
Community Standards and the Criminal Law

A common form of argument and analysis when discussing legal liability is to claim that “justice” requires one result or another. The “justice” argument is used most often and with greatest conviction when analyzing criminal liability, because criminal law, more than any other, is thought to be premised on principles of blameworthiness and desert. Various conceptions of justice have been proposed by moral philosophers, but when laypersons claim that justice requires a particular criminal liability or punishment in a case, rarely are they referring to conceptualizations derived from moral philosophy. Instead, they see the proper result as one that is in accord with their intuitive notions. Persons can articulate reasons for their intuitive judgments, of course, and importantly they often believe that those reasons are not idiosyncratic to themselves but are held by a broad community of moral persons. Thus, the argument that “justice would be served if . . .” is a claim not only of the speaker’s personal view but of an intuitive but grounded notion of justice that the speaker believes is shared by the community of moral individuals.

It is these notions of just results held by ordinary people that we set out to investigate. Since we collected the moral intuitions of more than thirty people about each set of cases, we were also able to determine the degree to which these intuitions actually were shared among individuals, thus testing the belief of many individuals that their moral intuitions reflect a community consensus. Thus, one focus of our investigation has been on the following questions: What are the moral intuitions of individuals about the sorts of blameworthiness and just-deserts issues that arise in criminal cases? To what extent are these intuitions shared (that is, do shared standards of justice exist)? In this book, we report the results of several of our investigations into these and related questions. By empirical procedures, we determine at least the beginnings of the outlines of “community standards”—those views that are held by ordinary members of our communities about criminal liability and punishment.

Rather than addressing this “moral intuitions” question across the spectrum of possible issues—all criminal activities—we allowed the specific cases we examined to be dictated by our second focus. Professor Robinson is knowledgeable

about criminal law as it is represented in the legal codes that govern the criminal justice system's determinations of trial outcomes and assignments of criminal liability. Those individuals versed in criminal law often are struck by the thought that the results dictated by criminal codes are at variance with our notions of the moral intuitions of individuals in our culture. Are these "secondhand intuitions," these intuitions of legal scholars about code-community discrepancies, correct? This became the second focus of our investigation. We strategically aimed our investigations of community standards at areas in which we suspected that such discrepancies existed or in which a discrepancy might be of particular interest. Are there really times when community standards are importantly different from the liability and punishment provided by legal codes?

Our studies follow a set form: We contrast the empirical judgments made by community members with those liability judgments determined by current versions of the legal code—particularly, those assigned by the Model Penal Code (the Code) but also those assigned by other codes or proposed codes that have some claim on the attention of legal scholars and code drafters. Our purpose is to cause a particular sort of controversy. We seek to bring the legal community to consider the consequences of discovered discrepancies between the moral intuitions of ordinary people and legal codes. Additionally, we will discuss what rides on the answers to the previous questions and what such discrepancies might imply for the criminal justice system.

In our investigations we discover that often the legal codes and the community standards reflect similar rules in assigning liability to a case of wrongdoing; but also often they do not. For each instance of a discovered similarity or discrepancy, we discuss the possible implications of the similarity or the difference. To signal our conclusions, we will argue that a discrepancy between code and community is by no means always an argument for changing the legal code, but it is an argument for careful examination of the possible roots of the discrepancy. At certain times, one would choose to "go with the code," to retain the code's formulation of an offense and the range of punishment for the offense that the code prescribes. At other times, the weight of the argument lies with the community standards; the code drafters should consider reformulating the legal codes to come into harmony with the moral judgments that our subjects provide. In still other cases, we see multiple possible directions that a code-community standard could take and are genuinely puzzled about what to recommend.

In summary, this book investigates the existence, nature, and implications of community views on the rules and principles of criminal liability and punishment by contrasting those views to the rules and principles embedded in legal codes. By doing so, we frankly hope to generate controversy—to generate debate on criminal codes.

