

If the Price is Right:  
Unfair Advantage, Auctions, and Proportionality

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At one point in England it was a capital offense to “appear on a high road with a sooty face.”<sup>1</sup> I do not know whether anyone was executed for this offense, but many people were sent to Australian penal colonies for such petty crimes as stealing a handkerchief. More recently, Kenneth Payne was sentenced to 16 years in prison for stealing a Snickers Bar in Texas. When the Assistant District Attorney in this case was asked how she could justify putting a man in prison for 16 years for stealing a candy bar she replied, “It was a king size,” and indeed it was – value, \$1.00.<sup>2</sup> These punishments are vulnerable to many criticisms but the most obvious is that they do not fit the crime. Unfortunately, the idea that the punishment should fit the crime is as difficult to characterize precisely as it is plausible. The doctrine of *lex talonis* embodied in the slogan “an eye for an eye” provides the most obvious answer to this question but it has the unfortunate vice of being false. In some cases the problems with *lex talonis* are moral ones – we would debase ourselves if we were literally to rape rapists. In other cases the problems are conceptual – taken literally, the theory seems to have no intelligible application for a crime like treason, for example. These problems are familiar and defenders of *lex talonis* typically qualify the doctrine in ways that are supposed to avoid them. However these qualifications typically are either *ad hoc* or too metaphorical to be helpful. Intriguingly, Michael Davis argues that we can formulate a more precise and non-metaphorical account of proportionality by

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<sup>1</sup> What Are We up to and Why - or If We're Doing More Harm than Good, Why Rush? Michael Marcus, June 2, 1997, presented at the West Central Wardens & Superintendents Association, <http://ourworld.compuserve.com/homepages/SMMarcus/PNDLTON.htm>, p. 1.

<sup>2</sup> “Sixteen Years for a Snickers Bar,” Russell Mokhiber and Robert Weissman, <http://uuhome.de/global/english/justice001.html>.

applying some ideas from game theory. In a series of articles culminating in his 1992 book *To Make the Punishment Fit the Crime*,<sup>3</sup> Davis defends the ingenious idea that proportionality should be understood in terms of an auction for licenses to commit crimes. The guiding idea behind Davis's account is that a criminal takes unfair advantage of others' obedience; a punishment fits a crime insofar as it annuls this unfair advantage. Davis is not alone in his appeal to the idea of unfair advantage to explicate proportionality.<sup>4</sup> What is unique and interesting (some might say eccentric and bizarre) about Davis's account is its game-theoretic model of unfair advantage.

After characterizing Davis's version of the auction theory in more detail (section I), I argue that what is often taken to be one of its most serious vices can easily be avoided, that it faces other more insoluble problems as a theory of justice but might nonetheless be useful as part of a theory of deterrence. As it stands, Davis's version of the theory is implausibly committed to supposing that a society that chose to punish unlicensed murderers and unlicensed shoplifters in the same way could be reasonably just. However, those favoring the auction account should simply drop the assumption that a society can provide an adequate model of unfair advantage only if it is reasonably just. (section II). The auction theory nonetheless fails as a general theory of proportionality (section III) because of its exclusive focus on unfair advantage. Intuitively, criminal punishment should be proportional to wrongness more generally. This suggests that the auction theory might nonetheless provide useful guidance and illumination if its scope were dramatically narrowed to include only crimes that are morally wrong only because they involve an unfair advantage. Perhaps in those cases, at

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<sup>3</sup> Michael Davis, *To Make the Punishment Fit the Crime* (Boulder, Colorado: Westview Press, 1992).

least, punishment should be proportional to unfair advantage since unfair advantage exhaustively characterizes its wrongness. However, the auction theory fails even if we restrict its scope in this way; proportionality in these cases is a function of the importance of the public good at stake rather than the unfair advantage taken (section IV). I conclude with some brief and speculative thoughts as to why the auction theory seems to fit well with actual criminal practice (Conclusion).

