

In Defense of Penal Lotteries

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Abstract

In “The Punishment That Leaves Something to Chance,” David Lewis presents the concept of a penal lottery in order to justify why successful crimes are punished more severely than unsuccessful crimes. Lewis argues that the practice of punishing unsuccessful crime less severely is a type of penal lottery, namely, an enactment lottery, but he does not argue for the implementation of a more literal type of penal lottery. In the same paper, he distinguishes theories of punishment such as retributivism and utilitarianism. In my paper, I will investigate the ideas brought up in Lewis’s argument and then I will contest his ambivalence towards whether or not penal lotteries are just, pushing towards the suggestion that they are just. I will argue for the implementation of penal lotteries in cases where the perpetrator willingly risked the lives and well-being of others, with the key examples being DUI’s, breaking quarantines, and selling illegal drugs. I will also show how penal lotteries appeal to a range of theories of punishment. I will also acknowledge some of the inherent dangers that arise from the presence of penal lotteries, particularly, the increased risk of corrupt sentences, but I will explain why we can afford to take such risks.

I. Introduction

Ronald Opus jumps off of his ten-story apartment building. There’s an awning below him that he didn’t account for which will save his life. But, as he falls, his pugnacious parents wrestle over a shotgun which then unexpectedly fires out the window as his body passes by, killing him instantly. Before his parents are arrested for murder it is revealed that normally the shotgun would not be loaded, but Ronald had intended to kill himself a few days earlier with the family’s gun and he had loaded a shell into it before deciding not to go through with that particular suicide attempt. So, his parents could not be held responsible for the murder, right? Well, the jury learns that the reason Ronald intended to kill himself was because of his abusive family members, and they deduce that he would not have loaded the gun had he not been pushed to kill himself by his familial strife. His parents are convicted of murder, but the question still remains: was Ronald’s death a murder or a suicide?

Perhaps this hypothetical illuminates a facet of certain crimes: that the culpability is distributed chaotically. It’s from this observation that I derive my paper’s motivating question: when randomness determines the culpability of crime, how do we distribute the appropriate punishment? This question is implied when we ask to what degree is the Opus family responsible for the death of their son. In this terribly unfortunate situation, random chance played a central role. It’s an obscene coincidence that the shotgun fired when it did. I believe that if such a case were to unfold in the real world, random chance should play a central role in the punishment as well. The way to do this would be to implement penal lotteries. This brings us to the driving

motivation for this paper: that penal lotteries are a necessary component of a good theory of punishment.

Before I proceed, I ought to quickly describe what a penal lottery might entail. One model that David Lewis proposes in his paper, “The Punishment that Leaves Something to Chance,” is that the jury or court may determine the probability of successfully murdering the victim in the case at hand and force the defendant to draw straws with a probability of maximal punishment that corresponds to the probability of harm the jury or court determined had occurred at the crime. Lewis provides a few other ways in which a penal lottery could be implemented, but the key takeaway ought to be that the defendant receives a worse punishment if they “win” the lottery and a lighter punishment if they “lose”.

Another important distinction going forward is that, while I will be arguing for the implementation of penal lotteries, the type of penal lottery that I will generally be discussing in this paper is different from the type that Lewis primarily endorses, which he calls the enactment lottery. I would say that, while the enactment lottery is technically a type of penal lottery, it is largely an interpretation of a certain set of properties of our present penal system, a set of properties which could be interpreted differently and in such a way that is not conducive to said set being a type of penal lottery. Also, an enactment lottery does not entail the use of a man-made lottery, and so it lacks certain causal properties that other types of penal lotteries have. Therefore, in this paper I will occasionally refer to penal lotteries which are not enactment lotteries as “concrete penal lotteries,” and I will occasionally describe enactment lotteries as “abstract penal lotteries.”

Finally, I will at some point use the phrase “risky crimes” which refers to a class of crimes wherein the perpetrator did not commit the crime with the intent of harming others, but they did accept the possibility. The main example for this type of crime that I will use is drunk driving, but the phrase could also apply to selling prescription drugs (potential for abuse; adverse side-effects; overdose), cyberbullying (since the harm caused could range from minimal self-esteem damage to suicide), negligent parenting, or going to a concert with a fever during a pandemic.