But haven't the social sciences charted the moral intuitions of ordinary individuals? One might expect that a vast research literature on this subject already ex-

ists. Certainly we expected this. We expected our contribution to be an examination of current legal code principles in the light of existing social science research. But for reasons that we do not fully understand, there has been little previous work in this area. Social scientists have not mapped the contours of the moral intuitions of our culture; psychologists—who one would expect to be particularly keen on carrying out this mapping—have not done so. (For a more detailed discussion of why this might be so, see Darley and Schultz, 1990.) There are only a scattered set of studies that examine the issue of code-community discrepancies, which we will cite as they become relevant to the particular elements of the code that we are examining.

This is not to say that there are not a good many studies about ordinary people's perceptions of various "law-psychology" issues. Much empirical work has been done on criminal justice issues, especially those that relate to the causes of crime and its effective treatment or control (Fox, 1985). Public attitudes toward crime and fear of it have been examined (Eitzen and Timmer, 1985, pp. 86–111), as well as attitudes toward particular aspects of the criminal justice system, such as the police and the death penalty. (See, e.g., Cowan, Thompson, and Ellsworth, 1984.) One aspect of this work that may be useful to substantive criminal law reform is the investigation of people's assessment of the relative seriousness of different offenses (Wolfgang and Weiner, 1982). Many procedural aspects of the system also have been investigated. Empirical research has proved useful in learning about the effect of the physical appearance of litigants (Dane and Wrightsman, 1982; Baumeister and Darley, 1982; and Kulka and Kessler, 1978), the reliability of eyewitness testimony (Wells and Loftus, 1984), the group decision-making processes of juries (Kassin and Wrightsman, 1988), strategies for biasing jurors during voir dire (Blunk and Sales, 1977), the effect of jury instructions (Kassin and Wrightsman, 1979), and sentencing disparity among judges (Hogarth, 1971). There also is a vast literature on the relationships between—or more accurately the contradictions between—legal and psychiatric definitions of mental illness. Little has been done, however, in assessing lay views on what some might argue is the one subject on which the community view is the final authority—the assessment of deserved liability and punishment.¹

In light of the social science interest in a wide range of criminal justice issues, the absence of liability and punishment studies puzzles us. Especially in a system such as ours—which ultimately relies upon layperson juries for the final liability judgment² and often empowers them to grade the seriousness of the violation—one would expect that public conceptions of liability and punishment would be matters of keen interest. As a practical matter, given the evidence of the limited effect of jury instructions in the jury decision-making process (Elwork, Sales, and Alfani, 1982), one might guess that litigants on both sides would want empirical evidence of the intuitive liability rules that juries are likely to follow. Yet, for whatever reason, examination of community views on the substantive rules for assign-

ing criminal liability and punishment does not appear to be high on the social science agenda. A primary theme of this book is to argue that it should be.

Social scientists have little reason to undertake this work, however, unless the criminal law community is persuaded that studies of community views are important to the development of criminal law and policy. If criminal law drafters see such information as important to their work, social psychologists will be motivated to undertake such studies, and their legal counterparts will be encouraged to participate. Toward this end, much of the argument in this work is directed at lawyers, judges, legal scholars, and legislators. We attempt to show that community standards are of relevance to the legal community and also what that relevance consists of in specific cases.

AN OVERVIEW

An overview of the book will be helpful to the reader. In our previous discussion we seemed to imply that the liability and punishment principles instantiated in legal codes ought to match, in large measure, those that would be employed to judge cases according to community standards. It may seem natural to some that the legal doctrine ought to track the community's views, especially in a democracy and in a system that relies upon the lay jury. But, like any other proposed principle for the distribution of criminal liability, this principle requires explicit justification. Why, exactly, should the community's views of liability and punishment be taken into account? The next section of this chapter examines that question. It concludes that community views are an essential consideration and ought to be an influential factor in the policy-making and code-drafting process but that such views ought not to be taken as determinative.

Even in those circumstances in which community views have a legitimate role to play, there may be hesitation in looking to them because of the existing difficulties and uncertainties of such empirical research. A brief description of the research methodology of the pilot projects presented in this book appears at the end of this chapter. Appendix A contains a more detailed description of methodology, as well as a discussion of the significant limitations inherent in all research of this kind. The pilot projects described hereinafter do not always provide complete, comprehensive, or definitive conclusions, but we maintain that research using social science methods similar to the ones we have used for our pilot projects can provide reliable data for criminal law code-drafters and policy-makers.

