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## Goldman's Paradox: Imperfect Perfection

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Goldman's Paradox: Imperfect Perfection  
by Aaron Manuel

In *The Paradox of Punishment*, Alan Goldman argues that the mixed theory of punishment is inherently contradictory. Goldman explains that the mixed theory is a combination of two older theories of punishment: retributivism and utilitarianism. The combination of these two theories into a single mixed theory was intended to mitigate these theories' flaws. However, Goldman asserts that the two theories are incompatible, as justification of one requires dismissal of the other, creating a paradox. While I agree that Goldman's paradox exists, and that it is logically inescapable, I believe he has neglected several points of analysis which weaken the impact of the paradox. In the following pages, I will provide an explanation of Goldman's paradox and set forth some criticisms.

The first premise given in *The Paradox of Punishment* is that retributivism demands proportional punishments. Retributivism, Goldman explains, is based on the criminal's forfeiture of rights. "If we are to justify punishment of particular wrongdoers or lawbreakers [...] we must argue that they have forfeited those rights of which we are depriving them" (Goldman 43). After all, if criminals did not forfeit their rights by committing crimes, how could the state justly infringe on said rights? By doing so, the state would become no better than the criminal. Thus, the retributivist theory justifies depriving the criminal by asserting that "having rights generally entails having duties to honor the same rights of others, [and] it is plausible that when these duties are not fulfilled, the rights cease to exist" (Goldman 43). However, this analysis is not yet

complete and accurate to our view of justice. “It is clear,” Goldman writes, “that violating specific rights of others does not entail losing all one’s own rights” (Goldman 44-45). The retributivist theory allows for this by stating that the rights forfeited by the criminal are only those which the criminal himself violated in others (Goldman 43). Since it is impractical to punish all criminals with perfect retribution, we instead deprive those criminals of a set of rights equivalent to the rights violated (Goldman 45). This principle of equivalence must be adhered to. “If we deprive [the criminal] not only of these or equivalent rights, but of ones far more important, whose loss results in far greater harm, then we begin to look like serious wrongdoers ourselves” (Goldman 46). This is the retributivist theory in a nutshell. Punishment is justified because of the forfeiture of rights, but that punishment must not go beyond the harm caused by the criminal in the first place. To punish beyond harm would cross the boundary from justice to wrongdoing. With retributivism explained, Goldman moves on to the second part of the mixed theory.

Goldman claims that the second element of mixed theory—utilitarianism—demands disproportionate punishments. Once again, he starts by explaining the relevant theory. “[Utilitarianism] states that a political institution involving the administration of punishment by state officials can be justified only in terms of the goal of reducing crime and the harms caused by crime to a tolerable level” (Goldman 47). Put another way, the purpose of punishment is deterrence. According to the utilitarian view, there is no point in punishment if it does not achieve some societal utility. If this were the case, then we would be needlessly inflicting suffering, and justice would be indistinguishable from revenge. In order to avoid this problem, utilitarians must impose punishments that achieve sufficient deterrence to merit government action in the first place (Goldman 47). The problem is that criminals do not always get caught,

and thus a punishment must be worse than the crime in order to have the proper deterrent effect. “In order to deter crime at all effectively, given reasonable assumptions about police efficiency at bearable costs, sanctions must be threatened and applied which go far beyond the equivalence relation held to be just” (Goldman 48-49). If there is a ~100% chance of committing the crime, and only a 50% chance to receive equivalent punishment (Goldman 48), then criminals are not likely to be deterred. As stated above, if criminals are not properly deterred, then a punishment cannot be justified. Therefore, under utilitarianism, punishments must be more severe than the crimes for which they are applied. With this principle explained, Goldman moves to tie the two theories together.