II. The Current Presence of Penal Lotteries

Lewis argues that a penal lottery already exists in our legal system, namely, the enactment lottery. This stems from his claim that the reason we punish murderers more harshly than attempted murderers is because attempted murderers won the lottery, metaphorically speaking, by missing their target (or failing to follow through with their crimes for other reasons that can be interpreted probabilistically, like being caught). So, if we imagine a probability distribution for how likely someone is to pull off a murder, then the enactment lottery is just one process of generating an outcome on that distribution wherein the process is the enactment of the crime itself. Now, in order to reach this conclusion, Lewis outlines five cases that detail the transformation from a concrete penal lottery to the concept of an enactment lottery. Let’s explore this progression.

In case 1, Lewis defines a system of punishment where, after a criminal is convicted, she is confronted with a range of punishments that vary in the amount of harm they would cause. The punishment that the criminal receives is chosen at random in accordance to some probability distribution. This is an overt penal lottery.

In case 2, the overt penal lottery is carried out in the same way for the most part except that the outcome of the probability distribution is generated before the criminal is convicted. In this hypothetical, she will still learn which punishment she receives after she has been convicted.

In case 3, the punishment is randomly determined before the criminal is convicted, and the punishment is revealed to the criminal before they are sentenced so that they know what may be in store for them.

In case 4, penal harm is ensured no matter what outcome the criminal receives. The purpose of this amendment is to account for a possible trial in which the criminal is told that they will lose the lottery, which means that even if they are convicted their sentence will be significantly lighter than they would normally have to worry about. Lewis seems to think a crucial component of the penal lottery is the anxiety it could cause in the mind of someone who has to wait a considerable amount of time to discover how harmful his or her punishment will be. Since case 3 eliminates the anxiety from the process, case 4 accounts for the loss of this feature of the system.

In case 5, instead of generating a probability distribution (which Lewis tends to refer to as “drawing straws”) the court renders a complete reenactment of the crime in which real people risk receiving the harm that the criminal risked causing, and the outcome of this reenactment determines the punishment that the criminal receives. This case is significantly more absurd than the prior cases since, in Lewis’s example, it entails risking the actual deaths of the reenactment actors. However, it is a crucial theoretical step towards the final conclusion which is the enactment lottery, wherein the outcome of the original crime is used to determine punishment rather than generating an additional reenactment.

III. The Justice of Penal Lotteries

Before I defend the justice of a penal lottery, I must note that in David Lewis’s conception of a penal lottery, a murderer might win the lottery and only receive the sentence of an attempted murderer. However, one could imagine a system that constructs penal lotteries with a baseline such that, if a criminal causes a great deal of harm with their actions than they are guaranteed a great deal of harm by the penal lottery that is not guaranteed to a less successful criminal. So, we do not have to put murderers in the same lotteries as attempted murderers. This distinction ought to push away any fear that a penal lottery would let loose dangerous criminals.

Now, I’d like to address Lewis’s key concern about penal lotteries, particularly, the process of determining an appropriate probability distribution. In his paper, Lewis brings up that there are a variety of ways to define a probability distribution that determines the outcome of one’s punishment, but that it is not immediately clear which method is best. In fact, he argues that a great advantage of the enactment lottery is that it defers this decision to nature. However, since I am arguing for the implementation of concrete penal lotteries and not just the abstract kind, I must explore this problem. Therefore, in order to argue that penal lotteries are just, I must account for the man-made lotteries that they entail. In order to this, I must either argue for one specific method of creating such a lottery, or I must show that whether or not penal lotteries are just is isolated from the problem of determining how to create such a lottery. I will do the former, but first, allow me to share Professor Salkin’s reconstruction of what Lewis considers to be the four types of probabilities we could base our lottery off of:

- 1) the objective probability of harm caused by the criminal’s actions

- 2) the probability of harm evaluated by a hypothetical observer who is reasonable and has all of the relevant facts
- 3) the probability of harm evaluated by a hypothetical observer who is reasonable and has only the facts that the perpetrator had
- 4) the probability of harm that had been evaluated by the perpetrator

I will now argue that 1 is an adequate probability to base our lottery off of. My first reason is that we already punish people for breaking rules which they were unaware of. It follows that we punish people proportionally to the actual harm they risked even if they were ignorant of what that harm was. So, intuitively, provided that the perpetrator is sane and mentally developed, we do not need to account for ignorance in our probability models. This means we can set aside 3 and 4. Now let's consider a situation in which the perpetrator is set up in a sting operation by the FBI. The objective probability of harm in this scenario is very low, which might suggest that 1 would be too lenient in this instance. However, this caused me to wonder whether one ought to be punished normally for a crime that was partially incited by members of the penal system. Perhaps this is a feature, and not a bug, so to speak.