In Chapters 2 through 6, we present a number of studies that examine the community's views on a variety of criminal liability and punishment issues. We also examine whether, if such shared community views exist, they match the rules and principles embodied in the legal codes that currently dictate criminal liability and punishment. The results of our studies suggest that shared notions of appropriate liability and punishment do exist on some issues. The comparisons to current law show that the subjects' views frequently do support the codes' positions, some-

times even for provisions that commentators have assumed have little public support. Often, however, the subjects' views are markedly different from those of the codes. In each instance, we discuss the implications of the results for the legal codes and for future research.

Our discussion of the studies is divided into three sets of chapters to address separately each of the three major functions of criminal law doctrine. First, the doctrine must define the conduct that is prohibited (or required) by the criminal law. Such "rules of conduct," as they have been called, provide ex-ante direction to the members of the community as to the conduct that must be avoided (or that must be performed) upon pain of criminal sanction. This may be termed the *rule articulation function* of the legal doctrine. When a violation of the rules of conduct occurs, the criminal law must take on another role. It must decide whether the violation is sufficiently blameworthy to merit criminal liability. This second function, the *liability assignment function*, sets the minimum conditions for liability. It is the initial step of the adjudication process. Here the law assesses ex post whether a person who violates a rule of conduct is blameworthy for the violation and therefore ought to be held criminally liable for it. Finally, in those instances in which liability is to be imposed, the criminal law must assess the seriousness of the violation and blameworthiness of the offender in order to determine the general amount of punishment that is appropriate. While the liability function requires a simple yes or no decision as to whether the minimum conditions for liability are satisfied, this third function, the *grading function*, requires judgments of degree. For a general discussion of these three functions of criminal law doctrine, see Robinson (1990) and Robinson (1994).

WHY COMMUNITY VIEWS SHOULD MATTER

Next we take up the question we previously raised. What relevance should the community's views of liability have for formulations of criminal codes? The question of relevance is central to the value of the studies that we propose, so we need to give a general defense of the proposition here.

The claim that a community's shared notions of condemnation and punishment should guide the formulation of criminal law may be criticized for several reasons. For example, desert theorists argue that criminal law doctrine should be formulated to punish blameworthy offenders; the distribution of just punishments ought to be the ultimate goal of criminal law. A distribution of punishment according to community views would be immoral, they might argue, because the members of the community may well express views about proper punishment that they would find unfair if they themselves were to be judged by such views or that are in some other way unfair when examined from some rational moral perspective.

Utilitarians generate punishment rules from a quite different perspective. Utilitarians argue that doctrine should be formulated in a way that efficiently mini-

mizes future criminal violations; efficient crime prevention ought to be the goal. A distribution according to community views, they might argue, would be detrimental to society because it would not maximize the efficient crime-prevention potential of criminal liability and punishment. That is, avoidable offenses (under efficient minimization practices) would be committed if such a distribution were adopted. To summarize and conjoin the arguments of the desert and utilitarian groups, it would be both immoral (from a deserts-theory perspective) and detrimental to society (from a utilitarian perspective) to distribute liability and punishment according to such community notions.

We would suggest that, if desert is the governing distributive principle, the community's view is relevant, because it is one source of determining what counts as the just desert. Admittedly, a moral philosopher might be reluctant to defer to the community for an assessment of what is morally deserved. Desert is not a matter of intuition, the philosopher might argue, but is to be logically derived from principles of fairness and good. At the very least though, the community's views may play a role in testing the derived rules. That is, if a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person's moral blameworthiness, at least suggesting that closer scrutiny of the reasoning behind the rule is required.

Under a utilitarian rationale for distributing liability, the community's views are of somewhat more direct importance. First, moral condemnation is an inexpensive yet powerful form of deterrent threat. It demands none of the costs that attend imprisonment or even supervised probation; yet, for many persons, it is a sanction to be very much avoided. The more importance a person places upon social acceptance, the more terrible (ergo efficient) this threatened sanction becomes. This marvelously cost-efficient sanction is available, however, only if the system retains its moral credibility. Each time the system is seen to convict in cases in which no community condemnation is appropriate, the system weakens the underlying force of the moral sanction.

