THE CRIMINAL-CIVIL DISTINCTION AND THE UTILITY OF DESERT

Paul H. Robinson*

The Criminal-Civil Distinction: Some Academic Explanations
The Lay View of the Criminal-Civil Distinction
   Why Distinct Criminal and Civil Systems?
   The Triumph of Intellect Over Emotion
Should the Criminal-Civil Distinction be Maintained?
The Utility of Desert
   The Criminal Law’s Ability to Facilitate the Creation of Shared Norms
   The Criminal Law’s Compliance Power as a Moral Authority
   The Prerequisites of Moral Credibility
Justifying Deviations from Desert
Conclusion

The communist Chinese have distinct criminal and civil systems, as do the democratic Swiss, and the monarchist Saudis. The criminal-civil distinction also is a basic organizing device for Islamic Pakistan, Catholic Ireland, Hindu India, and the atheist former Soviet Union, industrialized Germany, rural Papua New Guinea, the tribal Bedouins, wealthy Singapore, impoverished Somalia, developing Thailand, newly organized Ukraine, and the ancient Romans. Apparently every society sufficiently developed to have a formal legal system uses

* Professor of Law, Northwestern University School of Law.
the criminal-civil distinction as an organizing principle. Why? Why has every society felt it necessary to create a system to impose criminal liability distinct from civil liability?

THE CRIMINAL-CIVIL DISTINCTION: SOME ACADEMIC EXPLANATIONS

Academics have offered a variety of explanations. It is argued, for example, that a criminal system exists to provide sanctions, such as imprisonment, where tort law sanctions are inadequate to enforce a prohibition. But if differential sanctions were the explanation for distinct criminal and civil systems, one would expect to see less overlap in the sanctions available at criminal and civil law. The more fundamental problem with the differential-sanctions explanation is that, while it may in some sense describe the current system, it does not explain it. Why did not societies simply adopt a single system, in which adequate deterrent sanctions were provided? Why have societies created the problem of inadequate deterrent sanctions in tort by adopting distinct systems for crime and tort?

Another explanation offered for the distinct systems similarly notes the potentially greater sanctions available for criminal liability but focuses on the resulting need for greater procedural safeguards in the criminal system because of the more severe sanctions. Again, this may accurately describe the current American situation but it does not explain the universal practice. First, many societies do not share our special concern for greater procedural safeguards for the imposition of the potentially greater penalties of criminal law, yet those societies

---

3 See e.g., Richard A. Posner, An Economic Theory of Criminal Law, 85 COLUM. L. REV. 1193, 1195 (1985): “Much of this market bypassing cannot be deterred by tort law—that is, by privately enforced damage suits. The optimal damages that would be required for deterrence would so frequently exceed the offender’s ability to pay that public enforcement and nonmonetary sanctions such as imprisonment are required.”

4 The authority to incarcerate persons is not limited to criminal law but shared by civil law, as in its authority to civilly commit persons who are mentally ill or who have contagious diseases. See authorities cited at Paul H. Robinson, The Criminal Civil Distinction and Dangerous Blameless Offenders, 83 J. CRIM. L. & CRIMINOLOGY 693, nn. 23, 57 (1993). At the same time, a majority of criminal offenders are not imprisoned; they receive sanctions, such as fines or probation restrictions, that could have been imposed by civil law, as damages, fines, or restraining orders. See Table 5.52, Felony sentences imposed by state courts--1990, 1192 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 529 (1993) (only 46% of all convicted felons were sentenced to prison). The one sanction civil law cannot impose is the death penalty, but the criminal system always included many more offenses for which the death penalty was not available than those for which it was.

nonetheless structure their legal systems around the criminal-civil distinction.\footnote{For example, China, North Korea, Albania, Cuba, Burma, and Singapore have all been criticized for failure to follow international standards for fair criminal procedure and for arbitrary and abusive police practices (see Amnesty International Report 94, 108, 215 (1993); id. 331 (1992); id. 28 (1991)), yet each country maintains a separate and distinct criminal law. Meiever, supra note [1]; Federal Research Division, Library of Congress, North Korea: A Country Study 269-73 (1994); Minnesota Lawyers Int’l Human Rights Comm., Human Rights in the People’s Socialist Republic of Albania 41 (1990); Debra Evenson, Revolution in the Balance 150-53 (1994); Asia Watch & Women’ Rights Watch, A Modern Form of Slavery 28 (1993); Chau, supra note [2].}

