REPLY

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The prize for the biggest strawman goes to Johnathan Masur, Richard McAdams, and Thomas Miles, who spend the first third of their joint comment defending against an attack on the theory of general deterrence that doesn't exist.\(^1\) As its title advertises, the Core Text addresses a different issue: whether deterrence makes a good principle for distributing criminal liability and punishment.\(^2\) "Having a criminal justice system that imposes liability and punishment for violations does deter. . . . However, it seems likely that manipulating criminal law -- the substantive rules governing the distribution of criminal liability and punishment -- commonly does not materially affect deterrence. [T]he claim here is not that criminal law formulation can never influence behavior but rather that the conditions under which it can do so are not typical."

Masur, McAdams, and Miles, still in the strawman business, refuse to take "yes" for an answer and, despite the text quoted above, conclude that the Text must really be claiming that "all deterrence claims are false." Their magical reasoning follows this line of argument: The text concedes that having a criminal justice system does deter. "The arguments [Robinson] advances against the deterrent potential of criminal-law rules are just as readily deployed against the deterrent potential of the system as a whole."\(^3\) Thus, Robinson's critique implies "that all deterrence claims are false."

Of course, the arguments against the deterrent effectiveness of manipulating criminal law rules are not "just as readily deployed against the system as a whole." Clearly, the world would be a different place without a criminal justice system. However, trying to influence conduct by manipulating the legal rules within that system is a quite different matter. Most obviously, although targets of deterrence commonly do know that there is a criminal justice system that imposes punishment, they do not know its legal rules. Further, attempts to construct those rules to produce the desired choices requires a level of information about the real world and its dynamics far beyond what we currently know. As Russell Covey makes clear in his comment, the complexity of the dynamics are such that a miscalculation can as easily increase crime, as through substitution effects, as decrease crime. The background deterrent effect of having a criminal justice system has no such complexity, because it attempts no specific manipulation of conduct decisions. (Perhaps distracted by their strawman, Masur, McAdams, and Miles never address the complexity problem.)

The fact is we can get the general deterrent benefit of having a criminal justice system without ever using deterrence as a distributive principle within that system.

\(^{1}\) Masur, McAdams & Miles comment, at [paras 1&2].
\(^{2}\) Id. at [para 2] (emphasis in original).
\(^{3}\) Masur, McAdams & Miles comment, at [para 5].
Doron Teichman offers a more coherent challenge, arguing that "a large portion of potential criminals do fulfill all three of the prerequisites for deterrence." This is an empirical question, of course, and I am happy to follow wherever the research takes us. However, the presently available evidence gives good reason to be skeptical. Many people will obey the law without any deterrent threat, simply because they have internalized the relevant societal norm. But for those who have not, we know that most don't know the legal rules, that a large portion have impaired abilities to make rational calculations of future self-interest, and that capture and punishment rates for most offenses are so low as to be of minimal significance. Teichman offers nothing to make one more optimistic.

Could there be instances in which the three prerequisites for deterrent effect do exist? Yes. However, even if the prerequisites do exist and even if the complexity problem did not, it does not follow that general deterrence would make a good distributive principle. Such a distribution of liability and punishment clearly would conflict with the community's judgments about justice and undermine the criminal law 's moral credibility, and there is good reason to believe that a criminal law perceived as intentionally and regularly doing injustice and failing to do justice would suffer crime-control costs as its power of social influence is diminished. (Several commentators have challenged the importance of just punishment for crime control purposes, and I refer readers to the conversation on "Empirical Desert," in which I respond to similar comments.)

Further, even a desert distributive of punishment has deterrent some effect. To be preferred, a deterrence distribution would have to deter more, and that increase in deterrence would have to be so great as to outweigh the crime-control cost of a criminal law with reduced moral credibility. Still further, a deterrence distribution can do better than a desert distribution only where it deviates from desert, yet it is just those instances of deviation in which deterrence is at its most problematic. The deviations not only undermine the law's moral credibility but also make it difficult to satisfy even the first prerequisite. People assume the law is as they believe it should be ("empirical desert"). Where law deviates from people's notions of desert, it creates the serious burden of having to educate people to the fact that the law is not as they assume it is.

I agree with Doug Berman's final conclusion, shared by Teichman, that "theorists and lawmakers should respond to Robinson's insights by trying to make deterrence work better." These reforms may, as Berman notes, have little or nothing to do with reforming criminal law. He suggests investing in education, to produce more rational calculators. On the other hand, drug treatment centers, mental health services, and gang intervention might be better investments for this purpose. In a similar vein, I'm skeptical of Teichman's proposed shift to fines. Most of

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4 Teichman comment, at [para 2].

5 I'm not sure that the drug market example that Teichman gives is one of those instances. As Covey points out, "Where a 25% chance of death fails to deter new entrance into the crack market, even substantial increases in sentences will probably not have much deterrent effect." but no doubt the prerequisites exist in other instances.

6 Berman comment, at [para 1]. See Teichman comment, at [last para].

7 And no program producing more rational calculation will help if it serves only to make (continued...)
the persons most in need of deterrence are poor, for whom the threat of fine is essentially irrelevant.

Yes, let's try to "make deterrence work better." But even if this happens, there is reason to doubt that a system of improved deterrence will make an attractive distributive principle. It can provide greater deterrence than a desert distribution only by deviating from desert, yet such deviations make deterrence more difficult to achieve and undermine law's moral credibility, and thereby its normative crime control power.