METHOD IN PUNISHMENT THEORY

I can explain everything, but not all at once

– Rousseau

When an odd craft we philosophers follow! Those who give us the most attention are generally those we fail, our critics. They are also our most careful assistants. While they may not intend it, they show us what to fix; they help to strengthen what they fail to kill. Oddest of all, as we age, our philosophical enemies are increasingly our friends – as if a parent could grow to love those he knows are set on murdering his children.

Such were my thoughts as I reviewed recent criticism of the “fairness theory of criminal desert”. Nearly two decades ago, when I first proposed my version, criticism seemed to require more explanation. Sentences became paragraphs; paragraphs, whole sections. Then followed a long period when critics doubted that the fairness theory could do this or that. I applied the theory to specific problems. See, it works here, and here, and here. Now, criticism seems to be changing again, especially in the two long papers recently published in this journal, David Dolinko’s “Mismeasuring ‘Unfair Advantage’” and Don Scheid’s “Davis, Unfair-Advantage Theory, and Criminal-Desert”. The criticism is deeper – or, at least, more general. For example, both Dolinko and Scheid argue that my version of the theory is “incoherent”.

Yet here is another oddity of philosophy. My critics seem to have ignored earlier responses to some criticism. For example, one “incoherence” that both Dolinko and Scheid make much of concerns punishment

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3 See, for example, Sanford H. Kadish, “Forward: the Criminal Law and the Luck of the Draw”, *Journal of Criminal Law and Criminology* 84 (1994): 679–702, especially p. 694: “But, it seems unrealistic and demeaning to the rest of us to treat all crimes in this manner. What the law-abiding feel when they read of a child abduction, a rape, a murder, a vicious assault, is not the offender has gotten an unfair advantage over them for which he should be penalized. . . . It is the evil of the offender and the harm he has imposed on the victim

of unlicensed crime ("poaching") in the model with which I try to measure unfair advantage. I devoted a whole section of a paper—a paper both cite for other purposes—to explain why I chose one resolution of the problem and how that resolution avoided any incoherence. In another paper they cite, I argued that the measured value of unfair advantage is stable across all plausible resolutions of the problem. The "incoherence", if that is what it is, does not matter. How could my most careful assistants miss these arguments? They could not. So, from their perspective, the arguments must seem not to address their criticism. What then is their criticism? Where do we disagree?

What I shall argue here is that our disagreements are now (primarily) methodological. We disagree not so much about whether the fairness theory meets this or that criteria of justification as about what the proper criteria are. Since not much has been written about criteria of justification for theories of punishment, indeed, not much about justification of legal theory generally, much of what follows should be of interest even to those who might otherwise justifiably excuse themselves from a paper on punishment.

The paper has five parts. The first briefly describes the central features of the fairness theory, including the market model. Those familiar with the theory may skip this part. The second part distinguishes several kinds of justification. The third part examines certain demands often made of theories—that they be "coherent", that they not beg the question, and so on. Are these demands requirements, desiderata, or mere dreams not worth which moves them, not their own loss." This criticism appeared between references to my "Criminal Desert and Unfair Advantage: What's the Connection?" Law and Philosophy 12 (1993): 133-56, in which the final footnote discussed what seems an analogous objection (one differing only in being concerned with what a judge could justifiably say rather than what "the law-abiding feel"), p. 155: "As I understand the sentencing process, any reference to relative unfair advantage is appropriate only to explain why the maximum legal punishment for that crime is deserved. The judge is free to refer to the harm the criminal did, to the rights he violated, or the like to explain the crime's relative rank since such matters are relevant to 'supply'."


6 John Rawls has, of course, inspired a large literature on method relevant to his theory of distributive justice. But nothing I have seen, either by him or by his friends or critics, seems to address most of the points I shall be making below—or, at least, to address them in a way relevant to corrective justice. I find this absence of previous work unnerving.

7 But don't skip the footnotes where, at appropriate points, I respond to significant criticisms out of the main line of the argument.