CRIMINALIZATION TENSIONS: EMPIRICAL DESERT, CHANGING NORMS & RAPE REFORM

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This short Article is part of the organizers' larger Criminalization Project, which seeks, among other things, to develop theories for how criminalization decisions should be made. The argument presented here is that there is instrumentalist, as well as deontological, value in having criminalization decisions that generally track the community's judgments about what is sufficiently condemnable to be criminal, but that there are also good reasons to deviate from community views. Interestingly, those in the business of social reform may be the ones with the greatest stake in normally tracking community views, in order to avoid community perceptions of the criminal law as regularly or intentionally doing injustice. By building the criminal law's moral credibility, the law can earn "credibility chips" that the social reformer then has available to "spend" when the criminal law is needed to help change existing norms. The strategic dilemmas of a rape reformer are used as a case study to demonstrate the complexities of the calculations.

Let me begin by putting this discussion in the context of the larger Criminalization Project of which it is part. That Project considers how criminalization decisions should be made. One aspect of that question is: Should criminalization decisions be guided by what the community holds to be morally condemnable? There are at least two separate issues here: Should criminalization be limited to what is morally condemnable? And should condemnability be measured by the community's views?

There is an enormous literature on the first issue, of course, including such debates as: Should the criminal law permit strict liability offenses? Should the criminal law be used to punish regulatory violations that do not rise to the level of morally condemnable conduct? My own view, shared by many theorists, would be to set condemnability as a prerequisite for criminal liability.[1] In this paper, I want to focus primarily on the second question: Should the criminalization decision be guided by community views of what is condemnable conduct (rather than the views of moral philosophers, for example)?

The first issue – the advisability of constraining criminalization by moral condemnability – has moved from an academic to a practical issue in the United States. Two years ago, the American Law Institute amended its Model Penal Code for the first time in the 47 years since its promulgation. The amendment shifted the Code's distributive principle for punishment from the traditional "laundry list" of alternative mechanisms of coercive crime control – deterrence,

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[1] Aspects of this requirement at times have been formalized. See, e.g., MPC §2.12(2) (permits a defense if "the defendant's conduct [caused or threatened the offense harm er evil] to an extent too trivial to warrant the condemnation of conviction").

incapacitation of the dangerous, rehabilitation – to a distributive principle that set moral desert as the dominant and inviolable first principle.[2]

The Model Code does not address the issue of whether desert as a distributive principle should be based upon a moral philosophy conception of desert, what might be called "deontological desert," or based upon the community's shared lay intuitions of justice, what has been called "empirical desert."[3] On the other hand, it has been argued that in practice the latter is more likely to control than the former, if for no other reason than because of the notorious level of disagreement among moral philosophers about a wide range of, if not all, desert issues, which makes it difficult to operationalize a notion of deontological desert. In contrast, empirical desert can be easily and authoritatively determined simply by doing the empirical studies.[4]

Even if it is empirical desert, rather than deontological desert, that comes to be the distributive principle for punishment under codes based upon the Model Penal Code, the deontologists might well be quite happy. It may well be that empirical desert is the closest approximation of deontological desert that they are ever likely to have adopted in a working criminal justice system. (And there are some deontologists who would define desert in such a way as to suggest that empirical desert *is* deontological desert.[5])

Some of us have taken an instrumentalist approach and argued that empirical desert is an attractive distributive principle for punishment because such a distribution of liability and punishment in accord with the community's shared intuitions of justice builds the moral credibility of the criminal justice system and thereby promotes cooperation, acquiescence, harnesses the powerful social influences of stigmatization and condemnation, and increases criminal law's ability to shape societal and internalized norms. (Others have argued that empirical desert is an attractive distributive principle for criminal livability and punishment because it promotes democratic ideals.[6])

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[2] Compare MPC §1.02 (Official Draft 1962) to §1.02 (Amendment 2007). The latter requires the court: "to render punishment within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."

[3] Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 Cambridge Law Journal 145 (2008) [hereinafter "Competing Conceptions"].

[4] Competing Conceptions, supra note 3, at 164-166, 168-173.

[5] Paul H. Robinson, The Role of Moral Philosophers in the Competition Between Philosophical and Empirical Desert, Symposium Issue, 48 William & Mary Law Review 1831, 1839-1842 (2007).

[6] See, e.g., Andrew E. Taslitz, Empirical Desert: The Yin and Yang of Criminal Justice, in Paul H. Robinson, Steve P. Garvey & Kimberly Kessler Ferzan, Criminal Law Conversations 56 (Oxford 2009); Adil Ahmad Haque, Legitimacy as Strategy, id. at 57.

