected animals and displayed their heads on poles; or Peter Kurten, murderer of nine, who stabbed sheep during bestial intercourse and beheaded swans during childhood; or more recently, Luke Wood, who burned his pet dog two days before shooting his mother, teachers and classmates in an American high school. The connection is by no-means universal though: Dennis Nilson was a great animal lover who adopted stray cats and idolised his pet dog "Bleep".

However, in the USA, this connection has been seized upon by the Humane Society of America (a similar organisation to the British R.S.P.C.A.) who have been fighting for its official judicial recognition. In some states, the Humane Society passes on files of animal abuse to local police authorities in order to 'intercept' cases of domestic violence. This not a legislated exchange of information but it certainly appears to be common protocol. More specifically though, for our interests, the H.S.A's campaign came to fruition in a case in Kansas. A group of youngsters, the chief protagonist being a youth called Lance Arsenault, were arrested and tried after a video tape of them torturing and burning a Yorkshire Terrier, named Scruffy, had been intercepted by the police.

Ex-F.B.I. officers and members of the H.S.A. spoke for the prosecution about the animal cruelty/human violence connection in an attempt to secure a heavier sentence from the judge than the normal probationary term applied to animal abuse cases. The judge increased the sentence on Lance Arsenault from the standard probationary term to a twenty-two month interment for arson, as a form of acknowledging the gravity of the crime if the 'connection' made is vindicatable. For the sake of clarity, it may be worth making a

simple point about punishment in this case. What the judge actually did was to punish Arsenault for arson but the reasoning behind this was to account for the animal cruelty/human violence connection. This is the implicit case. However, there may be the potential for an explicit case whereby the judge drops the arson charge and submits Arsenault for psychiatric treatment. This explicit case is also now a possibility since the implicit acknowledgement of the animal cruelty/human violence connection in the Arsenault case sets a precedent that could result in explicit acknowledgement and rulings.

So, why is this problematic? The animal abuse/human violence connection and the Arsenault precedent appear to raise a tension in our concept of law, justice and punishment. If our concept of justice is a retributive one, we should only punish for the act (i.e. in the Arsenault case give a probationary sentence), however, what the people of Kansas want to do (and appear to have done) is to account for what Arsenault might potentially do. This would seem to be a consequentialist approach: punish only so far as is necessary to promote a greater social good. Preventing another Darma would appear to be a social benefit but it seems to involve punishing for an uncommitted crime. The point is that we are punishing, in this circumstance, for a crime that is not yet committed (but could potentially be) and we are doing this to secure a greater social good and prevent a greater social mischief. This would appear to be based on the Utilitarian principle of punishment as prevention (through reform and exclusion).

What Makes the Arsenault case Different?

The first thing to note about the Arsenault case is that it uses a perfectly sensible notion of intercepting a crime: prevention rather than cure via indicator crimes. This way it doesn't seem truly morally odious in the scapegoat sense of some problem cases. Further more it appears to be actually taking pro-active moves for both society and 'offender'; society doesn't want a murder and the animal abuser can be spared the stigma and greater punishment connected to murder should it happen.

Secondly, this case highlights the shortfall in taking a retributivist stance. If we do deal with this case as a retributivist we punish for the animal abuse case and forget about any responsibility we might intuitively feel we had to prevent cases of human violence arising. This feels wrong, that is why I am only really addressing the consequentialist means (given its best reading in Rawls' analysis) of dealing with such a case.

A Rawlsian Analysis II

So, through Rawls analysis the Arsenault case would be a one off case and would be dealt with in the judicial decision. Does this work though?

The judicial decision is supposed to be retributivist (in spirit) and punish only for the crime. In the Arsenault case taken implicitly, we might just get away with this. However, given that it sets a precedent and it underlying consideration is greater social utility, this is contentious. Taking the Arsenualt case explicitly, the ruling would be openly consequentialist (and legislative) and the Rawlsian division breaks down. This highlights a further question though. Could the problem be handled at the legislative level?

A case such as this might be seen as highlighting the need for legislative change. Consequentialist concerns at the legislative level might create a ruling that says animal abusers must be subjected to psychological evaluation/treatment to prevent the move to human violence. However, this appears to merely relocate the problem we faced under the judicial decision since it places consequentialist concerns in the judicial sphere: the punishment may be meated out for a crime but it is to account for consequentialist concerns.

Concluding Points

It seems to me that the Arsenault case places consequentialists (including Rawls) on the horns of a dilemma. Firstly if we deal with the case as the Kansas system did, we appear to going against the notion of punishing only for crimes committed and we are allowing legislative concerns to intervene on the judicial decision.

Secondly, if we obey the judicial decision/legislative division that Rawls advises, we punish only for the crime (in the Arsenault case a probationary sentence) via the judicial decision, but we contravene the overall purpose of punishment defined by legislative (consequentialist) concerns to protect society. If we punish for the potential crime, we are on the first horn of the dilemma by ignoring retributivist concerns about the allocation question. If, however, we don't punish for the potential crime (conceding to the retributivist about allocation), just the actual crime, we are the second horn and are ignoring the consequentialist concern for the greater good.

The point I am driving at here is that it seems the justification question and allocation

question cannot be given answers that are consistent with each other and our intuitive sense of what is right and wrong. The retributivist answer to the allocation question seems to be right in as much as only the guilty should be punished (at least I would hope that a good legal system would aspire to that) but their answer to the justification question feels primitive and unsatisfactory. Surely there is a bigger picture than the retributivist answer to the justification question implies. Can we not expect more of a legal system than punitive actions: how about moral guidance or a concern for the victims and causes of recidity? Consequentialism offers us these wider concerns in their answer to the justification question but it appears to sacrifice the merit of the retributivist answer to the allocation question and this seem wrong. The benefits of both stances and the tension between them becomes all to apparent in cases like Arsenault's and raises questions that go beyond whether we ought to adopt retributivist or consequentialist stances on punishment.

Bibliography

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