Furthermore, 2, 3, and 4 all introduce subjectivity into the probability equation, which is supposed to ground a system of punishment. The reason that 2 introduces subjectivity is because the concept of "relevant facts" is open to interpretation. What is relevant? Surely, in the example of the sting operation, the conspiracy itself might be considered relevant information, but is it? The perpetrator was intentionally deluded so that they could not obtain such information, so it could not have been relevant to the degree of harm they believed they would cause. However, the fact that it was a sting operation is relevant because it means that there was, in fact, a very low probability of harm! And of course, 3 and 4 both require mind reading technology to be sound, so we can assume that they would also be open to interpretation for now.

Finally, one might feel an aversion towards 1 since one could imagine making a critical mistake that results in a large amount of harm despite having done everything right. Such a mistake could be attributed to sheer chaos: a NASA engineer blows up a space shuttle because of a reading they got after a sensor malfunctioned. Alternatively, such a mistake could be attributed to a miscommunication: an anti-aircraft missile is fired at a Russian commercial plane that was wrongly but rationally suspected to be carrying radioactive cargo. However, in each hypothetical, the responsibility of the harm is causally connected to someone or something. The engineer is not responsible for the deaths of the astronauts when all they did was read a malfunctioning sensor, the responsibility rests on the chip and its manufacturer. The anti-aircraft missile operator is not responsible for the fallout of making a split-second decision that they had every reason to believe would stop a massive act of war, that responsibility rests on all of the factors that lead to the communication of the incorrect belief of the presence of radioactive cargo. I could elaborate further but I will proceed for the sake of concision. Hopefully, I have thus far made a convincing argument for the adoption of 1 as a probability metric for penal lotteries.

I'd like to wrap up this section of the paper by alluding to an idea posited by Rawls which is also mentioned in Lewis's paper. Rawls says that a law, punishment, or any product of a legal system is just if the legal system that produced it is just. In this paper, I am making the assumption that Rawls makes. I believe that I can say that penal lotteries are just so long as the grounds for their inception are just, which is why I invested so much discussion into the problem of determining which probability ought to be used to run such a lottery. Essentially, if penal

lotteries are created justly then the punishments they confer are just. I believe I have shown that the only just way to develop a penal lottery is to base it off of the objective probability of harm caused by the criminal's actions.

IV. Appeals to Theories of Punishment

Before I move on to handling a couple of counterarguments, I'd like to show how penal lotteries can appeal to a number of different theories of punishment, which, considering that my thesis is that penal lotteries are a necessary component of any good theory of punishment, I ought to do at some point. Each of these appeals deserve an entire paper to themselves, but I think it is necessary that I at least touch on each one in order to show how wide the appeal of penal lotteries should actually be.

First, penal lotteries appeal to retributivism because they account for the probabilistic retribution owed to society and the victims of risky crimes. For example, when someone gets behind the wheel of a car while impaired, they may not kill someone on their way home, but they are knowingly risking the lives of others. This risk accumulates as more people drive under the influence and people eventually die because of it. The families of victims of drunk driving would be right to seek retribution from all drunk drivers because of this, and in my own anecdotal experience, people who have been impacted by drunk driving tend to heavily resent those who do so regardless of whether or not their actions personally impact them.

Second, penal lotteries appeal to utilitarianism because they increase what is personally at stake for potential criminals. Not only could the anxiety of a penal lottery add additional promised harm but also by raising the ceiling of punishment on actions that only result in extreme amounts of harm sometimes, we add further deterrents for such actions.

Third, penal lotteries appeal to a reparational theory of punishment. Since drunk driving is a risk-based offense, drunk drivers who kill and those who don't jointly constitute a pool of offenders who are all responsible for the burden placed on those who are affected by DUI-related vehicular manslaughter. All who risk lives by driving impaired are responsible for the few deaths that occur via normalization and by increasing total risk towards others. Plus, some of the drunk drivers that do kill also die in the accident and so damages cannot be recovered from them. Therefore, families of drunk driving victims could seek reparations from the greater pool of drunk drivers both in the form of monetary reparation and retributive reparation. Admittedly, this argument deserves more time to develop, and its key function for this paper is to add to the breadth of appeal.

