

More Crime and Discipline

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In his reply (FL vol.6 no.1) to my remarks on his article, J.C. Lester tells us that his "quasi-contractual view of crime and punishment was being offered as an argument for those people who already take the value of liberty for granted but who see all punishment as rather like the initiation of aggression". This is as I supposed in my original reply (FL vol.5 no.3) where I mentioned that we could also argue that a little coercion in the form of punishment may prevent and compensate for a good deal of coercion in the form of crime. Mr Lester finds this view 'more fundamental' than his own, but I do not see why. Both views rest on the belief, however motivated, that the use of coercion is undesirable and requires some apology where it must be employed. Both arguments may stand independently.

Odd Consequences

We would both justify the relatively little coercion of punishment as the only alternative to the great deal of coercion involved in rampant crime. However, I took it that Mr Lester believes that such coercion is also justified because the criminal opts into it when he commits a crime and so in a sense consents to it. This is very much like contracting into slavery where we freely make a decision today to forego our freedom tomorrow. Such a situation is quite possible but its consequences are rather odd, and I think it reasonable to claim that in such a case, tomorrow's coercion "is in one sense no coercion". Though he denies it, I feel that Mr Lester says the same thing with more precision when he states that "...such punishment is not the violation of libertarian property rights; it is the enforcement of them."

Ideas of Freedom

I cannot accept as inevitable that "A society without punishment according to the levels people pay to see enforced would be less free..." (because this would) "...necessarily violate the property-contractual conception

of freedom". While it is unlikely in this extreme, it is possible that a government might enforce fewer and less restrictive laws than the market left to its own devices. In this case the "necessary" loss of freedom entailed through retaining a vestigial state might be much less than the "contingent" loss of freedom brought about by market demand. I doubt whether Mr Lester will be very impressed by this idea when the signs are that he would like to define freedom in terms of the unhampered operation of market forces. For him, a society in which, for instance, sexual intercourse outside marriage was a crime would be less free than a sexually permissive society, regardless of the moral preferences of most consumers. I guess that Mr Lester would place more emphasis on the illiberal restriction of the demands of the consumer majority. We may disagree here on the nature of freedom, but as a matter of fact I am sure that we both agree that the state is in reality no guardian of liberty, and that we are almost bound to get more tolerance through the market.

Unfortunately my original reply to Mr Lester contained a typographical error. My claim that "a contract requires consent between partners and in a crime there is no consent and there are no partners" was printed condensed into "a contract requires consent and there are no partners". Mr Lester rightly points out the nonsensical nature of the condensed version and politely overlooks the miserable English that accompanies it. My point was that it is nonsense to suggest that "a burglar quasi-contracts to be liable to be punished for his burglary" because there is no form of consent or partnership between the criminal and his victim or victim's representative.

What Makes a Contract?

It would appear that for Mr Lester all that we require for a contract are two actions, one the result of a predictable consequence of the other. In this case, A and B have a contract if A mugs B knowing he is liable to be punished for it. It must be obvious that contracts involve more than this, that it is essential to contracts that when a commodity, whatever its nature, is delivered, it is in *order* to receive another commodity

in exchange. Only then do we have the agreement or consent that is the hallmark of a contract and makes parties into partners. Mr Lester's claim that a criminal and his victim are partners in this way, as opposed to merely parties in an interaction, is quite bizarre. It is equivalent to saying that a burglar commits a crime in order to be punished for it, and that the victim demands the burglar's punishment in order that he might be burgled.

Nor do I see how the presupposition of libertarian property rights or any other conception of morality helps produce a contract where these features are lacking. It may be that either or both of us feels that he has a moral right to punch anyone who insults his mother, and it may be that most of society agrees with us, but how does it give us a contract with someone who doesn't share our views or intend to respect them?

In all of the above I have been assuming that by "quasi-contract" Mr Lester means a real but tacit contract - a situation where a contract is understood but not formalized. I took this from his example of a diner in a restaurant, a case in which there clearly is a genuine exchange of service for money, and not just the coincidence of two related events. It occurs to me though that Mr Lester's quasi-contract is not meant to be a real contract but a metaphorical one, sufficiently similar to a genuine contract for us to benefit from the analogy, but not a true contract as described above. But if so, what is the benefit of the analogy? Certainly not to show that the criminal consents in some way to receiving punishment as part of an exchange when consent and exchange are precisely what are missing from the original metaphor.

Indigestible

At the risk of being pedantic we might also draw a distinction between making a contract to be punished, and being punished for breaking a contract. In the first case the exchange involved in the contract is that of a crime against (liability for) punishment, and when Mr Lester speaks of a victim "charging a price" for the crime committed against him he appears to be thinking along these lines. However, he also mentions quasi-contracting

into rules of a society and of enforcing libertarian property rights, presumably when such rules are broken. In this case, punishment is the penalty for breaking a contract, for failing to make the agreed exchange of mutual respect for person and property,

This second idea is more usually called 'social contract' than 'quasi-contract'. Among the features of this idea that I find indigestible is the extreme broadness of the activity involved in making such a contract. While the diner signs no formal document, he must nonetheless enter the premises and order a meal in order to make a contract. The social contractee need do nothing more specific than "live in a society". More importantly, however, the social contractee has little or no choice as to whether or not to enter such a contract. He is certainly bound to have to live in one society or another, and he may like the rules of none of them. Nonetheless, it appears that he must enter into a contract with one of them. This idea of being coerced into making a contract seems to me contradictory, and in any event, I cannot see the value to Mr Lester's case of invoking a 'coerced contract' to defend the use of further coercion.

Not Just Any Price

Finally, it appears that we both agree that the level of punishment administered in a society is not solely at the discretion of the victims of crimes. Protection agencies will offer their services on the basis of what is thought satisfactory by overall demand of the mass of consumers, potential criminals or recipients of punishment included. I have to admit that on reading Mr Lester's original article more carefully it is clear that he never made any statement to the contrary. I am pleased that neither of us believe that individuals would be able to "dictate just any price they like". If we did then I am sure that we would both be extremely nervous of the legal decentralization that we advocate.