Furthermore, recent empirical evidence suggests that criminal law's most effective mechanism of compliance is not the deterrent threat of sanction; it is its capacity to authoritatively describe the moral and proper rules of conduct. People will follow those rules not because they fear punishment for violating them but because they see themselves as good and law-abiding people who are inclined to obey the law because it is the right thing to do. Most important, the compliance power of criminal law is directly proportional to its moral credibility (see, e.g., Tyler, 1990). If the criminal law is seen as unjust in one instance, its moral credibility and its concomitant compliance power are, accordingly, incrementally reduced.

In addition to these effects, the perceived "justice" of the system is crucial to gaining the cooperation and acquiescence of those persons involved in the process (offenders, potential offenders, witnesses, jurors, and so on). Greatest coopera-

tion will be elicited when the criminal law's liability rules correspond with the community's views of justice. Conflict between the two undercuts the moral credibility of the system and thereby engenders resistance and subversion (see, e.g., Kassin and Wrightsman, 1988, pp. 158–159; Schefflin and Van Dyke, 1980; and Kadish and Kadish, 1973).

The legal system that the community perceives as unjustly criminalizing certain conduct is one that is likely to cause the society governed by those laws to lose faith in the system—not only in the specific laws that lead to the unjust result, but in the entire code and criminal justice system enforcing that code.³ The reverse is also true. A rule that is strongly and persistently supported by the community as accurately reflecting moral blameworthiness but that is not followed by the criminal justice system raises similar destructive possibilities. The community is likely to engage in extralegal vigilante actions, with all of the dangers that that suggests.⁴

Empirical research suggests that a tension or contradiction between the legal code and a community standard does have some of the consequences we suggest. Studies show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid (Grasmick and Green, 1980; Jacob, 1980; Meier and Johnson, 1977; Silberman, 1976; and Tittle, 1980). Tyler's more recent Chicago panel study (1990) draws similar conclusions. The degree to which his subjects saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities.

Note that it is not the moral accuracy of the criminal law—as moral philosophers would define it—that is important for the utilitarian value of doing justice. Rather, it is the *community's perception* of the law's moral correctness that assists the law's effectiveness in gaining compliance. That is, the community's view of justice provides the standard by which the system's *perceived* moral credibility is judged. For these reasons then, an understanding of the community's notions of justice is needed for informed analysis of legal systems.

RESEARCH METHODS

We will now briefly overview the procedures we used for examining the community's views on appropriate liability and punishments for various conduct. We contacted people to participate in our studies and had them give us their views on the appropriate liability to assign to perpetrators of various criminal episodes that we described to them. Each individual read about a particular crime case—a "scenario" in our vocabulary—and decided whether to assign criminal liability and, if so, the general range of appropriate punishment. Individuals, "subjects" or "respondents" as we will call them, then read another crime scenario, which differed in certain critical ways from the first scenario, and made similar determinations as to liability and punishment. The text of the scenarios is reproduced in Appendix B.

In recruiting our subjects, we sought to involve persons from many walks of life. We did not test those familiar samples of convenience, such as college sophomores; and we also did not test persons involved in the criminal justice system, such as judges, law students, or police officers, figuring that those people would have opinions that were to some extent formed by their contact with the system. Instead we tried to recruit "ordinary citizens." In Appendix A, we report on the demographic distributions of our subjects; we found them sufficiently broad that we feel we have the beginnings of a set of demonstrations of the judgment patterns of typical citizens of the United States on liability and punishment issues.