## I.

The auction theory is a theory of proportionality in criminal punishment and is compatible with a variety of views about the justification of punishment. Moreover, the auction theory is compatible with a wide range of views about what the criminal law should prohibit. Finally, the theory concerns criminal punishment; it is compatible with a range of views about appropriate civil penalties and non-legal punishments. Davis's version of the auction theory aims only to explain how to determine the maximum punishment allowed by considerations of proportionality. The theory is silent on the issue of whether proportionality also requires minimum punishments.<sup>5</sup> Finally, whether a particular crime deserves less than the maximum set by the theory should be determined by judges in virtue of other considerations.

The theory aims to explain proportionality in terms of unfair advantage understood in terms of the auction model. The theory presupposes that crime constitutes a kind of free-riding. Insofar as it is reasonably just, the criminal law is a clear case of a mutually advantageous cooperative practice and failing to do your share in a mutually

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<sup>4</sup> See, e.g., John Finnis, "The Restoration of Retribution," *Analysis* 32 (1972): 131-135 and Jeffrie Murphy, "Marxism and Retribution," in his *Retribution, Justice and Therapy* (Dordrecht: Reidel, 1979), p. 100.

<sup>5</sup> See, e.g., Michael Davis, "Criminal Desert and Unfair Advantage: What's the Connection?" *Law and Philosophy*, v. 12, 1993, pp. 133-156.

advantageous cooperative practice is free-riding. Hobbes's dystopian vision of the state of nature may be overblown but we would be much better off with a reasonably just system of criminal law than we would be without one. An egregiously unjust system of criminal law may make some worse off than they would be in a state of nature – legally enforced slavery is a good example. However, crimes committed by those disadvantaged by the law in this way do not deserve punishment simply in virtue of the fact that they are crimes. Davis argues that such crimes deserve punishment, but only because they are morally wrong independently of the positive law. Davis suggests that these cases are ones of purely moral desert rather than criminal desert, and hence fall outside the scope of his theory.<sup>6</sup> The distinction between moral desert and criminal desert invoked here is problematic, and I return to it below (section IV).

In determining the unfair advantage associated with a given crime we must exclude the incidental advantage associated with it. Rather, the issue is what sort of advantage the criminal gains simply in virtue of violating the law. The auction theory maintains that the best measure of the unfair advantage associated with a given crime is how much a license to commit that crime would fetch in an open market in a reasonably just society with a fixed number of licenses is available. The suggestion is that the unfair advantage associated with a crime varies directly with the price a license to commit the crime would fetch in such a market. Of course, price is a function of both supply and demand, so the theory needs a criterion for the number of licenses to be offered. Davis suggests that the number of licenses for a given crime should correspond to the prevalence of that crime the society is willing to tolerate given the estimated costs of prevention. Politicians score points with rhetoric of “zero-tolerance” but any serious

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<sup>6</sup> See Davis, *To Make the Punishment Fit the Crime*, 1992 (previously cited), pp. 246-247.

attempt at the complete elimination of crime in a modern nation-state would be futile, unimaginably financially costly and involve the widespread violation of civil liberties. Ideally, the auction model provides an ordinal ranking of crimes in terms of unfair advantage. If a license to commit first degree murder would cost more than a license to commit assault then the maximum punishment for murder should be greater than the maximum punishment for assault. Davis argues that this account does better at legitimizing actual legal practice than its rivals.

One problem with Davis's formulation of the auction theory is the obscurity of the idea that a criminal necessarily reaps an advantage simply by committing a crime regardless of any so-called "incidental" benefits. The thought is that simply by committing a crime a person gets a certain advantage regardless of whether the crime succeeds. As Davis's critics have argued, this is a strained use of 'advantage'.<sup>7</sup> If my attempted robbery fails then intuitively I have gained nothing by it. The objection reveals that the main idea behind the auction theory is, contra Davis, not actual unfair advantage. We should instead understand the auction theory as measuring the *expected advantage* associated with a given sort of crime. My particular attempted robbery may provide no advantage at all. Nonetheless, my crime falls under a sortal recognized in the law – robbery – and crimes falling under that sortal can be assigned an expected value as a class. The expected value of a crime is general in two respects. First, its content is general – the expected value is of robbery in general. Second, it is the expectation not of this or that particular criminal but of society—the expected value *we* would assign to

