
Justice, Liability, and Blame

*Community Views
and the Criminal Law*

Paul H. Robinson
John M. Darley

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J. H. Robinson

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About the Book and Authors

Drafters of legal codes often implicitly or explicitly seek to incorporate community standards. To what extent have they succeeded? This book examines shared intuitive notions of justice among laypersons and compares the discovered principles to those instantiated in current American criminal codes. After discussion of the proper role of community views in formulating legal doctrine, Robinson and Darley report eighteen original studies on a wide range of issues in dispute among legal theorists. The authors compare lay intuitions and code provisions on such questions as the justified use of force, insanity, causation, complicity, risk-creation, omission liability, culpability requirements, duress, entrapment, multiple offenses, and criminalization matters such as felony-murder and sexual offenses. Many important differences between the legal code and community views are found, and the authors discuss the implications of those differences. One implication is the possibility that such conflicts could lead to reduced compliance as the code loses its moral authority with the community.

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New Directions in Social Psychology

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In memory of

Ann Harper Robinson

March 16, 1917–October 25, 1994
in love with people, life, and learning

—*P.H.R.*

John Gordon Darley

February 20, 1910–September 6, 1990
a man who had little security in his own early life
yet devoted himself to providing security
for those with whom he worked and lived

—*J.M.D.*

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Preface

Members of the criminal law community regularly make assertions about “the community’s sense of justice” on a particular issue and claim that, therefore, to be true to this sense of justice, a particular formulation or interpretation of a criminal code provision is required. Such claims typically express the speaker’s own intuitions, which the speaker believes are shared by other people of common sense. Such thoughtful speculation commonly is the basis upon which formulations of criminal law are proposed, adopted, and interpreted.

A social scientist may cringe at hearing this. The community’s intuitions on blame and punishment are not matters that one need speculate about. Modern behavioral science is well equipped to determine with some reliability the rules that laypersons use in assessing blame and deserved punishment. Basing criminal law formulation on speculation rather than fact suggests that the criminal law community is out of touch with modern science in an important and damaging way.

In this book we report eighteen original studies on a wide range of issues that are central to criminal law formulation, including issues relating to the justified use of force, insanity, causation, complicity, risk-creation, omission liability, culpability requirements, duress, entrapment, multiple offenses, and criminalization matters such as felony murder and sexual offenses. The questions selected for investigation are those for which the community’s intuition would be of importance to the legal decision-makers. In addition to reporting the community’s views, we compare those views to the rules instantiated in current criminal codes. Many important differences between code and community are found, and we discuss the implications of those differences.

Social scientists may look at these studies and wonder: What is it that makes these authors think the world breathlessly awaits yet another series of studies on “the law and social science”? There already exist a number of studies that trace relationships between various legal concerns and the findings of social and psychological science. How do the studies reported in this book differ from other studies? What sorts of new contributions do they make?

First, our studies differ from others in the specific questions we investigate. As noted, we test the views of ordinary people on the issues that govern the formulation of criminal codes. An example may make this clearer. Criminal codes are quite strict about what actions can be committed in self-defense. Roughly, the de-

fender can use only force sufficient to defend against the attack and can use deadly force only if serious harm is threatened and safe retreat from the attacker is not possible. One of our studies demonstrates that ordinary people hold considerably looser standards for acceptable force in self-defense. We then say what we can about the possible meanings of this code-community difference and, somewhat gingerly, discuss possible implications for code modification.

Our second claim to rareness, if not uniqueness, lies in this: the accuracy of our understandings of the legal codes. Frequently, when social scientists set out to do research relevant to legal concerns, they do so without a careful examination of the structure of the legal system that generates the issues to be examined. This has meant, much more than has been generally realized, that the studies do not make contact with the concerns of the legal system or make contact in a way that flaws the extrapolations that the social scientists wish to make. Thus, their intended audience—legal professionals—is not reached or is not moved by their arguments.

For example, an empirical study investigating lay intuitions on the blameworthiness of “recklessness” and “negligence” may give interesting results. Yet, if the definitions of “recklessness” and “negligence” used in the study are different from those used in criminal codes—where the two terms typically are given detailed definitions—the results will be of little or no use to criminal law decision-makers. Those familiar with social science research on insanity will be able to supply many examples of a similar sort; studies in which the questions that were raised with the study respondents were not in the form required to give answers to questions of interest to the legal decision-makers and scholars.

All too often, social scientists have aimed to collide with legal concerns—but missed their target. No doubt we make mistakes in this book, but this is not one of them. One of us has extensively studied criminal codes and has been involved in code-drafting efforts. Throughout the book, we discuss what weight should be given to a code-community discrepancy. That turns out to be a complex question. However, when our research demonstrates a discrepancy between code and community, we have confidence that it is a real one, rather than one that can be explained away by some misunderstanding of the code.

Aside from our deep conviction that any human being with pretensions to live the “life of the mind” would benefit from a copy of this book—or perhaps two copies—we can specify sets of readers to whom we address the book. First, and most obvious, our audience includes those who are involved in the processes of code drafting and interpretation—those legislators, committee staffers, and think-tank and university scholars who participate in creating criminal codes as well as those judges who must interpret code provisions and explain them to jurors. Second, our audience includes those research scholars and legal philosophers who do empirical and theoretical work on criminal justice issues or, more broadly, who work on issues of society and morality. By extension then, we also think that social scientists who study various issues of contact between law and

social science might find at least some of our findings and perhaps our research methods to be of interest. Instructors of seminars or courses on law and social science might want to explore at least some of the issues we raise and examine our research methods.

Many people have helped us carry out the research we report in this book, and we gratefully acknowledge their assistance. The studies were conceived, designed, and executed during the fall of 1990 and the spring of 1991 in seminars at Rutgers University School of Law, where Paul Robinson then taught. Our greatest debt is to the students in those seminars who enthusiastically did more than any seminar student could be expected to do: Cynthia Adler, Blake Bolinger, Amy Bosacco, Alison Brown, Kara Bruge-Holland, Michelle Carter, Ron Fisher, Gary Gallant, Geoff Garner, Tim Hartigan, William Horan, Kimm Lacken, Alfred Low-Beer, James Passantino, Eric Riso, Linda Thomas, Liz Varki, Ann Waybourn, and John Young. They learned more about research methodology than they wanted to learn, out of a conviction that criminal law ought to be based on more than speculation.

Anne Marie Carosella, while a graduate student at Princeton, was the teaching assistant for the Rutgers seminars and labored long and gallantly for experimental designs that would test the hypotheses set forth herein and provide analytically tractable data. Dan Bailis did much in analyzing the data after Ms. Carosella's graduation. The law-psychology research group at Princeton University, including at various times Dan Bailis, Marisa Reddy, Kathryn Oleson, Beth Bennett, Robert Harlow, and Holly Sukel, helped interpret the data patterns. Emily Reber helped prepare the data tables and figures that are presented throughout the text. Deborah Prentice tactfully coped with a number of data-analytic questions, some of a regrettably elementary sort, and accurately identified various incoherences in manuscript drafts. Natasha Goldstein, a law student at Northwestern University, did valiant work of every sort on the final manuscript. The willingness of Professors Stephen Morse, Tom Tyler, and Nelson Polsby to provide wise advice on aspects of the project also is gratefully acknowledged.

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