

SOME THOUGHTS ON JOEL FEINBERG'S MODEST PROPOSAL: IS IT REALLY SUCH A MODEST PROPOSAL AFTER ALL?

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In his paper *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, Joel Feinberg offers the "modest proposal" that the criminal law ought to correct for the influence of luck by eliminating the causal condition from the definition of crimes. The reason for the modest proposal, according to Feinberg, is to eliminate the purportedly corrosive effect of arbitrariness within the law. If two people, say A_1 and A_2 , act identically in all morally relevant respects (i.e., they have identical intent, plans, aims, etc.) but A_1 's act has the unfortunate result of causing someone's death while A_2 's act does not have this result, then to punish them differently is to punish arbitrarily. Differential punishment, Feinberg suggests, is arbitrary because the example assumes that A_1 and A_2 are equally blameworthy—the only difference being A_1 's bad luck and A_2 's good luck—and if this is the case then the principle of proportionality would seem to require equal punishment.

This modest proposal, which Feinberg calls the "reformist" position, tends not to sit well with many who find something about the "traditionalist" view appealing.¹ But Feinberg examines a number of attempted justifications for the traditionalist view and finds them all wanting. Feinberg's strategy in arguing for the reformist position, then, is twofold. First, he argues that the reformist position eliminates the problematic arbitrariness of the traditionalist position. And second, he claims that common attempts to justify the traditionalist position—to find some reason for punishing the successful more severely than the unsuccessful—do not succeed (and so the problem of arbitrariness remains). The reformist position becomes the default position since only it can avoid the problem of arbitrariness. The burden is placed on the traditionalist who must continue the justificatory search, while the reformist stands by ready to point out the errors of the traditionalist's proffered justifications.

But must the traditionalist bear this burden? One tack the traditionalist may take is to turn the arbitrariness argument on Feinberg himself with the aim of showing that they are "companions in guilt."² How might this be done? The difference between the successful and the unsuccessful is said to be attributable to luck. The causal conditions beyond the control of the two agents must be such that otherwise identical cases result in tragically different degrees of harm.

1. The traditionalist view maintains that greater punishment for A_1 than A_2 is legitimate.

2. I borrow this phrase from JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 39 (1977).

But there are further causal conditions that are beyond the control of the agents—causal conditions that make them who they are.³ Hence it seems possible that those who attempt crimes and those who do not might also be attributable to luck. Take, for instance, the case of the Gilmore brothers. In his biography of his brother Gary, Mikal Gilmore attributes Gary's (successful) attempts to kill to his receiving the major and worst portion of their father's abuse.⁴ Mikal acknowledges that had he been in Gary's situation he might well have been led to commit similar crimes:

[H]ad I been beaten as much as they were—in particular, as much as Gary, whose pain and fear only seemed to gain him especially savage thrashings—there's a good chance that I also would have ended up as a man who spent his whole life preparing to pull a trigger.⁵

The different constitutions of Gary and Mikal are themselves a matter of luck.⁶ If this is right, then it seems the reformist position would require that we punish Gary and Mikal equally.⁷ If before we experienced modest discomfort with Feinberg's modest proposal, we now find ourselves confronted with severe discomfort with what appears to be a severe proposal. The aim of this argument is to place Feinberg in a dilemma: either he adopts the unsatisfying severe proposal or he maintains his moderate proposal and accepts the arbitrariness that comes with it.

Let us briefly examine the various responses available to the reformist. First, the reformist may grab the first horn and argue that equalizing punishments for attempters and non-attempters is in indeed justified. Let us call this the radical reformist approach. The radical reformist position is untenable. We could not accept its implications: it is difficult to imagine punishing non-attempters or not punishing attempters.⁸ Second, he may try to get out of the dilemma and save moderate reformism by showing that its recommendations are justified and so the arbitrariness is only apparent. However, to show that the moderate reformist position does not succumb to arbitrariness, as does the traditionalist position, Feinberg must show that differential punishment is arbitrary in the case of successful versus unsuccessful attempts but is not in the case of attempts versus non-attempts. On this response the moderate reformist is searching, just like the traditionalist, for some relevant difference.⁹ What

3. Both Bernard Williams and Thomas Nagel refer to this as "constitutive luck." See Bernard Williams, *Moral Luck*, in *MORAL LUCK*, at 20 (1981), and Thomas Nagel, *Moral Luck*, in *MORTAL QUESTIONS*, at 28 (1979). There are also other kinds of luck that are less pervasive than constitutive luck that may still be of some significance, but we shall have to leave them aside to simplify matters.