In all the studies we conducted, we presented subjects with a scale on which to indicate their assignments of liability for the persons in the scenarios. As shown here, that scale consisted of a choice of N (no criminal liability); 0 (criminal liability but no punishment); or 1 through 11 on a scale that corresponded to prison sentences of from one day (1) to the death penalty (11).⁵

Criminal liability and sentence for _____ ?

| | | | | | | | | | | | | |
|----------|---------|-------|-------|------|------|------|------|------|-------|-------|-----------|-------|
| N | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
| no liab. | liab. | 1 day | 2 wks | 2 mo | 6 mo | 1 yr | 3 yr | 7 yr | 15 yr | 30 yr | life | death |
| | no | | | | | | | | | | imprison- | |
| | punish. | | | | | | | | | | ment | |

The table used to translate liability scores into terms of imprisonment appears in Appendix C.

As the reader will notice, the length of the prison sentences increases differentially as the scale advances. For instance, the difference between scale value 5 (a sentence of one year) and scale value 6 (a sentence of three years) is only two years. However, the difference between scale value 8 (a sentence of fifteen years) and scale value 9 (thirty years) is much greater. We set up the scale in this way for two reasons. First, it corresponds, at least approximately, to the psychological perspectives on equal distances between punishments (Erikson and Gibbs, 1979; Gescheider, Catlin, and Fontana, 1982). Second, the scale's punishment differences also correspond to the grading categories that are used in the typical American criminal code. (Given the psychological perspectives on equal distances between punishments, it should come as no surprise that legislators use these distinctions in creating the punishment categories for criminal codes.) This means that the punishment choices we presented to our subjects are similar to those available to legislators when they decide how to grade an offense.

The several scenarios given to each respondent usually were identical in a set of core elements and differed only on the dimensions that we thought would make a difference in the subjects' liability judgments (or are held by criminal codes to make such a difference). By examining the differing sentences assigned to closely related cases (scenarios), we sought to determine whether shared community notions of justice exist, and, if so, on what issues they exist and how those notions

compared to current law. An example will help to make this clear. Criminal codes sometimes treat the crime of forcible sexual intercourse differently if it is committed between individuals who have had a previous sexual relationship. Is this in accord with the way people currently think about rape? To determine this, we first wrote a core story in which an incident of rape was described. We then built that core story into a number of different scenarios. So in scenario variations, the incident was described as occurring between two individuals who had had a previous sexual relationship or two who had not had such a relationship. As we will show you in Chapter 6, our subjects assigned liability judgments to those cases in ways that differ in some respects from judgments instantiated in criminal codes.

Each subject read one version of a scenario, then another. Sometimes a subject judged as many as seven or more versions of a scenario. Obviously then, they were aware of the differences that were built into the different versions of the scenarios, and their attention was focused on those differences. The danger here is that the subjects would feel that we (the researchers) thought that the differences were important and that they should change the liability they assigned, even if they themselves did not think it appropriate. To avoid this problem, we instructed subjects that they should not read the differences in this way (as requiring them to assign different liabilities). As the reader will see as we progress through the study discussions, the subjects often judged different cases alike in the liabilities that they assigned to the perpetrator of the crimes. In other words, they were not unduly influenced by thoughts that the researchers wanted them to see differences between cases that they (the subjects) reasoned should be treated similarly.

This experimental design, in which each subject responds to every version of the scenario (called a "within-subjects design" in the vocabulary of experimental research) is a very powerful one, in that it is highly likely to find statistically reliable differences in the subjects' responses, even when those differences are comparatively small. Particularly for the initial investigations in the field, we thought that this property of the research design was an important one to employ.

As we said, different scenarios were variant versions of each other. Sometimes the differences were obvious and direct, such as the variations between the sexual offense studies just described. (In one scenario the rapist had a prior relationship with the victim; in another, he was a stranger.) In some of the other scenarios, the differences were both less direct and more subtle. For instance, in another case we described one set of actions that we thought would suggest that a perpetrator's conduct was necessary but not sufficient in causing another's death, and in a related scenario, conduct that was sufficient but not necessary in causing the death. It is a genuine question whether subjects perceived the concrete descriptions as being necessary in one instance and sufficient in another. The standard solution to this (in scenario research) is to ask the subjects questions that not only measure the punishments they want to assign but also probe for their psychological perceptions of the circumstances of the scenario. So we asked subjects in the cases

described whether they thought that the actions were, for instance, sufficient in themselves to have produced the death and necessary to produce the death. As we will see, we were sometimes successful in producing the perceptions of the situations that we wished to produce and sometimes less successful. When we were less successful—and we have noted these instances—more complicated and more tentative interpretations of our results are necessary.