Goldman’s third premise that a punishment cannot be proportional and disproportional at the same time. This is a simple application of the law of noncontradiction to the first two premises. The law of noncontradiction is a logical axiom which states that two contradictory statements cannot be true at the same time, in the same place, or in the same way. Goldman applies this axiom to the mixed theory of punishment in the following way. The retributivist theory demands that a punishment be proportional. The utilitarian theory demands that a punishment not be proportional. The law of noncontradiction proves that a punishment cannot be proportional and disproportional at the same time, at the same place, and in the same way. Therefore, both retributivism and utilitarianism cannot be upheld in the same punishment. Goldman’s conclusion is the natural continuation of this premise.

Having proven that retributivist and utilitarian theories cannot both be followed at once, Goldman concludes that under the mixed theory, all punishments are unjust. This can be supported by simply reviewing all the possibilities for punishing any given crime. Any punishment which imposes equal or lesser harm than the crime is unjust under utilitarianism,

because such punishments do not deter enough to make their imposition worthwhile. Any punishment which imposes greater harm than the crime is unjust under retributivism, since the deprivation of rights not taken is equivalent to punishment of the innocent. This is Goldman's paradox.

Now we turn to the merits and flaws in Goldman's arguments. Overall, Goldman's analysis is very strong. I cannot deny the logical force of his assertions, especially when the contradiction is so straightforward. The paradox is only conditional in the sense that it could be avoided with a 100% apprehension rate for criminals, which is blatantly unrealistic. As it stands, Goldman's paradox is inescapable. That said, it is not perfectly analyzed. I believe that Goldman has made several oversights when considering his paradox, oversights which do not change his conclusion but which deplete its force. The first is that governments must (and always do) rely on some level of moral scruples to work in tandem with deterrence, thus lowering the necessary severity of utilitarian punishments. The second is that Goldman assumes we punish only for practical harms, which is demonstrably false. Let us consider both of these errors.

While Goldman acknowledges the presence of moral pressure in his article, he incorrectly dismisses it as irrelevant to his conclusion. Goldman admits: "It might be argued that we could lower penalties to make them equal to harms from crimes and yet still have a deterrent effect, since for most persons, the threat of official sanctions simply adds to internal moral sanctions against harmful or criminal acts" (Goldman 49). This is exactly correct, but Goldman then goes on to give a false refutation of this argument. Here is the relevant text:

For such persons, who are reasonably well-off and have much to lose if apprehended, the moral disapproval of the community might be felt as a more

serious harm than an actual prison sentence or fine. The problem with these claims is that they do not apply to the typical criminal in our society, or to the potential criminal whom threats of punishment are intended to deter (Goldman 49).

Let's unpack his reasoning. It seems that Goldman has made the curious assumption that morality obeys utilitarian criteria. He claims that the moral deterrent only applies to those who have much to lose, which is quite ridiculous. While I agree that poverty and desperation may overpower moral scruples in some individuals, to say that morality disappears altogether is not an accurate model of the human condition. In addition, Goldman seems to think that moral scruples are equivalent to fear of "the moral disapproval of the community" (49). Again, this is clearly not an accurate description of morality, as moral principles do not depend on whether the offender is caught. Even in situations where there is no chance of detection, most individuals' conscience still applies. Thus, Goldman's painting of morality as nothing more than a fear of social disutility is wrong, and he is mistaken to ignore this objection to his paradox.

To respond to my objection, Goldman might claim that the moral deterrent is not sufficient to cover the difference between retributivist and utilitarian punishment criteria. He might remind me that decreasing punishment to a proportional level and relying on morality is bound to cause an increase in crime. I agree. As stated before, I do not think that the moral objection is sufficient to break the paradox. I only claim that the moral deterrent lowers the necessary utilitarian punishment by a non-negligible amount, and that Goldman is wrong to dismiss it so quickly.

Goldman's second mistake is that he presumes that punishment is solely a response to practical harms. I am not certain whether this is an element of retributivism of Goldman's own thinking, but it is false regardless. There are many situations where we clearly and justly punish for things other than the taking of rights. For example, we impose punishments for attempted crimes which did not succeed: attempted murder, attempted robbery, attempted rape, etc. Even when the target is subjected to no risk at all, we still punish. The only requirement for conviction of attempted crimes is intent.

