JUSTICE AND PREDICTABILITY

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Punishment should be for the commission of a criminal offence, criminal justice should not be 'individualised'. This conception of the nature of criminal law has been the target of a critique basing itself in the social sciences and psychiatry. The author believes that the law's emphasis on reference to the offence is pointless. The offence cannot be undone, the point is to *prevent* crime. Rejecting individual traits or characteristics is invalid and the measures which will turn one individual away from offending will not suit another.

These conflicting positions are the terrain of a debate between criminal law and a preventative/welfare alternative. The concern for equality of treatment, for predictability is weighed against the concern for prevention, for a 'purpose' to disposition.

Justice and Predictability takes a novel approach. By questioning the basis of this debate, the book asks whether a retributive theory of criminal law involves a rejection of the principles which inform the 'welfare' stance. Building on theoretical analysis and case material the investigation of this question involves a reconsideration of a number of areas prominent in the theory of criminal law and in jurisprudence: the nature of judicial decision-making, the place of excuses in the criminal law, the concept of justification in criminal law, the idea of a 'duty to aid', the conflict between different 'theories of punishment'.

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Also by Antony Cutler

MARX'S *CAPITAL* AND CAPITALISM TODAY
(with B. Hindess, P. Hurst and A. Hussain, 2 vols)

Introduction

A legal system, and in particular that aspect dealing with criminal law, which is our main concern in this book might seem necessarily to have a 'backward looking' character. A central concern is a past act, the commission of a criminal offence. The apparatus of investigation, trial, sentencing all in various ways and in different degrees are governed by the reference to the commission of an offence. However, the criminal law is also seen as an arena of policy, to some extent at least, it must function to reduce crime and thus it is oriented toward the future, to the achievement of a desired effect.

The application of forward or backward looking criteria can have radically different effects on the operation of a criminal justice system. A heavy sentence may be called for on 'retributive' grounds because the offence is 'serious' even though this may have no crime preventive effect. The *crime passionel* is the 'classic' instance here, an offence of great 'gravity' (at least on some dimensions) but a severe sentence will have little deterrent effect and the offender is most unlikely to re-offend.

So, here is a field of debate defining different conceptions of what the criminal law ought to look like. However, to understand such a debate requires reference to the value judgements involved in both stances, why look forward or backward, what criteria are deployed to answer such questions?

As far as the 'forward looking' stance is concerned an instrumental position is dominant. The criminal law must have a goal or a purpose and to this extent it must look forward. Essentially this is because the scope for 'undoing' a harmful past act, a criminal offence, is limited. Naturally it follows that the dominant goal of the criminal law should be preventive. Of course, there are a number of forward looking positions with distinct premises and implications yet these are differences

concerning the road to crime prevention not about the salience of the objective.

What of the backward looking stance? As it does not offer a pragmatic pay-off (the pursuit of such a pay-off is inimical of what it values) what sustains it? To some extent a backward looking stance defines itself in relation to the pernicous effects which are seen to result from forward looking positions. Our aim is to reduce crime by 'rehabilitating' the offender, the disposition involved rests on the judgement of the body charged with such decisions. Our object is to deter, we vary the penalty with the incidence of the offence. Our aim is to incapacitate the potentially 'dangerous' offender, again who is dangerous and what should happen to them is not known in advance.

Is there a problem here, is there a *common* problem to such distinct forward looking positions? The problem from the backward looking stance is that the offender lives in an *unpredictable* world when he/she is subject to forward looking measures. The offender will not know which 'treatment' will be deemed most appropriate for him/her, cannot control the incidence of a given offence, may not be able to influence assessments of 'danger'. For the backward looking stance if we wish to 'post in advance', the demands of the law, if we abhor 'retrospective legislation' we should reject the forward looking position.

And a second 'problem', if we aim to prevent crime may we not justify 'too much'? After all is it not peculiar in a preventive position to act only after what we wish to prevent has happened? Why not seek to prevent the 'potential offender'? What if we could predict criminal behaviour then would not preventive measures against non offenders be justified? The backward looking theorists see a potential for an *unlimited scope of law* here. Individuals may be coerced as an effect of *conduct* amounting to offending but the proponents of a preventive position may justify coercion on the basis of status (membership of an ethnic group, 'class', on the basis of age, etc.) or in respect of 'private' matters ('lifestyle').