I have written a good deal about this issue and will not repeat the discussions here,[7] other than to suggest that empirical support for this view is growing. The most recent set of studies show not only that the traditional coercive crime-control doctrines of deterrence and incapacitation generate sentences that commonly conflict with shared intuitions of justice, but also that such conflicts undermine the criminal law's moral credibility and, thereby, have practical consequences that undermine the criminal justice system's crime fighting effectiveness.[8]

Justifying Deviations from Desert to Change Societal Norms

What I would like to address in this paper are some of the issues, including complications, that can arise when one adopts empirical desert as one's distributive principle. Specifically, one can imagine a number of situations in which one would want to deviate from empirical desert. There are difficulties with justifying deviations from desert for coercive crime-control purposes because such deviations undermine the crime control goal sought to be achieved,[9] but there are other interests, such as legality or control of police and prosecutors, that might call for some deviation from desert.[10] At least, there has been some significant history of this. As discussed elsewhere, some of these deviations are more justified than others.[11]

In this paper I address a different sort of justification for deviating from desert: using law to help change existing societal norms. If law always tracks shared community views, then it becomes difficult, if not impossible, for social reformers to use criminal law to change existing norms. Drunk driving and domestic violence, for example, are instances in which community views have changed over the past several decades, in part because criminal law got out in front of community views rather than simply following them.

However, the point I want to make here is that the social reformers' decision on whether to urge deviating from community views is not always an easy one. The deviation can have serious costs to a planned reform program, even as it can have benefits.

Let me use as a case study the situation of rape law reformers. Assume you are a reformer who believes that men do not take sufficiently seriously the importance of insuring clear and free consent before having intercourse. You might view current law, and community views, as problematic because they seem to accept in some ways the attitude of today's typical young man, who you think is insufficiently sensitive to the importance of clear and free consent. You might easily conclude that the criminal law's traditionally demanding culpability

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[7] Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 Southern California Law Review 1-67 (2007) [hereinafter "Implications"]; Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished How Much? chs. 8 & 12 (Oxford 2008) [hereinafter "Distributive Principles"]; Paul H. Robinson, Empirical Desert, in Paul H. Robinson, Steve P. Garvey & Kimberly Kessler Ferzan, Criminal Law Conversations 29-39 (Oxford 2009); Paul H. Robinson, Geoff Goodwin & Michael Reisig, The Disutility of Injustice, NYU L. Rev. (forthcoming 2010) [hereinafter "Disutility"].

[8] Disutility, supra note 7.

[9] See generally Paul H. Robinson, Distributive Principles, supra note 7, at ch. 8 (2008).

[10] Id. at ch. 12.

[11] Paul H. Robinson, Michael T. Cahill, Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve, Parts I and II (Oxford 2005).

requirements allow young men's damaging insensitivities regarding consent to continue unabated.

This is true not only with defining the unconsented-to intercourse offense to require the higher culpability levels of purpose and knowledge, which give defenses to young men even when they have not given consent the serious thought that it deserves, but also may be true even if the offense were defined to require only the lower culpability levels of recklessness and negligence. The problem is that, at least jurisdictions with Model Penal Code-based criminal codes, the definitions of recklessness and negligence incorporate existing community standards by judging the young man's risk-taking or inattentiveness by standards of "reasonableness." That standard has the effect of relying upon the existing norms that the reformer thinks are so troubling.

It is not hard to see why the concerned rape reformer might be attracted to a rule of strict liability as to consent. Giving a defense to young men who have intercourse without consent, albeit mistakenly, only perpetuates the unacceptable existing norm. If the law is to get serious about social reform, intercourse without consent ought to be punished in all cases, the reformer might argue. Once young men understand this, they will have a strong incentive to become careful about consent.

The Importance of Criminal Law's Moral Credibility to Social Reformers

Unfortunately, I don't think things are so simple for the reformers. The primary problem is this: It is social reformers, perhaps more than others, who very much need the criminal law to speak to the community with strong moral authority. If the criminal law is to have sufficient moral authority to prompt people to rethink their views on what to expect of young men, it must have earned that moral credibility with those it seeks to influence. Every deviation from desert perceived by the community incrementally undermines the law's moral credibility.

It is not that a criminal law must be perfect in tracking community views or lose all credibility. Some deviations from desert will be quickly and easily excused by the community because they are seen as unavoidable. The criminal law can do only so much in trying to accurately re-create the facts of a past event, especially in reference to culpable states of mind that may be difficult to be sure of even at the time. Also, as mentioned earlier, there are other important societal interests, such as fairness, that may call for deviating from desert. Doing justice, while it is an extremely important interest to most people, is not the only interest. What a sophisticated criminal law can do is take every opportunity to build its moral credibility – building up its store of "credibility chips" – with an eye toward prudently spending those chips on those special occasions that it judges to be worth the expenditure in order to shift an existing societal norm.

What guidance can one give the savvy social reformer about how to perform this balancing act of when to follow community views and when to deviate from existing views to lead them? First, it would seem appropriate to always try to avoid blatant and serious conflicts with the community's shared intuitions of justice, that is, to avoid ever producing cases that will be perceived as instances of the criminal law intentionally doing what will be seen as serious injustice. That may mean, for example, that strict liability as to consent is a bad idea for the ultimate success of rape reform. Such a rule would invite serious liability for a mistake that could not have been avoided even by the most thoughtful person, thereby risking the creation of defendant martyrs, which will muddy the offender-victim distinction perceived in such cases.