Consider a scenario where an aspiring criminal goes out seeking to shoot someone. Fortunately, the bumbling thug forgets to load his weapon, and when he fires at an unaware pedestrian, nothing happens. In this situation, no harm was done. The target wasn't even aware of the criminal's actions, and so could not have been traumatized by them. The target was not even subjected to any risk of harm, as the gun was not loaded. Yet the bumbling criminal could still be charged for attempted murder.

The reason for this is that we calculate just punishments as a compound value: punishment for evil intent plus punishment for practical harm. The crime of causing death is a perfect example of this. When there is both intent and harm, we call the crime murder and punish it very severely. When there is harm but no intent, we call it manslaughter and punish it less severely. When there is intent but no harm (or less-than deadly harm), we call it attempted murder and punish it less severely. Pay special attention to the distinction between murder and manslaughter. The only difference between the two is intent, yet they have wildly different punishments. What this means in the context of Goldman's paradox is that he ignores an important element of proportional punishment. I submit that a punishment can still be proportional while causing the criminal more harm than his victim. This is because the

punishment for intent is not calculable in a cost-benefit analysis alongside practical harm. Of course, this raises its own problems. It is nearly impossible to determine how much a criminal should be punished for intent. Punishment for intent is based on moral feeling rather than the elegant cost-benefit process possible with disutility. I do not pretend to know the solution for this, but it is irrelevant for the purposes of Goldman's paradox. What matters is not how much we should punish for intent, but merely that we do, and that such punishments do not have negligible severity. Thus, Goldman has overlooked a second important factor pertaining to his paradox.

Once again, Goldman might respond to my objection by claiming that punishment for intent does not have sufficient value to make up the difference between the retributivist and the utilitarian. I am not entirely convinced that this is the case. After all, punishment for intent is largely indefinite. The most we can say for certain is that punishment for intent has a nonzero value. But even if I simply accept Goldman's response to be true, my objection still carries weight. Punishment for intent has an effect, regardless of whether that effect is enough to rescue the mixed theory. The fact that Goldman does not acknowledge this is still an error in analysis.

On a final note, I would like to address a complication of Goldman's paradox which one might be tempted to use in order to refute some of my objections. It may be inferred from Goldman's article that he believes that the paradox does not apply to the punishment of murderers. It seems that the death penalty satisfies both elements of mixed theory. The argument might state that the death penalty is both proportional and causes enough deterrence to be justified. However, this argument is the product of inconsistent thinking. The problem comes from the utilitarian theory. Can the utilitarian deny that we would get more deterrence if we tortured murderers in addition to killing them? So why shouldn't we, according to the utilitarian



theory? The utilitarian has real trouble disagreeing with this conclusion. He cannot cite some nebulous idea of humaneness, for true utilitarians are not concerned with such things unless they translate to net utility. And he cannot claim that our current level of deterrence is sufficient either. For if he did, his same logic could be used to justify making all other punishments proportional. If the utilitarian is willing to allow the loss of potential deterrence against murder, why would he not allow the same for every other crime? Thus, for the utilitarian to remain consistent with his own ideology, he would have to advocate for disproportional punishment for murder. There is nothing special about punishment for murder that suddenly exempts it from the calculation of utilities. But this objection is only a distraction from Goldman's paradox and the argument at hand.

As I have displayed, Alan Goldman's paradox is a powerful rebuke to the mixed theory of punishment. Goldman's arguments in *The Paradox of Punishment* are logically sound and persuasive. However, his article also makes several blunders, failing to address key ideas which weaken, but do not necessarily refute, his paradox. Although I accept Goldman's conclusion, I submit that he should provide further, better analysis to strengthen an already formidable argument.

\*Credit goes to Dr. Criley for pointing out that Goldman's paradox might not apply to all crimes, particularly murder.