In approaching this terrain one may seek to elaborate the discussion of the two sides, to develop related ethico-political arguments. Alternatively one may examine the concrete effects of such positions, has rehabilitation succeeded, has it been tried,

how good are techniques predicting criminality? Our work tries to do neither of these things, although it draws on such discussions in the course of its analysis.

We aim to examine two distinct types of question in the theory of criminal law in the light of the forward/backward looking division. We have anticipated one of these questions, the dual role of the criminal law concerned with punishing offending and with promoting crime reduction policy. This means that criminal law embodies both forward and backward looking positions.

From the theoretical point of view the problem is can such a combination, prima facie contradictory, be rendered coherent. This problem is classically the problem of the forward looking theorist who wants to avoid justifying too much and we encounter manifestations of such positions in particular in the work of Floud and Young in the first chapter and Hart in the third. The reader will find that we believe that such attempts at synthesis are failures, as far as the existing literature is concerned, forward and backward looking positions remain in tension. In this sense we affirm the validity of the division which sets up the space of the debate.

Yet there is a further set of questions which involve quite different conclusions. What happens if we confront a backward looking stance with a series of key problems, problems to which any criminal law system must provide an answer? For example, any backward looking stance should entertain the idea of *excuse* being a key part of a criminal justice sytem. If it is wrong to 'punish the innocent' should this not apply to those who 'could not control themselves' or 'who could not be justly blamed'? Backward looking positions call for excuses yet excuses are in some respects anomalous. If it is clear in advance what conditions count as excusing conditions does this not logically invite the individual so placed to commit the offence? Of course, this may be 'answered' by saying that when we deal with excuses each case is 'treated on its merits', no rules or precedents are set up. However, if this is so do we not here enter the hated world of 'unpredictability'? So our second set of questions is concerned with how far in facing these questions the backward looking stance really does retain its distinctiveness from the forward

looking? How far the supposed defects of the forward looking position, lack of predictability, intrusion 'beyond the limits' apply in the backward looking 'answers'?

In pursuing these sets of questions we have divided the book into four chapters. In the first chapter we develop the exposition of forward and backward looking positions outlined in this introduction. We examine some of the basic difficulties of reconciling forward and backward looking positions in the light of dealing with the 'dangerous offender'. We consider the juvenile court as a jurisdiction where the response to forward looking strategies in judicial decisions and legislation is instructively ambivalent.

In the second chapter we look at the nature of judicial decision making. We find the problem of a commitment to pregiven rules binding the judge clashing with policy goals or being out of step with desired outcomes from an ethical standpoint. We consider attempts (notably in the work of Dworkin) to resolve such tensions.

Our third chapter treats of the question of excuse. An examination of Hart's work focuses on the attempt to synthesise forward and backward looking positions in this area. In contrast George Fletcher's *Rethinking Criminal Law* is analysed as an example of an attempt to face up to the problems implicit in a backward looking treatment of excuses.

Our final chapter deals with how a criminal offence is defined and in particular with the problem posed by acts which while fitting the 'formal' definition of the offence may be considered morally justified or pragmatically valuable. Familiar problems are manifested, for instance backward looking positions stress the importance of culpability in rendering individuals liable for criminal punishment. On the other hand offences define liability not only in respect of culpability but equally in respect of outcome. Clearly these may be opposed, how do we deal with the culpable individual who escapes committing the offence by a 'chance' occurrence? No liability, thus a de-emphasis on culpability or liability then liability is in respect of intention not conduct, amounting to an infringement of the proper limits of the law?

We attempt in the course of the investigation to utilise not

only theoretical writing but illustrative case material drawn, almost universally, from Anglo-American law. Each area is treated as a space in which the basic problems outlined in the introduction are regularly encountered.

Contents

1 Forward and Backward Approaches to Criminal Law

Debates on the normative character of a system of criminal law have focused on a contrast between 'forward' and 'backward' looking positions. In the former case a policy is adopted if it facilitates a goal related to a future state of affairs. Thus, a crime prevention policy is forward looking since it is designed to reduce future crime rates. In contrast a 'backward looking' policy is one where policy is governed by reference to actions undertaken in the past. If an offender is sentenced according to the 'gravity' of his offence this past action governs the disposition.

Now, while, as we shall see, these outlooks are, in some respects, radically opposed it is common in both jurisdictions and in theoretical arguments to combine the two by a simple algorithmic argument. This is that forward looking criteria may be applied to criminal law policy but only in respect of those who have been convicted of a criminal offence. So, one may only subject to punishment those convicted of a criminal offence but one may apply forward looking criteria in the design of their punishment. For example, I may only punish you if you are convicted of a criminal offence but in deciding on the punishment I may consider the likelihood of your re-offending, what disposition is best designed to reduce the likelihood of this eventuality, etc.