Fourth, penal lotteries appeal to an expression-based theory of punishment in that they yield poetic justice for the victims of risky crimes. Essentially, criminals risk harming others and in return the justice system risks harming them (I should clarify that this last sentence is worded to be more poetically powerful than it is meant to be immediately coherent; I mean to say that with a penal lottery the justice system can measure the harm of their punishments with respect to the risk that the criminal accepted in order to expressively reflect the gravity of that risk).

Fifth and finally, penal lotteries appeal to an education-based theory of punishment because they reinforce why risking others' lives is so serious. Probability is not always easy to grasp for the layperson—I know that I personally did not take a formal statistics class until college—so it's very possible that perpetrators of risky crimes do not fully comprehend the weight of the risk of their actions. However, were they to see the probability of harm in their risks reflected by the penal system, it might become more apparent to them.

V. The Injustice of Penal Lotteries

One of the primary objections to a penal lottery concerns the issue of injustice of outcomes. One could argue, rightly so, that it would not be fair that some people will be punished more harshly than others for committing the same crimes. It sounds like a recipe for a systemic injustice, and since justice is the central concern of any penal system, the fact that such an addition to the system would create outcomes that appear so glaringly unjust suggests that the implementation of penal lotteries would be ridiculous.

I will respond to this crucial concern by reiterating my comment about Rawls from earlier in the paper and then by saying one thing about the concept of probability itself. First, as Rawls said, if the procedures are just then the outcomes are just. So, if every individual that is charged with murder is entered into a similar penal lottery (each case will produce a slightly different lottery since the objective probability of harm will vary), then even though some will receive lighter sentences than others, they will all have gone through the same system. Random chance will decide their fates just as it decided their victims' fates, and because of that some of them will incur the death penalty and some life in prison (in one possible version of a lottery; a murder case). But the inequality of outcomes is not indicative of injustice, because they all would face equal probabilities for equal crimes. Justice is a function of equality, as I understand it, and as long as the probabilities are equal for equal crimes, and as long as the punishments are determined truly randomly, then there is no injustice here. To be clear, by "truly randomly" I mean that the punishments are determined by a probability distribution and there is no foul play. The distribution may not be a uniform one though, which is what the layperson might erroneously believe constitute randomness, but regardless it will be random.

Additionally, there is a certain justice captured by the penal lottery that is not captured by today's system. Similarly to Hammurabi's code which is "an eye for an eye," penal lotteries introduce a form of justice that is "risk for risk" which is different from the former because risky crimes are of a different type than non-risky crimes. Let me be clear, all crimes entail a bit of risk, but if I aim my gun at you and pull the trigger, the risk of harm is nearly one-hundred percent, so I call that a non-risky crime. In that instance, I am concretely causing harm. If I were to drive drunk, I would be probabilistically causing harm. So, there is a type difference between risky crimes and others which necessitates alternative procedures for the risky ones.

The other objection that I will handle is that this could be an incredibly powerful tool for corruption. Now, I will respond to this glaring concern with an In-Good-Company argument, in that, we can assume for now that this will not happen in order to focus on the theoretical problem which is the judicial validity of penal systems if enacted properly. Rawls similarly assumes that the penal system he devises in his paper, "The Justification of Civil Disobedience," is not corrupted in practice, even though it is a glaring concern. Specifically, he assumes that a constitutional democracy will be constructed justly, which is not a guarantee. But I do not need to lean on Rawls in order to defend my argument against the potential for corruption.

I acknowledge that penal lotteries can pose a threat to our justice system in that bad actors can hijack the system and put groups of people in prison for crimes that don't warrant such or confer lighter sentences to their buddies, but almost every arm of the justice system poses a threat to society when we imagine how it could be used if it were taken over by bad actors. Yet, we continue to put our faith in these legal institutions because that is necessary in order to maintain an orderly society. Bad actors could infiltrate every branch of government, they

can infiltrate the police, the federal reserve, and maybe even the military, but these institutions still exist because their power is necessary in order to achieve the order and justice they bring.

VI. Conclusion

Risk and chance are innate aspects of all crimes, but some more than others. Therefore, we need proper judicial tools to handle such crimes, and that is the justification for penal lotteries. Penal lotteries can be constructed justly, and they appeal to many different theories of punishment. So, in conclusion, I hope that I have shown that penal lotteries offer new methods of attaining justice, and that they are in fact just in the ways they attain this justice, although they would require regulation to prevent corrupt interference, and they would require us to open our minds to a slightly adjusted conception of justice. Namely, that it does not have to be “eye for an eye,” but rather “risk for risk,” when appropriate.