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<sup>7</sup> See, for example, David Dolinko, "Mismeasuring 'Unfair Advantage': A Response to Michael Davis," *Law and Philosophy*, 13, 1994, pp. 493-524, esp. pp. 492-500.

robbery. It remains a good question why punishment should be proportional to unfair expected advantage so understood; I return to this question below (section IV).

## II.

Unless the auction model includes a penalty associated with committing an “unlicensed” crime, there is no obvious reason to buy criminal licenses. The auction theory faces a trilemma. Either the theory imposes no punishments for unlicensed crimes or it imposes different punishments for different unlicensed crimes or it imposes the same punishment for all unlicensed crimes.<sup>8</sup> The first option is a non-starter since it provides no incentive to buy licenses in the first place. The second option raises the question – what is the standard by which these different punishments are arranged? If the standard for those punishments is fixed by another lottery then a vicious infinite regress threatens. If, on the other hand, those punishments are fixed by some auction-independent standard then it is unclear why we could not simply use that standard to fix punishments in the actual world. After all, on Davis’s account the society in which the hypothetical auction takes place is supposed to be reasonably just, so the punishments assigned to crimes there must also be reasonably just. The third option, however, is incompatible with Davis’s assumption that the society in which the auction takes place is reasonably just. For any society that punishes unlicensed jaywalking and unlicensed murder identically is not reasonably just. Such a society will either assign penalties that are far too weak for some crimes or far too severe for others. A society that punishes unlicensed murder with no more than a small fine is not reasonably just. Perhaps even more clearly, a society that punishes unlicensed

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<sup>8</sup> Actually, there is the fourth option of simply stipulating that people in the auction would not poach and know this about themselves, but this seems rather artificial and raises awkward questions about how their psychology differs from the psychology of actual people such that they would never poach. Davis rejects this account as unrealistic and I shall follow him in putting it to one side.

jaywalking with the death penalty or life imprisonment is not reasonably just. Indeed, such a regime would be draconian in the most literal sense. For ‘draconian’ comes from an Athenian lawgiver Draco who punished all crimes with death:

/W/hen Draco was asked why all of his decreed punishments were the same, he apparently replied that he thought small offences obviously deserved death, but that he couldn’t think of a worse penalty for more serious crimes.”<sup>9</sup>

Critics of the auction theory have not been silent on this point.<sup>10</sup> Davis’s considered response is to embrace the third horn of the trilemma, arguing that such punishments are not so unjust as to render the entire scheme unjust because everyone had the option of buying a license to commit the crime in question.<sup>11</sup> This is unconvincing. If Draco had offered a Davis-style auction then perhaps his regime would have been less unjust but monstrously unjust nonetheless.

Davis is fighting an uphill battle on this front for no good reason. He is right to embrace the third horn of the trilemma but wrong to hold onto the idea that the auction must be understood against the background assumption of a reasonably just society. For nothing in the theory requires that the society be reasonably just. After all, the auction itself is not a model of justice in any sense. Quite the opposite, it is a model of the unfair advantage (better: unfair expected advantage) associated with a particular sort of *injustice* – free-riding. Nor, in any event, would a model of justice necessarily need to be just. As Davis himself has taken pains to emphasize, models are not just like the subjects they model. A model of microscopic particles does not need to be microscopic, so why must a model of justice be just?

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<sup>9</sup> Chris Taylor, Classics Department, Brentwood School, Essex, *The Guardian*, April 18, 2002, G2 Section, p. 18.

<sup>10</sup> For an early statement of the objection, see R. A. Duff, “Auctions, Lotteries and the Punishment of Attempts,” *Law and Philosophy* 9, 1990, pp. 1-37.