More importantly, the more-safeguards-for-more-severe-sanctions explanation does not explain the existence of two distinct systems. If differential safeguards were the reason for the distinction, why have not societies simply required within a single system more safeguards for more severe sanctions? Why waste the criminal law's special procedural safeguards on the large number of less serious cases in which the sanction is no greater than would be available under civil law (fine, restraining order, etc.)?

Still another explanation offered is that societies use the criminal-civil distinction to distinguish conduct to be prohibited from that to be only priced.\footnote{See John C. Coffee, Jr., Does “Unlawful” Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B. U. L. Rev. 193, 193-94 (1991) (“Characteristically, tort law prices, while "criminal law prohibits."); Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523, 1548-50 (1984).} The obvious problem with this explanation is that there is much overlap between tort and crime.\footnote{Coffee admirably acknowledges this weakness in his theory, id. at fn 4, but it is hard to see why this does not undo his theory. He might argue that making crimes torts in useful because the tort liability can add to the deterrent threat for violation of the prohibitions. But, if that were the case, one would expect all crimes to be torts, which they are not. Nor does the prohibition-pricing distinction explain the host of other differences between the two systems that are discussed in the text. See text accompanying notes [9-11].}

More importantly, and again, why would societies require distinct and separate systems in order to prohibit some conduct and only price other conduct? Why not a single system that prohibits some things and only prices others? Current civil law often reflects this kind of distinction. Courts enter injunctions in some civil cases, which prohibit conduct on pain of contempt, but order only damages or regulatory fines in other cases.

Still further, the prohibition-pricing distinction fails to account for the wide range of substantive differences between the two systems. Why the public vs. private difference in plaintiffs in the two systems? (Why not have private plaintiffs help in enforcing prohibitions, why limit their role to pricing?) Why have criminal fines paid to the state but civil damages paid to the injured party?
Why is consent generally a defense in tort but not a defense to most crimes? Why does criminal law recognize a defense where the actor has violated the law's prohibitions but the violation is de minimis, while tort law imposes liability even if the extent of the damage is trivial. Why permit defendants to rely on insurance to pay damages in tort but not to pay criminal fines? The differences all make perfect sense, of course, from the perspective of the lay person's understanding of the criminal-civil distinction, as the next section discusses.

The failure of the prohibition-pricing explanation, as with most law-and-economic explanations for the distinction, lies in seeing the criminal law as simply another aspect of law's system of preference-shaping disincentives: tort law and criminal law are simply two regions on the law's continuum of deterrent threats. But the differences between the two systems, including those noted above, suggest more fundamental differences in their purpose and goals.

**THE LAY VIEW OF THE CRIMINAL-CIVIL DISTINCTION**

The lay person would no doubt be puzzled by these academic attempts to explain the criminal-civil distinction. Why are those academics working so hard to not see the obvious? The lay conception, shared by most academics until our recent periods of enlightenment, is roughly this: Criminal liability signals moral
condemnation of the offender, while civil liability does not. Our language reflects this view. In the criminal context, we speak of a "crime" rather than a "violation" or "breach," and of "punishment" rather than of "remedy" or "damages" or "sanction." The terms "crime" and "punishment" carry the implication of moral condemnation that the civil terms do not. As Webster's puts it, something "criminal" is something "disgraceful." "Punishment" suggests "retributive suffering, pain, or loss." Breaking a contract or failing to adequately fence a swimming pool may be conduct that we seek to discourage and may be a sufficient violation of rules or expectations to justify compensation of a party injured by the breach, but such conduct or omission typically lacks the moral blameworthiness, the "disgracefulness," sufficient to merit the condemnation implicit in criminal conviction. Civil liability may serve a variety of functions, compensation of injured persons, regulation of conduct for the greater good of society, or the efficient distribution of loss. The shared quality, the defining characteristic, of civil liability is that it is not criminal liability, and it lacks the condemnation that criminal liability traditionally suggests.