We have advanced the argument that the forward and backward looking positions are often radically opposed, if so, then the 'hybrid' we have identified must be highly problematic notwithstanding its 'practical' and 'theoretical' popularity. Before we can properly investigate this question, however, we need to

specify what these positions are. We shall begin with the forward looking positions, leaving a thorough consideration of the backward looking positions to the end of the chapter.

It is customary to discuss forward looking positions in terms of three alternatives, deterrence, rehabilitation and incapacitation.

At its most basic, deterrence involves countering the 'advantage' derived from criminal activity by the use of punishment. If this is the case then not only the sanction (or to be precise the *perceived* sanction) 'for' a given offence is relevant but equally the perceived likelihood that an offender will be punished. Thus, for instance, an increase in the crime rate for a given offence could be met, within a deterrence position, by heavier sanctions (e.g. longer prison sentences) or by seeking to increase the likelihood of apprehension (by, for instance, increasing the police presence in an area in which criminal activity is high) or both. Thus, deterrence is 'forward looking' because the imposition of punishment, for example, is designed to reduce offending *in future*.

Rehabilitation involves designing a dispositional measure to create the conditions whereby the individual's propensities can be changed. One of the supposed virtues of rehabilitation is that unlike deterrence (and incapacitation) it benefits not only the community (by preventing crime) but the individual 'rehabilitated' and rehabilitation is often looked at as analogous to the provision of medical care. As we shall see later, this aspect plays a significant role in discussions of rehabilitation. Rehabilitation is forward looking because the dispositional measures are orientated to a *future* change in the individual concerned.

Incapacitation is necessarily bound up with any custodial disposition, in the case of the adult offender prison takes him/her 'out of circulation'. In this sense incapacitation is an incidental effect of custodial deterrent sanctions and custodial rehabilitative measures. However, it is perfectly possible to conceptualise incapacitation as a primary aim of disposition. Incapacitation in this sense is forward looking because the need to incapacitate is related to a prediction of the likelihood of offending *in future*.

The 'hybrid' position which we outlined at the beginning of this chapter made it a condition that before forward looking

criteria could be applied (at the dispositional stage) the backward looking condition (that the individual is a convicted offender) had to be met. In other words a consistent forward looking position is precluded if such a stance is adopted. Why is this? The 'hybrid' position allows us to apply crime prevention measures to the convicted, we may seek to rehabilitate them, we may incapacitate them, we may apply sanctions to them with the object of discouraging potential offenders. What we cannot do is apply such measures to those not convicted of offences, to the 'innocent'.

Yet this could be argued to be paradoxical. Our aim is prevention but we can only act once an offence (what we are seeking to prevent) has been committed or until it is suspected that an offence will be committed. What would be a consistent forward looking alternative? An example, which serves to illuminate this question, comes in an article by Andrew Hacker.[1] Hacker points out that most of the criminals in New York City are among the male black population between the ages of 15 and 29. A hypothetical preventive strategy would be to cease treating this group as presumptively innocent. This could involve a range of measures of differing degrees of 'extremity', 'stop and search' by the police without any 'suspicious' behaviour on the part of the individual concerned, curfew, preventive confinement. Clearly, if such a position were adopted, forward looking criteria would be applied to those who were neither necessarily convicted offenders nor even suspected of criminal acts on the basis of conduct (suspicion would rest purely on the basis of being in the 'target' group). Obviously such measures would be, to say the least, highly controversial so one can see the appeal of the 'hybrid' to anyone sympathetic to a forward looking position. Yet how coherent is the hybrid?

We have already indicated the seeming paradox of a preventive position which is limited to acting after what it seeks to prevent has happened. Let us examine this problem in relation to each of our three forward looking positions.

The deterrent position operates by seeking to counter crime through the threat of detection and punishment. The threat of punishment does not, however, only rely on the threat of

detection as a pre-condition but equally relates to the probability of conviction. This is an area where a tension between prevention and offence-based criteria can arise. However, to see why this is so we need to consider the relationship between 'offending' and liability to the constraints of the criminal law.

To do this we must ask the question, why should commission of an offence (or at least sufficient suspicion that one has committed an offence) operate as a 'trigger'?