Second, it seems likely that the system ought to, in all other instances, try to track community views of justice in order to build up its reserve of "moral credibility chips." That is, it ought to avoid frittering them away with deviations from desert that have little payoff, such as

doing what current law frequently does today in deviating from desert to advance general deterrence when the prerequisites for effective deterrence are not likely to exist.[12] The central point here is that no deviation from desert should be tolerated unless the benefits from it are clear. Hopefully, the recent empirical work has at least discredited what was the common wisdom of the past 50 years that deviations from desert are cost free.[13]

Finally, it makes sense that, when reformers do decide to spend some of their credibility chips, they do so carefully and thoughtfully. This means "picking your fights." Understand that one has limited and dearly-earned chips to spend. Don't spend them now if one will regret not having them for a more important purpose later. In the context of rape reform, for example, this might mean adopting a culpability requirement as to lack of consent (that is, avoiding strict liability), but perhaps setting it lower than criminal law might normally. A recklessness or negligence requirement would avoid the perceived injustices likely to result from a strict liability standard, and would place at center stage the issue of what the society should reasonably expect of its young men with regard to assuring full and free consent. Thus, every case litigated in public would become not an opportunity for hand wringing about the injustice being done to young men who make honest mistakes, but rather an opportunity to promote the public discussion about what should be considered "reasonable" in this context.

This does not mean that a few cases will produce a dramatic shift in societal norms. Norms are glacial – enormously powerful but slow-moving. However, when norms are successfully shifted, conduct does change, and not just the conduct that is likely to be caught and prosecuted as a criminal offense. The power of social norms is one that will seep into the conduct of two people in an intimate setting, about which neither would ever seriously think to make public, let alone to involve the criminal law. Yet, a changed internalized norm will change the conduct, which presumably is what the social reformer is seeking.

Limits on and Techniques for Changing Norms

An important caveat remains to be made: not every judgment about wrongdoing is open to easy modification by social reformers, at least not through techniques that would be permitted by liberal democracies. (A good deal of modification can be done through coercive indoctrination techniques that require serious intrusion into and control over a person's life.[14]) Our best guess of the intuitions of justice that, as a practical matter, cannot easily be modified are those on which there is an existing near unanimity as to their central aspects, part of the "core" of agreement. This core includes aspects of physical aggression and theft.[15] Out from

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[12] Paul H. Robinson, John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 Oxford Journal of Legal Studies 173 (2004); Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 Georgetown Law Journal 949 (2003); Distributive Principles, supra note 7, at chs. 3-4.

[13] See, e.g., Disutility, supra note 7.

[14] See, e.g., Paul H. Robinson, The Case of Richard R. Tenneson, Criminal Law Case Studies 158-159 (West, 4th ed. 2009).

[15] Paul H. Robinson & Robert Kurzban, Concordance & Conflict in Intuitions of Justice, 91 Minnesota Law Review 1829 (2007); Paul H. Robinson, Robert Kurzban & Owen Jones, The Origins of Shared Intuitions of Justice, 60 Vanderbilt Law Review 1633 (2007).

this core, however, change is possible, probably including judgements about coercion to intercourse.

Appreciating the difference between intuitions that can be changed and those that cannot is important for reformers. First, it avoids a waste of resources in efforts toward an unreachable goal. (Those who seek to persuade people that they ought not want to punish, for example, are on a fool's mission.[16] Reformers who want real change, rather than just an excuse for fiery rhetoric, must focus on what is possible.)

Second, savvy reformers can use the unchangeable core for their own purposes, if they acknowledge it rather than fight it. For example, an effective technique aims toward building up (or tearing down) the strength of the analogy between the unchangeable core and the norm out from the core that is sought to be modified. One can see this lesson at work in recent advertising campaigns, such as of the music industry seeking to reduce the amount of unlawful downloading of music. (Note the ineffectiveness of the law by itself to change conduct without changing the underlying norm.) A recent television campaign shows a person sneaking money from the pocket of a pleasant and hard-working musician. The message: downloading music is just like pickpocketing. The campaign seeks to build the strength of the analogy between the core wrong of physical taking without consent and the unlicensed downloading of music.

For rape reformers, the approach may suggest focusing public discussion and education on the impropriety of coercive pressures for sex – building the analogy between psychological coercion and physical coercion – and on the harmful effects of intercourse without consent – building the analogy to assault.

Conclusion

For our larger criminalization project, the argument here is, first, that serious moral condemnation ought to be a prerequisite for criminalization, second, that for instrumentalist (and perhaps deontological) reasons the moral condemnation relied upon ought to be that reflected in community views, not moral philosophy, but that, finally, there can be legitimate reasons for deviating from community views. Indeed, the most important point here may be that the persons who ought to be most interested in criminal law normally tracking community views are those who want to use the moral credibility thereby earned to bring about important changes in societal norms.

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[16] Implications, supra note 7, at 11-18.