The moral blaming function of criminal law is apparent in the many substantive provisions noted above that criminal law does not share with tort law. A de minimis violation is a defense to criminal liability but not to tort liability because, while the conduct may violate the rules of conduct and another's rights, de minimis conduct lacks the moral blameworthiness necessary for criminal liability. As the language of the Model Penal Code provision puts it: It is a defense that the defendant’s conduct is "too trivial to merit the condemnation of criminal conviction." Note that even the highly utilitarian drafters of the Code believe that "condemnation" is implicit in "criminal conviction." The German system of criminal law, which serves as a model for criminal law systems as diverse as Turkey, Japan, and Brazil, even more closely ties criminal liability to moral norms. Even if an actor’s conduct violates the provisions of the criminal

---

(…continued)

arguing for a "new paradigm" of criminal law in which it follows a restitution function).

14 WEBSTER'S NEW COLLEGIATE DICTIONARY 197 (7th ed. 1965).

15 Id. at 693.

16 Model Penal Code § 2.12(2).

code, it cannot be the basis for liability unless it also violates a societal norm.\textsuperscript{18} Thus, while criminal liability is not synonymous with norms, it cannot extend beyond the violation of norms.

Similarly, consent generally is a defense in tort but is not to most crimes because the plaintiff's consent may vitiate his or her right to recover damages but it does necessarily vitiate the violation of a societal norm. The suffering cancer patient may rationally ask her spouse to kill her, but such consent does not take away the wrongfulness of the conduct as a norm violation in many societies.\textsuperscript{19} One can insure against civil liability but not criminal because "punishment" of criminals requires that they personally suffer. While civil law "damages" are paid to the injured party, as compensation, criminal "fines" are paid to the state, as evidence of the wrong against society's norms. These explanations are, of course, well known to most first-year criminal law students. They suggest that the traditional, lay understanding of the crime-tort distinction comfortably describes the thrust of current law.

\textbf{Why Distinct Criminal and Civil Systems?}

It may well be that criminal law seeks to blame, condemn, and punish, while civil law does not, but why should this difference in function call for a separate and distinct criminal system? Wouldn't it be more efficient to have a single system that avoids the complexity and wasteful duplication of two separate and distinct systems, a single system in which condemnation and punishment (and damages) could be imposed when deserved and in which only damages could be awarded when condemnation and punishment are not deserved? And, given the great diversity of legal and societal cultures, wouldn't one expect that some societies would develop such a unitary system? Wouldn't one expect that some legal systems would use the criminal-civil distinction while others would not?

\textsuperscript{18} This is the role of the \textit{Tatbestand} in the German criminal system. For a general discussion of the German analytic scheme and the role of the \textit{Tatbestand} within it, see, e.g., Wolfgang Naucke, \textit{An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts}, 1984 B.Y.U. L. Rev. 305; see also George P. Fletcher, \textit{Rethinking Criminal Law} 575-576 (1978).

\textsuperscript{19} Consent will vitiate the violation of a societal norm only if that norm is expressly defined in terms of lack of consent. This is the case for several offenses against the person, such as rape (only intercourse without consent is rape) and for some offenses against property (only taking without consent is theft). But it is rarely the case for other kinds of criminal offenses--consensual bribery and consensual gambling are still crimes--and not the case for even many or most offenses against the person or property--consensual homicide, arson, and incest are still crimes.
The answer is that the human desire to make moral judgments is universal,\textsuperscript{20} that there is practical value in giving formal legal expression to this human desire (more on this in a moment), and that a distinct criminal justice system is the only way to effectively express condemnation and to gain the practical benefits of doing so.

The first advantage of a separate system is its communication value. Most people have lives full of concerns and pressures having little to do with the law. If the legal system hopes to communicate with the average person, to say nothing of less educated and less intelligent person, that communication must be clear and simple. By creating a special \textit{criminal} label and widely disseminating the notion that this label has a different, a condemnatory, meaning, the system enhances its ability to communicate a condemnatory message when it wishes to. Without a distinct criminal system, it would be more difficult to convey the message that some cases (that we now call criminal) signal condemnation while other cases do not.