4. MIKAL GILMORE, *SHOT IN THE HEART* (1994).

5. Martha Woodall, *Violence Begets Violence: Brother sheds light on Gary Gilmore Saga*, ARIZ. DAILY STAR, July 31, 1994 at 11E (reviewing MIKAL GILMORE, *SHOT IN THE HEART* (1994)) (quoting MIKAL GILMORE, *SHOT IN THE HEART* (1994)).

6. We might say that Gary was two steps removed from his brother on the ladder of luck. First by being unlucky enough to have been the object of his father's abuse and second to have been successful in his attempts to kill.

7. Leveling down we don't punish Gary at all, leveling up we sentence Mikal to death, or we find some middle ground such as twenty years jail time for each.

8. This is not, however, to say that it is without all force. For it does seem reasonable to want to correct to some extent for unfortunate life circumstances that lead one person to a life of crime, even though we may find it difficult to fully take such factors into consideration.

9. There are too many possibilities to consider here, and so we may only consider a few. But, it is noteworthy that many of the justifications the moderate reformist offers for allowing apparent arbitrariness might be utilized by the traditionalist. Thus, the moderate

could this difference be? One possible answer focuses on epistemological considerations. We punish those who attempt but fail because we know that they could have killed someone precisely because they attempted to do so and only luck stood in their way. But we face a much greater difficulty in coming to any kind of reliable assessment of whether someone would have attempted to kill had the antecedent causal conditions differed. Our greater uncertainty in the latter case, it is argued, justifies not punishing those who might make such attempts even if that means that those who would have made such attempts go unpunished since (we can suppose) it would be worse to mistakenly punish those who wouldn't make such attempts. The problem with the moderate reformist's epistemological justification is twofold. First, since it is possible that there may be cases where we do have reliable evidence (suppose one of two identical twins attempts a crime), equal punishment might be required after all. Second, the traditionalist might also invoke the epistemological justification. For we might have better reasons for thinking that the successful are more blameworthy.¹⁰

Another, perhaps more promising, justification for the moderate reformist would be to seek to distinguish the attempter and non-attempter in terms of blameworthiness. Gary, but not his brother, has certain beliefs, desires, purposes, goals, motives, and aims that render him morally blameworthy. Specifically, Gary chose to kill and Mikal did not. So, it would seem that there is a morally relevant difference after all. But is this right? Our example (like Feinberg's initial example) assumes that Mikal would have had and that Gary would not have had those beliefs, desires, etc. that make for our ascription of moral blameworthiness were it not for the influence of luck.¹¹ To punish Gary but not Mikal seems to introduce a kind of arbitrariness, albeit of a deeper or more remote sort, into the punishing scheme invoked by the criminal law. If this is right, then both the moderate reformist and the traditionalist introduce some form of arbitrariness into the law. There is no principled distinction between the two positions, but only a matter of degree. If we believe that we must avoid arbitrariness altogether then it seems we must adopt the unpalatable radical reformist view.

Are we compelled to do this? The answer to this question, given our remarks thus far, would seem to depend upon the acceptability of some degree of arbitrariness. To accept some measure of arbitrariness is to grasp the second horn of the dilemma and, I think, brings us to the core issue since it is a concern about arbitrariness that motivates the reformist proposal in the first place. Feinberg contends that arbitrariness in the law is a bad thing—it is, he says, like rust to machinery.¹² But as Barbara Herman points out, referring to Feinberg's metaphor, some rust is not necessarily threatening.¹³ Can we say this about arbitrariness and the law? I believe that we can.¹⁴ But how we come to

reformist has the added burden of locating some justification that the traditionalist will not be able to utilize.