So far as I know, Davis has never given an argument that the society in which the auction takes place must be reasonably just. The only reason I can imagine for such an assumption would be if we were supposed to carry out such an auction to determine appropriate punishments. However, Davis explicitly rejects this interpretation, claiming that “the auction was not intended as a real possibility but as a model...”<sup>12</sup> Moreover, if the theory did require us to carry out such a bizarre experiment then it would clearly be hopeless. For such an experiment is politically impossible precisely because it would be so unjust. It is unjust not only because it would require that we punish all unlicensed crimes in the same way, though that is already a serious injustice. It is also unjust because it would allow those convicted of very serious criminal wrongdoing to avoid criminal punishment altogether. Imagine telling a woman whose son was raped, tortured and brutally murdered that although we know who committed the crime and can prove it and have him in custody, we unfortunately will have to allow him to go free because he had licenses for all of his crimes! Such a woman would quite rightly be morally outraged, nor would the availability of civil litigation adequately address her outrage. Clearly, this is not justice but a mockery of it. Indeed, I cannot resist pointing out that something close to this appears for comic relief in Terry Pratchett’s famous and popular “Discworld” series of amusing fantasy books. Here is a representative passage from Pratchett’s *Guards! Guards!*:

One of the Patrician’s greatest contributions to the reliable operation of Ankh-Morpork had been, very early in his administration, the legalizing of the ancient Guild of Thieves...In exchange for the winding down of the Watch, they agreed...to keep crime levels to a level to be determined annually. That way, everyone could plan ahead, said Lord Vetinari, and part of the uncertainty had

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<sup>11</sup> See Davis, *To Make the Punishment Fit the Crime*, 1992 (previously cited), pp. 255-256.

<sup>12</sup> Davis, “Criminal Desert and Unfair Advantage: What’s the Connection?” *Law and Philosophy* 12, 1993, pp. 133-156, p. 139.



been removed from the chaos of life...a complicated arrangement of receipts and vouchers saw to it that, while everyone was eligible for the attentions of the Guild, no-one had too much...<sup>13</sup>

It is with good reason that Pratchett presents us with this scenario in a farcical story; it is funny in part because it is so absurdly unjust. Davis is right not to suggest that we should try to adopt his model in the real world precisely because it would be unjust. Fortunately, we can drop the assumption that the society in which the auction takes place must be just.

### III.

The auction theory may well provide a good model of the expected unfair advantage associated different crimes, but does expected unfair advantage provide a good account of proportionality? As Davis puts it, what we want is a theory of “how much to punish criminals” under the laws of a relatively just society.<sup>14</sup> The auction theory’s answer is, “Punish criminals who violate just laws in proportion to the unfair advantage associated with the crime.” The most obvious problem with this answer is that intuitively criminal punishment should be proportional to the overall wrongness and not merely unfair advantage. To take an unfair advantage of others is a kind of free-riding. However, being a free-rider is only one sort of moral wrong-doing, and often not the most serious sort at that. Admittedly murderers, rapists and child abusers are free-riders and that this is part of why their crimes are wrong. Still, this is only a small part of the wrongness of those crimes. That they take the life of an innocent person, that they violate another person’s bodily integrity and treat them as a mere object, for example, seem like much more serious wrong-making features. Intuitively, the primary reason a murderer deserves greater punishment than a shoplifter is that taking an innocent person’s life is a much

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<sup>13</sup> Terry Pratchett, *Guards! Guards!* 1990, Reading: Corgi Books, pp. 45-46.

<sup>14</sup> Davis, *To Make the Punishment Fit the Crime*, 1992, p. 244.

more serious sort of wrong-doing than shoplifting. It might turn out that murder also happens to be a form of free-riding associated with a greater (expected) unfair advantage, but this is not why murder deserves a greater punishment than shoplifting. Even if the auction theory gets the right results, it gets them for the wrong reasons.