And it is not just the final verdicts in court cases that must be distinguished as criminal and non-criminal. If it were only an issue of distinct verdicts, one might try to do this within a single system with the use of distinct verdict labels. But it is the inquiry itself that people must know is a \textit{criminal} inquiry. The system conveys messages to the public in the conduct that is selected for investigation or indictment or is brought to trial, for this may signal conduct that is in the zone of suspicion, conduct that people ought to know may attract the attention of the system. The system also conveys messages by the cases that are not investigated, not indicted, not brought to trial, or end in acquittal at trial, for this can signal, depending upon the stage at which the inquiry is dropped, that the conduct is not within the suspicious zone, that it is within an exception (as with a justification of self-defense\textsuperscript{21}), or that the conduct is a violation of a rule of conduct but the offender is excused (as with the duress defense). The point is, only a separate and distinct criminal justice system can clearly signal that the inquiry in a given case is \textit{criminal} in nature, with all the attendant meaning that that carries.

\textsuperscript{20} The most readable full account of this and the reasons for it is found in \textsc{James Q. Wilson}, \textsc{The Moral Sense} (1993).

\textsuperscript{21} I refer here only to the objective form of justification. The subjective form, what I would call mistaken justification, sends no such message. It is, in part, the important difference between these two messages that leads me to argue for an objective formulation of justification defenses, with a separate excuse defense for mistaken justification. See \textsc{Paul H. Robinson}, \textit{Competing Theories of Justification: Deeds vs. Reasons}, in \textsc{Current Problems of Criminal Theory} (A.T.H. Smith & A. Simester, eds. 1995).
The duplication costs of distinct and separate criminal and civil systems are partially offset by the fact that the systems will in any case require different rules and procedures because of their different functions. Many of these differences have already been noted: the nature of the plaintiffs (public versus private), the recipients of a fine or award (public versus private), the availability of defenses, such as consent and de minimis defense, as well as the prohibition of insurance against criminal penalties and the need for greater procedural safeguards for criminal liability. Other important differences that derive from their different functions also exist. For example, the conditions for civil commitment ought not be as onerous as the conditions of criminal confinement, which is intended as punishment. Criminal commitment, as punishment for a past offense, logically can be for a fixed term, while civil commitment of a person on a claim of dangerousness logically requires periodic review to test for continuing dangerousness. While these many differences do not compel separate and distinct systems, they may justify some of costs of the duplication between the systems.

The Triumph of Intellect Over Emotion

Some of the utilitarian writers referred to above may concede everything I have said about the lay view of the criminal-civil distinction and the reason for its creation and continued existence, yet point with pride to their triumph of intellect over emotion in letting their intuitions of blame and punishment govern the distribution of criminal sanctions. I want to argue in the next section that it is a mistake, in utilitarian terms, to deny the importance of the human desire for blame, condemnation, and punishment. The arguments in that section will stand on their own, but let me suggest here a few peculiarities about the present academic utilitarian position that ought to initially give one pause about that view.

First, even if good utilitarians academics have themselves overcome the irrationality of blaming and punishment, the world is not made up of good utilitarian law professors and economists. Criminal policy must take account of the fact that the world is made up of people who see blaming, condemnation, and punishment as a natural and necessary aspect to human interaction.

Second, some of the academics who want to deny the relevance of the human sense for making moral judgements, may well be less than candid about

---

their own feelings. My speculation is that they themselves make blaming judgements all the time, condemning and insisting on punishment of offenders in their daily lives. When the economist who lectures about criminal law as simply a preference-shaping system of disincentives gets home from work, he or she may well have much to say about the colleague who has plagiarized another's work, about the man who raped a daughter's friend on a date last month, about the chronic wife-beating by a hard-drinking next door neighbor, or about a blatant racist’s harassment of a black friend. The economist may even be angry about some of these things and express condemnation and demand punishment. I do not know that these are expressions purely of an interest in implementing a preference-shaping disincentive system.23

**SHOULD THE CRIMINAL-CIVIL DISTINCTION BE MAINTAINED?**

The previous section has been primarily descriptive, making claims about why the criminal-civil distinction was created and continues to be maintained in so many diverse societies. It does not logically follow, of course, that, even if the distinction was created for the reasons I suggest—to capture the community's felt need to do more than just compensate for a loss, to condemn and punish—that such a ground for the distinction should be maintained. Indeed, the trend of the last few decades toward muddling the traditional criminal-civil distinction suggests that the legislatures and courts that have contributed to that muddling think that the original form of the distinction is not useful or, possibly, that there is little justification for maintaining the distinction.