10. For instance, that they were more intent upon killing and had fewer second thoughts.

11. That is, had the influence of luck been reversed, Mikal would have chosen to kill and Gary would not have.

12. See Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995).

13. See Herman's response to Feinberg. Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143 (1995).

14. In fact, it seems that we do, since we tend to remain committed to the traditionalist view in the face of its apparent arbitrariness.

this point requires some investigation.

First, we must distinguish between arbitrariness and discrimination (in the pejorative sense). Some decision, act, or practice is arbitrary if it lacks good reason or justification. While something is discriminatory if it is contrary to good reason or justification. We can also delineate a third category, namely, those things which possess some positive justification. Clearly, perceptions of discrimination will have a corrosive effect on the law. But what about perceptions of arbitrariness? Rational considerations would seem not to weigh upon arbitrary decisions, acts, and practices—i.e., that something is arbitrary provides us with neither a defense of it nor an argument against it. Instead, it seems that given the nature of arbitrariness we ought to be rationally indifferent to it. We have, then, a *prima facie* argument for rational indifference with respect to the arbitrary.¹⁵ If this characterization is right, arbitrariness in the law should not concern us.

Those, like Feinberg, who are concerned about arbitrariness must have more in mind. One way to make sense of this concern is to understand Feinberg as collapsing the category of the arbitrary such that there are really only two categories: the justified and the discriminatory.¹⁶ The arbitrary, incorporated into the discriminatory, would thus have a corrosive effect. But such a view requires further argument. Specifically, it requires that one defend the twofold classification and show that greater punishment for successful attempts is discriminatory while simultaneously arguing—if one wants to avoid the radical reformist position—that greater punishment for attempts (as opposed to non-attempts) is justified. I do not think this route advisable, for it rests on the mistaken assumption that that which we are not able to justify must be unjustifiable and so unjustified. There are sometimes serious epistemic difficulties concerning issues of justification; epistemic difficulties that if sufficiently stubborn might themselves warrant the postulation of an independent category of the arbitrary or, at the very least, the acknowledgment of its possibility.

Supposing there may be such a category what is its significance? The matter is not quite as simple as we indicated above with the *prima facie* argument for its acceptability. Intuitively, we do not think that all arbitrariness is of no rational significance. We need to pinpoint the source of our concern about arbitrariness. We might for our purposes usefully distinguish two kinds of arbitrariness. First, there is arbitrariness which is internal to a legal system. The legal system as an object of human creation and design is something from which we aim to eliminate arbitrariness. Standards of evidence, sentencing standards, and various methods and procedures are utilized to create a system that reflects our ideals of fairness and consistency. We aim to treat relevantly similar cases similarly. When this fails to happen, however, it may not be the result of any identifiable discrimination. There is a kind of luck, chance, or randomness given the complexity of the system. To the extent that we can correct for this (and to the extent that such corrections will not be too costly),

15. Or, perhaps ambivalence if we feel the pull of equal reasons in each direction. To allow for this possibility would expand the category of the arbitrary. I am not certain that this ought to be considered part of the arbitrary. Further argumentation is required.

