Lecture 4: Two Concepts of Rules

Distinguish between justifying a practice and justifying a particular action falling under it.

Punishment:
- retributive view: punishment is justified on the grounds that wrongdoing merits punishment.
- utilitarian: punishment is justified by forward looking considerations, appealing to probable consequences of maintaining public order.

We feel the pull of both considerations. How do we reconcile them?
- Suppose I ask you: “Why was J put in jail?” This is a question about J. The proper answer is that he was found guilty of a crime.
- Contrast, with the question: “Why do we put people in jail?” This is a question about the institution of punishment. The appropriate answer appeals to the good consequences of having such an institution.

The two questions correspond to two perspectives:
- The legislator decides which system of rules will be best.
- The judge applies those rules to individual cases.

Still, doesn’t justifying institutions by appeal to consequences justify too much? Won’t it justify punishing, on occasion, an innocent person?
- We need to think about what the institution would be that would mete out this kind of ‘punishment’ and evaluate the value of such an institution.
- “punishment works like a kind of price system: by altering the prices one has to pay for the performance of actions, it supplies a motive for avoiding some actions and doing others. The defining features are essential if punishment is to work in this way; so that an institution which lacks these features, for example, an institution which is set up to ‘punish’ the innocent, is likely to have about as much point as a price system where the prices of things change at random from day to day and one learns the price of something after one has agreed to buy it.”

Promises:
- A common charge is that according to utilitarianism a person should keep a promise only if it maximizes the good.
- Appeals to the good consequences of keeping promises are unlikely to secure the strict obligation in any particular case.
- Rawls: We can account for the strictness of the obligation to keep promises, once we view our individual promises in the context of the practice of promising.
- “…the point of the practice is to abdicate one’s title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance.”
- We can think about how best to set up the practice. But once we have accepted it, we are not at liberty to change the rules.
- This does not mean that we cannot deliberate about whether to keep a promise. But the exceptions and admissible excuses are part of the practice of promise-keeping.
- If someone explained that they broke a promise because it led to better outcomes, we would think that they don’t really understand what a promise is.

Rules:
The reason why so many think that utilitarianism cannot account for promises and punishment is that they confuse two notions of rules.
Summary Conception of Rules: summaries of past decisions arrived at by the direct application of the utilitarian principle to particular cases. Rules are regarded as reports that cases of certain sort have been found on other grounds to be properly decided in a certain way.

1. The point for having such rules is expediency: similar cases recur.
2. Decisions on particular cases are logically prior to rules. Many cases can exist that are not covered by rules.
3. Rules are aids and guides; a society of perfect deliberators would not need them.
4. We arrive at rules by weighing simplicity against accuracy.

Practice Conception of Rules: rules define a practice. Practices are set up because we need to collaborate.

1. The rules are prior to particular cases.
2. An individual person does not have the authority to decide whether to follow the rules in a particular case.
3. Rules are not decision-procedures.
4. They are not statistical.

The summary conception misses the distinction between justifying a practice and justifying actions. Rules are mere decision-procedures.

On the practice conception, one's actions are settled by the rules. When we start to examine the rules, we shift perspectives from judge to legislator.