The criminal-civil distinction has been blurred in a host of ways. Civil law has taken on some characteristics of criminal law, as with its increased use of punitive damages,24 but more commonly criminal law has been expanded to

23 I don't want to take too far the claim that economists are just like other people. I note for example that in an experiment designed to test whether students would contribute to a public good (such as a community stereo for a dormitory), only one group of students preferred to free ride -- graduate students in economics. See Gerald Marwell and Ruth Ames, *Economists Free Ride, Does Anyone Else?*, 15 *JOURNAL OF PUBLIC ECONOMICS* 295-310 (1981).

24 Punitive damages at civil law may well have been created for a different reason than to mimic criminal liability, and might properly be maintained for this different reason, even in a system that returned to a sharp criminal-civil distinction. Specifically, one might speculate that in cases of intentional wrongdoing, which is where punitive damages typically are imposed, the harm of the violation to the victim is actually greater than where the harm is caused negligently. Note, for example, that the sting of discrimination often lies in its intentionality. The victim of the discrimination suffers more when the motive is clear than where the actions might be accidental. The introduction of punitive damages in cases of intentional torts may well have been out of recognition of this greater (continued...)
include traditionally civil violations. Jack Coffee offers an impressive review of the increasing use of criminal law to sanction violation of administrative regulations, frequently using strict liability and vicarious liability.25 The result is a mountain of new “crimes” that carry no moral condemnation. Coffee reports that there are now 300,000 federal crimes.26 Coffee fails to include in his list, however, the modern invention and increasing use of criminal liability for legal fictions, such as corporations. (Corporate liability makes perfect sense when the issue is allocation of a loss suffered by one of the parties. But legal fictions can neither feel nor deserve moral condemnation; only people can.)

Is there good reason to maintain the distinct nature of criminal liability and its condemnatory implications? Should the traditional criminal-civil distinction be protected against further muddling, and returned to a sharper focus, or should it be dumped, or perhaps maintained to be muddled where muddling proves useful?

In part, the answer to these questions is the old dispute over the proper distributive principle for criminal law: according to the defendant’s deserved punishment versus that which most efficiently reduces crime. Based upon past debates, one might predict views on maintaining a clear criminal-civil distinction as follows:

Desertists, retributivists, will want to maintain the distinction because this allows criminal law to remain purely desert-based while tort and other civil law go the way of the utilitarians. Abolishing or muddling the distinction essentially assures that a desert distribution of cannot be maintained because most areas of current civil law have little reason to follow a desert distribution of liability.

Many lay persons will want to keep the distinction for similar but slightly different reasons. Unlike the retributivists, lay people are likely to see the importance of the infliction of deserved punishment not because it is demanded by philosophical principles of right and good but because of human feelings that this is necessary and proper. Liability and sanctions, without condemnation and without the sting of punishment, cannot satisfy that important human need. On the other hand, the typical lay person will be interested in reducing crime. A whack on the head, or the real fear of it, tends to clarify one's priorities. Reducing crime may seem more important to some people than even their desire for justice. They

\[\ldots\text{continued}\]

harm.

25 Coffee, supra note [7], at 201-221.

26 Id. at 216.
may well be willing to distribute sanctions in a way different than deserved punishment would provide, if that would reduce crime.

Those most willing to blur the criminal-civil distinction generally are the consequentialists, utilitarians, who do not see doing justice as an important value in itself and who are happy to ignore desert in favor of a distribution of sanctions that might more efficiently reduce crime. As noted, they see crime and tort as just two similar mechanisms of behavior control.

