

There Is a Third Camp. Some Remarks in Response to Dr Czabański

Mikołaj Barczentewicz¹

Dr Jacek Czabański in his paper *Why Consequentialists Should Be Retributivists Too* argues that *it is fully rational for consequentialist to be retributivists too*. I have no interest in questioning this claim, but I do have some problems with Czabański's argument and its assumptions especially.

There is a third camp

The very first sentence of the paper in question states:

There are two opposite camps within the theory of punishment. One is that of retributivists while the other is that of consequentialists.

Retributivism claims that offender morally deserves punishment and this fact is a necessary and sufficient condition for deliberate infliction of some kind of harm on this person. Consequentialism seeks justification for punishment in deterrence and disablement (i.e. consequences of an act of punishment).

Utilitarian approach of consequentialism may lead to presumably undesirable outcomes. If deterrence is to justify punishment, does it at all matter whether someone is guilty or not? Of course, there is one big advantage for prosecuting the former - it is easier to prove one guilty if he is actual wrongdoer. However, history teaches us that this obstacle is not really hard to overcome for skillful attorneys (like Andrey Januaryevich Vyshinskiy).

However, there is a view in the theory of punishment, which accepts premise that malefactor *deserves* punishment and even agrees that it is not immoral to deliberately cause

¹ Student in the College of Inter-Faculty Individual Studies in the Humanities at the University of Warsaw. His personal website: www.barczentewicz.com

suffering of other person, but recognizes also another principle and places it on the top of this hierarchy [see, for example: Barnett 1977]. This principle states that it is a victim, who deserves restitution in the first place. Proportional punishment is only a standard, an upper limit to which it is justifiable to extort compensation from offender.

Restitution views utilitarian goals as desirable, though not being able to justify criminal justice system:

It is not my thesis that deterrence, reformation, and disablement are undesirable goals. On the contrary, any criminal justice system should be critically examined to see if it is having these and other beneficial effects. The view advanced here is simply that these utilitarian benefits must be incidental to a just system; they cannot, alone or in combination, justify alone criminal justice system.
[Barnett 1977: 283]

Incentives

In section III of his paper, *Costly punishment and why we need retributivism*, Czabański examines an example in which there is no system of public law enforcement and victims have to rely on themselves to enforce the law (for the sake of argument's simplicity let us forget about crime insurance). They face to options: (1) do nothing; (2) chase the offender.

Now, when victim chooses the latter option and succeeds, what are the options? One is to recover stolen goods. That is fine, but what if there was no robbery in place, instead some kind of personal injury was committed, e.g. rape, or even murder? Then, only second option applies, viz., punishment. As Czabański rightly points out, punishment is associated with high costs. Victim will punish only to the extent, which she perceives equal to the alternative cost of not doing so. If the alternative cost is low, even chasing the criminal might be ineffective (irrational). This is the case when costs are dispersed in the society, much less when they are concentrated.

I hope my reconstruction of the argument is accurate. This argument looks convincing, but there is one option lacking. Victim (or anyone acting on her behalf) may extract² compensation from offender.

Compensation (restitution) should cover all victim's expenses and losses (costs of investigation, apprehension, trial - for both sides, compensation for inability to work, to name only few). This standard drastically changes incentives structure for victims and enables emergence of plenty of different institutional arrangements and business models. Now, it is fully rational for victim to chase and prosecute offender, because benefits are concentrated. Of course, dispersed benefits, like deterrence and disablement (even rehabilitation) are in place, but they are only a byproduct. There is no risk of positive externalities problem (free-riding and underproduction), because individual benefits constitute sufficient incentive to ensure proper level of "production".

Restitution in proposed form has very firm punitive character, namely - it allows victim (respectively: any agent acting in her behalf) to force offender to repay his obligation (debt), especially by incarcerating him. Of course, it would not be always necessary and, even if imprisonment would happen, it might take a form of minimum-security labor project. If any person in labor project would refuse to work, there are two options: (1) he would be supported by the state (or any willing person) or (2) he would not be supported at all (because he is not entitled to it), hence it will be much like suicide.

Efficiency and other problems

Czabański argues that "in retributive societies we can expect to have less criminals, and such systems are more efficient from the utilitarian standpoint". Retributive society is one in which people "have intrinsic retributive beliefs ... regardless the cost of punishment for themselves". I would like to know which criterion of efficiency author has in mind when he values such arrangements as being "more efficient". I can think of huge alternative costs of diverting large

² I am aware of negative connotations of this word, but I believe that it reflects properly punitive element of restitution

amounts of financing to punishment, which presumably might (1) cause increased suffering, (2) decrease monetary wealth (Kaldor-Hicks inefficient), or (3) simply leave someone worse off, without compensation (Pareto inefficient).

In addition, one serious problem remains unsolved: how much (punishment, deterrence, disablement)? As Barnett indicates, there will be always some group advocating more deterrence (sky is the limit) and those who think that we need less punishment. Of course, this is not an argument aimed at Czabański's paper exclusively, the problem is much wider and even restitution has to deal with it (problem of compensation proportionality).

Conclusion

Form of these remarks does not allow me to deal with all problems and possible scenarios. The literature of this subject is not very abundant, but I suggest some positions in bibliography. My goal was only to indicate that there exists another option, which responds to incentives problem without need for taxation (*paid-in-advance system*) and I believe I have succeeded in this effort.

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