16. The reasons for adopting a two-category view are many, but I cannot go into this here.

we ought to do so.¹⁷ But, it may not be possible to make such corrections (due to cost or sheer complexity); and then, the arbitrariness is lamentable and something that we must tolerate.¹⁸ The second kind of arbitrariness, and the kind with which I shall be concerned, is that which is external to the legal system. The legal system aims to take the relevant events and happenings in the world (or facts) that comprise cases and go from these to judgments or prescriptions about what ought to be done in response. The system is internally arbitrary to the extent that the connection between cases and judgments is arbitrary. But we must also realize that the relevant events and happenings in the world are themselves infused with arbitrariness before they are brought to the legal system. The facts of a case involve various moral considerations. It is possible, then, for the legal system to reflect this external moral arbitrariness while being itself internally non-arbitrary. We might, utilizing this distinction, hypothesize that when the legal system merely reflects arbitrariness that is external to it, it is not undermined; but when the arbitrariness is internal to the legal system itself, it tends to have a corrupting effect. Let us call this the external arbitrariness thesis. The reason, according to the external arbitrariness thesis, that we do not find differential punishment in the case of failed and successful attempts to be unfair is that we take the law to be merely reflecting the arbitrariness that is ineliminably a part of life—the legal system as a system has little or nothing to do with this sort of arbitrariness. Internal arbitrariness cries out for reform and correction in a way that external arbitrariness does not.¹⁹

Do we have reason to accept the external arbitrariness thesis and with it the traditionalist view? Evidence for the external arbitrariness thesis would require that we at least show that there is a kind of external (non-legal) arbitrariness that differential punishment tracks. The external arbitrariness that differential punishment tracks is, as I have already hinted, a more fundamental moral arbitrariness. To bring out this point, let us begin with a moral case and then we shall return to the legal realm. Suppose two parents P_1 and P_2 leave their respective children C_1 and C_2 briefly unattended in their swimming pools while they go inside to answer the phone. Upon returning to the pool, P_1 finds C_1 drowned, while P_2 finds C_2 splashing about and having fun. In some sense they are certainly equally morally guilty of negligence. But, we will typically find that only P_1 experiences great regret, remorse, shame, and angst. P_1 hopelessly wishes to go back in time to avert the tragedy that has occurred but knows he cannot, hence his inner turmoil. P_2 will go on largely as before (with the exception of a possible “what if...” thought in the back of his mind). To the

17. I take it that this is the concern that motivates Feinberg. Namely, that we want to eliminate arbitrariness from things of our own creation. Perhaps we cannot live with the repercussions of arbitrariness at our own hands—it is something we do not want to be responsible for.

18. This is not the situation with Feinberg's modest proposal, for it does seem possible to correct for the kind of arbitrariness that he is concerned with. The question, then, is should we?

19. This is not to say that we should simply accept external arbitrariness in all its forms—there are certainly some that we should aim to correct, such as unfair disparities in wealth and opportunity that lead to some committing crimes but not others. However, this sort of arbitrariness is internal to the political system and so these kinds of reforms must proceed at the broad political level and not merely within the criminal law. Other kinds of external arbitrariness may not admit of correction, such as the kind of natural intervention of which Feinberg is, and I shall be, concerned with.

observer this is largely how things should be. We may think P_2 ought to be a bit more reflective so as to avert possible future tragedy. But, if P_1 were not to feel this inner turmoil, we would find something seriously wrong. Something terrible has happened— P_1 has lost a child—and this loss ought to be acknowledged. Furthermore, were P_1 to offer as a justification for not feeling inner turmoil an argument that appeals to the fact that P_2 does not feel any inner turmoil, and that he, P_1 , is equally guilty and therefore he ought not to feel inner turmoil, we would find this argument offensive and the fact that P_1 does not feel inner turmoil (and offers such an argument) a bad reflection on P_1 's character. It reflects an insensitivity to a loss of something of great value. P_1 ought to take it upon himself to feel this inner turmoil as an acknowledgment of the tragedy. We might even go so far as to say that it is appropriate for P_1 to "punish" himself for his bad luck. If P_1 does not we think it appropriate to morally condemn P_1 .