My goal here is to persuade utilitarians that a careful calculus takes account of the lay desire for condemnation and punishment and may suggest that the greater utility is in an essentially desert distribution of criminal liability. Thus, I argue, utilitarians ought to want to maintain and sharpen the criminal-civil distinction because it can enhance the system's power to efficiently reduce crime. I cannot, on current data, argue that the issue is clear and the questions settled, but I do think it fair to say, at the least, that utilitarians take a large risk when they muddle the criminal-civil distinction and, at the most, that many of the kinds of controversies that utilitarians argue about are sufficiently out of touch with the real forces of compliance in the world as to be essentially irrelevant, even in the terms of a utilitarian calculus.

**The Utility of Desert**

Here is a brief summary of my argument: The real power to gain compliance lies not in the threat of official sanction, but in the power of interpersonal relationships and internalized norms. But law is not irrelevant to these forces. Criminal law, in particular, plays a central role in creating and maintaining the consensus necessary for norms (and in diluting existing norms). In a society as diverse as ours, the criminal law may be the only single mechanism that is society-wide, that transcends cultural and ethnic differences. Thus, properly nurtured, criminal law's most important real world effect can be its ability assist in the building norms and thereby harness the compliance power of interpersonal relationships and personal morality.

The criminal law also can have a more direct effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community perceives and does not perceive as condemnable, people are more likely to defer to its commands as morally authoritative, at least in borderline cases

---

27 I explain what I mean by “an essentially desert distribution” at text accompanying notes [41-42] infra.
where the propriety of certain conduct, or the degree of its impropriety, is unsettled or ambiguous.

The extent of the criminal law's powers in both these respects—in facilitating and communicating societal consensus on what is and is not condemnable and in gaining compliance in borderline cases through deference to its moral authority—is directly proportional the criminal law's moral credibility.

The criminal law's moral credibility is enhanced by a distribution of liability that the community perceives as doing justice and is undermined by a distribution of liability that deviates from community perceptions of justice. The freedom to distribute punishment according to such perceived principles of desert is greatest under a criminal justice system that is separate and distinct from civil law, allowing civil law to rely upon distributive principles other than desert. Perhaps more importantly, the criminal law's moral credibility will be greatest when it can publicly communicate its singular commitment to doing justice by distinguishing an assignment of criminal liability, with its condemnatory message, from civil liability, which conveys no such message. Thus, the compliance power of the criminal is enhanced by a clear criminal-civil distinction.

Here are the specifics of the argument.

Social scientists have known for many years that the threat of official punishment by the criminal justice system is of very modest effect in limiting crime. Many, if not most, offenders may be unrealistically optimistic about the precautions they take to avoid being caught. But, even if they were entirely realistic, consider the likelihood a potential offender faces of getting caught and punished for his or her offense.

An astounding number of serious offenses are never reported to police (e.g., 21% of rapes, 40% of burglaries), either out of embarrassment or fear of reprisal or from a belief that the police are impotent to do anything.²⁸ Of the offenses reported, clearance rates (the rate at which police identify and arrest a suspect for reported offenses) have been steadily dropping for decades. The homicide clearance rate nationwide, which was 93% in 1955, has steadily declined to a

current 67%. Rape has declined from 79% to 52%. Burglary went from a not very high 32% to a sad 13%.²⁹

And, of course, getting arrested is a far cry from getting punished. Only 40% of those charged with a violent felony are convicted of any kind of felony.³⁰ Further, less than half of those convicted of a felony are sentenced to prison.³¹

The cumulative effect of the many escape hatches leaves a deterrent threat that looks like this: Homicide offers a 44.7% chance of being caught, convicted, and imprisoned for that offense. A person contemplating a rape faces a 12% chance of going to prison for that offense. Robbery presents a 3.8% chance. Assault, burglary, larceny/theft, and motor vehicle theft are each a 100-to-1 shot.³² Our potential offender may not be entirely cowed by these threats. (These figures also explain why longer prison terms can have only a limited effect in deterring crime: If a robber faces a 3.8% chance of going to prison, why should it matter to him whether the likely sentence is 2 years or 10 years? He is not likely to see the issue as relevant to him.) The chart in the margin summarizes the relevant statistics.³³ (These statistics are meant to give only a quick overview; neither they


³⁰ Table 5.66, Adjudication outcome for felony defendants in the 75 largest counties, 1993 Sourcebook of Criminal Justice Statistics 536 (1993).