We have conducted upward of twenty different studies (not all of which are reported herein). The studies were designed and executed in seminars at Rutgers University School of Law at Camden in the fall of 1990 and spring of 1991, with the help of faculty and graduate students from the Princeton University Department of Psychology.

In the following chapters, we discuss the results of our studies and attempt to draw out the implications of our findings for the criminal law. In those discussions, we will be fairly bold; we will sometimes make suggestions for code alterations or other modifications of criminal justice procedures. This seems to us to be the best way that we can contribute to what we hope will become a debate. But we need to be clear that we do not regard our empirical studies as the last word. This is true for two sets of reasons.

First, our studies have various general and specific imperfections. We have not tested the large and randomly selected sets of subjects that would provide an entirely convincing mapping of community standards at the state or national level. Because we did not do this, we also have not given the question of what exactly constitutes a community standard the full consideration that it warrants before one would want to consider code alteration based on a conflict with community standards. Simply to signal how this community-standard consideration would go, we now provide a brief sketch: Whenever one polls a community about an opinion on some issue, whether politics, preferences, or legal codes, one can derive an “average opinion.” But to say that the average opinion is a “community standard” is to claim more. It has sometimes occurred in presidential elections that some states voted for *A* by a 51 percent to 49 percent majority, others for *B* by a similar margin. Obviously, it would be absurd to say that *A* was the “community standard” in the states that he carried, and *B* likewise in the states that he carried. What needs to be recognized is that there was nothing that we should be comfortable in calling a community standard in either state. Therefore, in our studies, we need to require that some substantial majority holds a view before it begins to fulfill the requirements for being a community standard.

Actually, we need to require more. If we find some subgroup in sharp disagreement with the majority, this challenges the idea of a community standard more than would be the case if their disagreement was a matter of degree rather than of kind. For example, a majority of people may think that the existence of a previous relationship between two people does not affect the gravity of the offense if one of the individuals rapes the other. However, a minority does think that the existence

of a previous relationship matters. If that minority thinks that it only slightly mitigates the offense, then it would be possible to make the case, on the one hand, that there is a community standard about the seriousness of such an offense. If, on the other hand, the minority thinks that a rape that takes place within a marriage is no offense at all, the case for a community standard is at a minimum considerably harder to make. These are the sorts of considerations that need to take place when the existence of a community standard is asserted. In our discussions of the studies that follow, we will recognize this task by signaling the reader when we see evidence of sharp disagreements on legal standards among our subjects. Interestingly, sharp disagreements occurred rarely. (In technical terms, we rarely saw signs of a bimodal distribution of responses.)

These are the general problems with our studies. Specific studies can also have specific flaws and problems. In some of our studies, in which we intended subjects to read the cases we presented them in a particular way (as perhaps establishing a particular state of mind on the part of the perpetrator), our subjects read them in importantly different ways; because of this, some of our conclusions require complex qualifications. In other studies, the set of scenarios that we presented turned out to represent a spectrum of possibilities that was more restricted than was adequate to test the legal code provisions. In other studies, still other difficulties came up that will require correction in future studies.⁶ Again, the function of these studies—and this book—is to begin a discussion of the interplay between law and social science on issues of criminal liability; and to both illustrate the kinds of important information that social scientists should be asked to provide to the legal community generally, and code drafters specifically, and to stimulate the kinds of empirical and philosophical considerations that will need to be addressed in future discussions on these matters. A contradiction between the legal code and community standards by no means automatically argues for the alteration of the code in the direction of the standards. There may be good reasons why the legal codes should deviate from community standards. The discovery of a contradiction simply points to a tension that is worthy of analysis.

Do such tensions exist? Are there, in fact, important differences and conflicts between the legal codes that prevail in our country and the community standards of those governed by the code? Are there shared moral intuitions about when punishment is deserved and about how much is deserved? We address these questions empirically in the research reported in the following chapters of the book.