Now let us return to the law. What lessons can we learn from the moral case? Should we punish A_1 (the successful) more than A_2 (the unsuccessful)? There are, I think, two implications to be drawn. First, that other things being equal it would be appropriate despite the arbitrariness to punish A_1 more. In the case of A_1 something terrible has happened and this ought to be acknowledged. To punish A_1 and A_2 equally is an affront to our moral sensibility because it fails to recognize the tragedy that has occurred. Just as grieving parents (and we) can accept their grief in the face of life's arbitrariness, so too those who commit crimes (and we) can accept their greater punishment despite some measure of arbitrariness. This brings me to the second implication: that we punish the anguished criminal less severely in part because there is already a recognition of the tragedy. The remorseless must be punished more severely so that we as a society may say to them that they ought to recognize the terrible thing that has happened at their doing. There seems, then, to be this connection between a fundamental moral arbitrariness and arbitrariness in the law: that the latter is a reflection of the former. Differential punishment is not internally arbitrary, instead it tracks a moral arbitrariness that exists outside the legal system and which we accept in our moral practice. In short, we would say of A_1 and A_2 that their cases are not morally relevantly similar—in the case of A_1 *someone has died*—and therefore they need not (and perhaps ought not) be treated alike.

Isn't this to offer a justification for greater punishment and therefore to deny that it is arbitrary? There are two things that must be said here. First, it may be a justification of the traditionalist position to the extent that that is possible. The justification would be that the traditionalist position does not introduce a corrupting internal arbitrariness into the legal system—an arbitrariness of our own creation. A complete justification (i.e., a justification all-the-way-down), however, would require showing that the external arbitrariness the legal system reflects—i.e., moral arbitrariness—is itself justified. This brings up the second point, that this kind of justification is not possible. Fundamental arbitrariness, by its very nature, is not something that can admit of justification. Although the justification of moral arbitrariness is out of the question there may be a sense in which we can come to terms with it. We see, I think, that there is a kind of paradox brought about by moral arbitrariness: on the one hand, we think that arbitrariness threatens the autonomy of agents by rendering our moral responses to agents not merely

responses to their wills; while on the other hand, the attempt to eliminate all arbitrariness threatens to implode autonomy—since the will itself appears subject to arbitrariness in the form of constitutive luck.²⁰ In the face of this paradox, we, as agents who experience our own autonomy from the inside, find that we must accept arbitrariness and its consequences to both lay claim and maintain a hold over our autonomy. Autonomy may begin from the acceptance of responsibility for some things that go beyond our control.²¹ This is often not easy to do, but it is essential to our seeing ourselves as persons. This acceptance is characterized by what we might call an attitude of moral fortitude—e.g., the attitude of tragic figures such as Sisyphus and Oedipus—and it is evident, as we have seen, in our most basic moral emotions of regret.²² If this account of the moral emotions in grounding autonomy is right, then moral arbitrariness is not something which is justified, but is something which we must come to terms with insofar as we see ourselves as autonomous agents.²³

As an intuitive traditionalist, this is my best attempt at defending the traditionalist position against Feinberg's insightful reformist criticisms. I hope to have shown that the question of arbitrariness is of central importance. Specifically, that the attempt to eliminate all arbitrariness threatens to lead to an unacceptable radical reformist position. Both the moderate reformist and the traditionalist must allow for some degree of arbitrariness and I have argued that the arbitrariness invoked by the traditionalist is an external moral arbitrariness that we can (or even must) come to terms with. The implication of this for Feinberg's moderate reformist proposal is that to convince the traditionalist Feinberg has to show why constitutive arbitrariness is acceptable while the circumstantial arbitrariness he considers is unacceptable.²⁴ If he can do this, then we ought to become moderate reformists in principle. The remaining question, of course, would be whether we ought to go the next step and become moderate reformists in practice.

20. See *supra* note 3.

21. The importance of this act of will is a central insight of many "existentialist" writers.

22. I have in mind what Bernard Williams calls "agent-regret." Agent-regret is captured by two conditions: first, it is regret experienced by an agent connected to some aspect of her agency; and secondly, it involves "a particular kind of expression"—a symbolic expression of "reparative significance" that goes beyond mere compensation. See Williams, *supra* note 3, at 27, 29.

23. The argument of this paragraph has been influenced by Nagel's piece, *Moral Luck*. See *supra* note 3.

24. Such a response is certainly possible, but unfortunately we cannot consider it here. It involves a different kind of line-drawing than I have attempted here.