Nor is it entirely clear that the theory gets the right results. The main theoretical problem is that criminal punishment should be proportional to wrong-doing *tout court* and not merely wrong-doing qua free-riding. The limiting case of this problem is a crime that does not involve free-riding *at all*. Consider the following disturbingly timely example. A terrorist masterminds an attack against the United States from overseas which kills several people. This hypothetical terrorist (unlike Osam bin Laden) has never reaped any benefits from the United States nor has he reaped any benefits from the existence of international law. The U.S. manages to capture this terrorist and prosecute him for murder. The case is an unusual one but very plausibly the terrorist deserves criminal punishment. However, if we suppose that maximum criminal punishment must be proportional only to unfair advantage then he deserves no punishment whatsoever. For given that he never reaped any benefits from the U.S. system of laws he is not guilty of free-riding and has not taken unfair advantage of Americans' compliance with criminal law. Here we have a case in which severe criminal punishment is warranted but where the auction theory implies that any criminal punishment is too much. Whereas if we held that punishment should be proportional to wrongness *tout court* we could easily maintain that the terrorist deserves severe criminal punishment because of his wanton destruction of innocent human life regardless whether he is guilty of free-riding. There are much worse things than being a cheater. I emphasise that this example is a limiting case and

that the main and more general point is that even if the auction theory does get the right results in other cases then it does not get them for the right reasons.

Davis is aware that free-riding is not a measure of overall moral gravity.<sup>15</sup> He draws a distinction between morally deserved punishment and deserved criminal punishment and argues that our intuitions in these sorts of cases are intuitions only about morally deserved punishment and not intuitions about deserved criminal punishment as such. Since his theory is a theory of deserved criminal punishment as such these intuitions are supposed to be irrelevant. Here is Davis:

Those who do not benefit from the criminal law can deserve punishment only insofar as their offences are immoral as well as illegal. They could, for example, deserve punishment for murder but not for sleeping in the park.<sup>16</sup>

It is true that those who do not benefit from the criminal law can deserve punishment only insofar as their offences are immoral as well as illegal, but this is equally true of those who benefit from the criminal law. It is just that those of us who benefit from the law act immorally whenever we break a just law from which we benefit – this is free-riding. Perhaps Davis's point is that while those who do not benefit from the criminal law do deserve punishment when they act wrongly, they deserve this punishment regardless of the criminal law. The examples seem to support this interpretation; murder is wrong regardless of the law whereas sleeping in the park is wrong (when it is) only because of the law. However, it does not follow from the fact that someone does not benefit from the law that he cannot do something that is wrong only because of the law (*mala prohibita*). The suppressed premise of the argument seems to be that all actions that are wrong only because of the law must be wrong in virtue of being free riding, but

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<sup>15</sup> See, e.g., Davis, *To Make the Punishment Fit the Crime*, 1992 (previously cited), p. 249.

<sup>16</sup> Davis, *To Make the Punishment Fit the Crime*, 1992 (previously cited), p. 248.

this is not so. The rules of the road are a good case in point. Driving on the incorrect side of the road is for most people a form of free-riding but it is also knowingly risking grave harm to others, and it is morally wrong for *both* of these reasons. It risks grave harm to others only because of the law, though. So its falling into this moral category is dependent on the law. If someone who did not benefit from the criminal law at all (a runaway slave, say) were to drive on the wrong side of the road then his action would still be wrong only because of the law (*mala prohibita*) but it would not involve free riding.