An influential argument here, which will be stated at this point in a rather summary form is the following: the operation of the criminal law confers various benefits on us, we are afforded protection from the depredations of criminals. If, however, we are ourselves offenders we receive these benefits but in return we are not willing to accept the restraints imposed by the criminal law, i.e. we are unwilling to resist the temptation to break the law.

Clearly the way this argument is cast means that it can only apply to those who could (or could be said to be able to) conform to the law. The assumption is that I *could* resist temptation but I choose not to do so. At this stage we will make no attempt to assess these concepts which are examined at length in Chapter 3. However, what follows from such arguments is that 'involuntary offenders' ought not to be convicted and thus should be 'excused'.

Yet here we have a very basic difficulty from a deterrent standpoint, and one which has often been signalled, the availability of 'excuses' must necessarily reduce the efficacy of deterrence. This is simply because an excuse operates to increase the probability of acquittal and so necessarily reduces the threat of punishment. Consequently this suggests extending the conditions under which individuals render themselves liable to criminal punishment by removing excuses. Clearly this makes eminent sense from a deterrent point of view but naturally it means that whether an individual could have conformed to the law becomes irrelevant to the question of liability to conviction.

In examining the elimination of excuses from the criminal law to maximise the efficacy of deterrence we must realise that what is at stake is the general principle of 'punishing the innocent'. Thus, while eliminating excuses might seem less 'extreme'

than say, preventive confinement of 'potential criminals', they both involve an infringement of the said principle. Consequently, an objection to preventive confinement (we shall examine this question in more detail below) is that if individuals are assessed on their 'propensities' they are subject to punishment even though they are not allowed (by that confinement) to conform to the law. If excuses are eliminated there is a basic affinity with preventive confinement since those deemed unable to conform to the law (by virtue, in this case of the relevant 'excusing condition') would, again, be punished.

Where the object is rehabilitative the 'hybrid' involves a number of problems distinct from those involved in deterrence. An important difference is that while a deterrent rationale clearly envisages *punishment* as being dispensed at the dispositional stage this is not the case with rehabilitation. Here dispositions have the role not only of benefiting the community (through crime prevention) but also the individual.

However, there is a similarity between deterrence and rehabilitation to the extent that excuses subvert the basic objectives entailed in the position. Thus, for instance, what might serve as an excusing condition could be seen as an index par excellence of a need for treatment. This difficulty is nicely crystallised in Glanville Williams' argument, advanced in the context of a consideration of the criminal responsibility of children. He stresses that the role of defences negating criminal responsibility do not save the child:

> From prison, transportation or the gallows but from the probation officer, the foster-parent or the approved school. The paradoxical result is that the more warped the child's moral standards the safer he is from the correctional treatment of the criminal law.[2]

In addition to this problem there is the difficulty of the inversion of priorities. A hybrid stance in the rehabilitative context means that 'treatment' measures may only be applied to offenders. If, however, offending is seen as a function of an underlying 'condition' which requires treatment then commission of an offence is a purely contingent feature. It is the

'need for treatment' which structures the propensity to offend, in a particular set of circumstances the propensity will be 'realised'. According to such an analysis it would be incongrous to base the condition of treatment on the commission of the offence because the treatment should be provided in respect of the propensity not the conditions of its 'accidental' fulfilment.

There is an almost perfect parallel between the 'problem of excuses' in the rehabilitative position and in relation to incapacitation. A classic example of the kind of problem which is encountered where two heterogeneous frameworks collide is provided by the defence of 'diminished responsibility' in English law. This defence, introduced into English law in 1957, was, by its very terms, backward looking in the sense that 'abnormality of mind' was to be taken to *reduce* the individual's responsibility for his/her actions thus it was designed to function as a 'partial' excuse. In *Reg* v *Byrne*[3] Parker explicated the relevant section of the Homicide Act of 1957 as follows:

> 'Abnormality of mind' in section 2 of the Homicide Act, 1957 covers the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a judgement whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement.[4]

Clearly, if this defence were successful the corollary should have been a reduced sentence in line with the 'reduced' culpability of the individual concerned. However, from the forward looking standpoint this would be a totally erroneous course. The individual with a reduced degree of self-control could be regarded as more likely to commit the act concerned again. To reduce the sentence would be to release the individual concerned at an earlier date, increasing the risk to the public by both ending incarceration and reducing the time available for treatment. Furthermore, insofar as a line of treatment could be specified it would be related to the sentence only in the most fortuitous way.