The more basic point, though, is that Davis's theory addresses the question, "how much to punish criminals" under a just system of laws and it is clear that this is a moral question. As Davis's example of punishing someone who does not benefit from the criminal law for murder but not for sleeping on a park bench strongly suggests, we do have a reasonable albeit vague idea of moral desert of punishment that is goes beyond moral desert for free riding. Insofar as that more general idea is sound, though, there is no reason it should not be relevant to determining the maximum criminal punishment someone morally deserves for a given crime. It is not as if our more general moral notion of deserved punishment is not general enough to catch criminal punishment in its net. Intuitively if one person's crime is immoral only because it is a case of free-riding then intuitively her maximum criminal punishment should be much lower than someone whose crime is also immoral because it is murder. Davis's position seems unstable. His discussion of those who do not benefit from the criminal law strongly suggests that we can make reliable moral judgements about what the maximum penalties appropriate for

forms of wrongdoing other than free-riding<sup>17</sup> but he also denies that those intuitions are relevant to determining the maximum criminal penalty. If the intuitions are generally sound and take criminal punishment within their scope, it is arbitrary simply to exclude them from a theory of proportionality. The result may be a theory that is messier than the auction theory, but we should not sacrifice truth for precision.

Nor is it useful to make the terminological appeal to “criminal desert” as opposed to moral desert more generally. For our question, as Davis puts it, is “how much to punish criminals” and this question should take into account moral desert more generally and not mere criminal desert *if* ‘criminal desert’ is stipulated to include only moral desert associated with free riding. A theory of mere “criminal desert” in this sense simply would not answer the more general question of “how much to punish criminals” in precisely the sense relevant to judges and legislators. A judge might reasonably respond, “OK, this is how much criminal punishment he deserves because what he did was a crime associated with such-and-such unfair advantage, but how much more *criminal* punishment does he deserve because he murdered someone?” Substantive concerns cannot be avoided by terminological manoeuvres.

In a discussion of methodology in punishment theory, Davis suggests that the justification of a theory should be comparative,<sup>18</sup> otherwise we may overlook the possibility that even the best theory has fairly serious vices. In this spirit, the critique offered here is comparative. My suggestion is that a theory of proportionality that holds that maximum criminal punishment should depend on overall wrongness is more

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<sup>17</sup> This also seems implicit in his discussion of non-criminal punishment in extra-legal settings, such as punishment of someone in a concentration camp by his fellow prisoners. See Davis, *To Make the Punishment Fit the Crime*, pp. 237-238.

plausible than one that makes it depend only on wrongness qua free-riding. I hasten to add that it is *actual* degree of overall wrongness that matters on this theory, and not merely what sociological surveys suggest most people take to be the degree of overall wrongness; Davis argues that the latter approach has unacceptable consequences.<sup>19</sup> How we determine actual overall wrongness is a difficult question and requires serious moral philosophy as well as various forms of empirical inquiry. Undoubtedly there will be reasonable disagreement about such matters, but it is equally clear that there will be reasonable disagreement about the outcome of an auction for licenses to commit crimes. Davis at one point<sup>20</sup> suggests that such a theory would force judges to pry unacceptably into people's personal lives to determine how wrong they acted, but this conflates the distinction between the wrongness of an action and the wickedness of the agent. We need not assess someone's character to determine the wrongness of her action though we do perhaps need to determine her beliefs and intentions. This move also ignores that the theory might well focus primarily on types of crimes rather than particular tokens (as Davis's own theory does). A focus on the wrongness of types rather than tokens would also assuage some of Davis's worries about predictability. Such a theory is admittedly less precise than Davis's but this seems like a less serious vice than handling cases in a highly unintuitive way.

#### **IV.**

Perhaps the argument of the last section illustrates only that Davis's version of the auction theory is too ambitious in its scope. If the problem is that the theory only gauges

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<sup>18</sup> See especially Davis, "Method in Punishment Theory," *Law and Philosophy*, 309-338, 1996, pp. 308-338.

<sup>19</sup> See, e.g., Davis, *To Make the Punishment Fit the Crime*, 1992, Chapter Three.

<sup>20</sup> Davis, *To Make the Punishment Fit the Crime*, 1992, p. 31.

free-riding perhaps the solution is to narrow the scope of the theory to crimes that are wrong only because they involve free riding. The resulting theory is admittedly less sexy than the original but sexiness is a less important theoretical virtue than truth.

Unfortunately, this move does not work. To see why it fails, we must return to the question, why should penalties for free-riding be proportionate to the extent of unfair (expected) advantage associated with it? That is the guiding idea behind the auction theory and it does sound plausible at first blush. However, on deeper reflection it looks deeply problematic. For intuitively the maximum penalty associated with a form of free-riding should correspond to the importance of the public good at stake and not to the amount of unfair advantage associated with the crime. Our resentment of the free rider's immorality is a function of his cavalier attitude to doing his fair share in preserving the public good and not a function of the advantage associated with it. The clearest way to see this is by considering a case in which the two come apart.

Suppose a small fishing tribe relies on two kinds of fish. Call the first "caviar." Caviar is a delicacy inessential to the nourishment of tribe members. Call the second "staple." Staple is crucial to tribe's survival - if staple stocks are depleted then the tribe cannot survive. The tribe has a rudimentary system of law under which each person is allowed to catch 5 fish of each kind (5 caviar and 5 staple) per week. It may well be that a license to catch extra caviar would fetch much more on an auction than a license to catch extra staple - caviar is very, very tasty and 5 fish is easily enough to keep one from going hungry (change the number if 5 doesn't sound compatible with this, but I am assuming that staple are big fish!). Intuitively, though, the punishment for overfishing staple should be much higher than the punishment for overfishing caviar and not just for

utilitarian reasons. Overfishing staple is a much more serious sort of moral wrongdoing because the tribe's very survival is at stake, so the person who overfishes staple deserves a more harsh punishment precisely because his free-riding is more wicked than the person who overfishes caviar. So even if we restrict our attention to “free-riding-is-all-that-is-wrong-with-it” crimes, punishment should be proportional not to unfair advantage but to the overall moral gravity of the free-riding in question, and overall moral gravity of free-riding typically is a function of the importance of the public good at stake rather than unfair advantage. Moreover, even if we put the issue of moral gravity as such to one side and concede Davis’s distinction between criminal desert and moral desert the main point stands. For I suspect that most people would have the same intuition about the fishing example even if they were asked to focus on criminal desert as opposed to moral desert. The intuitions might in that case bypass the idea of moral gravity as such, but the bottom-line assessment of proportionality presumably would still be sensitive to the size of the public good at stake as opposed to the amount of expected unfair advantage.<sup>21</sup>

This is a powerful counter-example to the auction theory, and if successful then it's easy to generate countless variations on the basic idea. Moreover, it sheds light on why the theory goes wrong even with respect to cases in which free-riding is the only wrong involved. One might worry that the case is underdescribed, as philosopher's thought experiments often are. However, having considered different ways of filling in the details of the case, none seems to undermine the basic point (the reader is invited to consider variations on the case for him or herself). Nor is the example nearly as fanciful as many philosopher's thought experiments, and I suspect that most people's intuitions

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<sup>21</sup> Many thanks to Sean McKeever for emphasizing that the objection I am pressing here actually is independent of the dispute about criminal versus moral desert raised earlier.



about the case will be firmly and confidently at odds with the auction theory. Nor is there any obvious reason to suppose these intuitions are unreliable. I therefore tentatively conclude that the auction theory fails as a theory of proportionality even if its scope is restricted to the kinds of crimes for which it is tailor made.

### **Conclusion.**

In spite of its apparent attractions the auction theory fails as a theory of proportionality. So far as justice goes, punishment should be proportional to overall wrongness and not merely wrongness qua free riding. Even in cases of pure free-riding, justice requires that punishment be proportional to the seriousness of the crime understood in terms of the value of the public good at stake rather than in terms of unfair advantage. Still, the auction theory does seem to do an impressive job of predicting actual criminal penalties, as Davis argues in a many places and this does not seem to be entirely accidental. I conclude with some speculative thoughts on this point which suggest that the theory may be a useful one after all.

The ability of a moral theory to legitimize existing practice is a virtue only insofar as existing practice actually is legitimate; existing practices can be unjust even when widespread. In some of the cases Davis discusses, this is relevant. For example, the practice of punishing unsuccessful criminal attempts more seriously than successful ones is problematic precisely because attempted murder seems just as wrong as murder. As is often noted in the literature on moral luck, either it is just an accident that one person's attempt is successful or it is merely evidence of some other feature of the case (wholeheartedness, perhaps) that is the genuinely morally relevant one.<sup>22</sup> The latter

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<sup>22</sup> See, e.g., David Lewis, "The Punishment that Leaves Something to Chance," *Proceedings of the Russelian Society* (University of Sydney) 12 (1987), pp. 81-97 and in *Philosophy and Public Affairs* 18

possibility would not warrant different punishments in general for unsuccessful attempts but rather indicates that juries should consider the failure of an attempt as evidence of some other feature – half-heartedness in the attempt, say. After all, in many cases this merely defeasible evidence of the presence of some other feature does not warrant the inference that the other feature really is present. In some cases, it really is just a matter of luck that one person’s attempt failed where another person’s was successful. In those cases, at least, it is intuitively implausible to think that justice would allow a higher maximum penalty for success as opposed to failure. We might be willing to live with such a scheme for utilitarian reasons but this just highlights that justice is but one (admittedly important) value amongst many. The issue of moral luck is a famously difficult and vexed one and I cannot do justice to it here. It is, however, worth registering that Davis’s argument that his theory would legitimize existing legal practice in this area may be more of a vice than a virtue.

Still, the question remains, “Why does the auction theory seem to do so well at legitimizing actual ordinal ranking of the severity of punishments insofar as they seem reasonable?” as Davis argues it does. Here it is worth reminding ourselves that the unfair expected advantage associated with a given crime very clearly is an indication of the strength of the incentives to commit such crimes. Of course, the actual incentive of a particular criminal to perform a particular crime will depend on an enormous number of idiosyncratic features, but it would be impossible for the criminal law to try to deal with such highly variable features. Perhaps the auction theory provides a very rough and useful guide to the strength of the incentives to perform various crimes. In that case,

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(1989), pp. 53-67. Also reprinted in Lewis’s *Papers in Ethics and Social Philosophy* (Cambridge: Cambridge University Press, 2000), pp. 227-243.

there is another explanation as to why Davis's theory gets the right results when it does. All else being equal, severity of criminal punishment should vary directly with the incentive to commit the crime. Otherwise the law is unlikely to deter crime in a way that is efficient, humane and consistent with genuine constraints of proportionality (not understood in terms of unfair advantage). If we aim to avoid unnecessarily draconian laws and an overtaxed criminal justice system then we should try to find the minimum punishment needed for deterrence. Perhaps this explains why the auction theory legitimizes existing legal practice as well as it does, particularly since rough considerations of deterrence historically have played a large role in setting criminal punishments. For the greater the incentive associated with a given crime, the more severe the punishment needs to be, all else being equal. So if the auction theory succeeds in giving an ordinal ranking of the expected advantage associated with a crime then it should be no great surprise if actual schemes of criminal punishment were roughly isomorphic with this ranking.

If this is correct then one of the main apparent advantages of the auction account – its ability to fit with existing legal practice - provides no support for the theory as a theory of proportionality. For on the proposed explanation, the theory tracks existing practice in virtue of rough considerations of deterrence rather than considerations of proportionality. This also suggests that we should not be too quick to abandon the auction model. For it might well be useful as part of a larger theory of deterrence. This would be a very different function from the one Davis proposes. On Davis's account, the auction model helps determine maximum penalties but on this account it would help determine the minimum penalties needed deterrence. Moreover, instead of determining

proportionality and justice, the theory would now determine punishments in accordance with the utilitarian need for deterrence. Since deterrence often seems to conflict with justice, this is an ironic reinterpretation of the auction model but a potentially fruitful one nonetheless. We remain indebted to Davis for articulating the model even if we “kick away the ladder” of proportionality and replace it with a less grandiose scaffolding of deterrence.