³¹ Table 5.52, Felony sentences imposed by State courts, 1992 Sourcebook of Criminal Justice Statistics 529 (1993) (this figure does not include the many offenders who, before or after conviction, may spend several months in local jails).

Of those actually sentenced to prison, the median time served ranges from 5.5 years for murder to 2.2 years for kidnapping to 1.4 years for arson. Table 6.125, First releases from prisons in 35 states, 1988, 1991 Sourcebook of Criminal Justice Statistics 693 (1992). Even these short terms of imprisonment seriously overestimate the typical length of time served because these figures only include those offenders who are sentenced to prison. In reality more violent offenders are sentenced to jail than to prison, and for property offenses twice as many criminals are sentenced to jail. See Table 5.57, Sentences Received in 14 States, 1988, 1991 Sourcebook of Criminal Justice Statistics 549 (1992).

³² See col. (d) of the Table in note [33] Note that each concerns the chance of being caught and convicted for that offense. No doubt many offenders will be caught and convicted of a lesser offense. But of course this effect exaggerates the success of the system in capturing and convicting for lesser offenses.

³³

<table>
<thead>
<tr>
<th>Type of offense</th>
<th>(a) Number Committed</th>
<th>(b) Number Reported (% of col. a)</th>
<th>(c) Number Arrests (% of col. a)</th>
<th>(d) Number Convictions (% of col. a)</th>
<th>(e) Prison Sentence (% of col. a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(continued...)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

13
The chart statistics are drawn from the following sources:

Column (a): Table 1, Personal and household crimes, 1990, 1990 CRIMINAL VICTIMIZATION IN THE UNITED STATES 16 (1992).

Column (b): Table 3.122, Estimated number and rate of offenses known to police, 1990, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 357 (1993).


Column (d): Federal figures from Table 5.15, Defendants convicted in U.S. District Courts, 1990, 1992 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 486 (1993); State figures from id. at 528, Table 5.49, Felony Convictions in State Courts, 1990.

Column (e): Federal figures from id. at 490, Table 5.19, Offenders sentenced to prison in U.S. District Courts, 1990; State figures from id. at 529, Table 5.52, Felony sentences imposed by State courts, 1990 (figures (continued...)}
nor my sophistication in interpreting them can be relied upon for anything more
than a fuzzy snapshot of the system.)

Given such a weak deterrent threat, why do the vast majority of people still
obey the law? Social scientists have a preliminary answer: More than the threat
of legal punishment, people obey the law (1) because they fear the disapproval of
their social group and (2) because they generally see themselves as moral beings
who want to do the right thing (as they perceive it).

In one study, Meir and Johnson conclude: "despite contemporary
predisposition toward the importance of legal sanction, our findings are . . .
consistent with the accumulated literature concerning the primacy of interpersonal
influence" over legal sanction. In his book, Why People Obey the Law, Tom
Tyler concludes:

\[\text{Testing the ability of each of the attitudinal factors . . . to predict}\]
\[\text{variance in compliance . . . the most important incremental contribution is}\]
\[\text{made by personal morality . . . .}\]

\[\text{This high level of normative commitment to obeying the law offers an}\]
\[\text{important basis for the effective exercise of authority by legal officials.}\]
\[\text{People clearly have a strong predisposition toward following the law. If}\]
\[\text{authorities can tap into such feelings, their decisions will be more widely}\]
\[\text{followed.}^{35}\]

Some people may hear these conclusions and conclude, fine, social and
internalized norms may be the primary sources of compliance power but criminal
law's threatened sanctions can continue to provide a supplemental force, in just the
way they always have; nothing in these findings suggests that we need shift to a
more desert-based distribution of liability and punishment or that we need
maintain the criminal-civil distinction.

---


35 TOM TYLER, WHY PEOPLE OBEY THE LAW 60 (1990). In another study, Grasmick and Green conclude: “each of the three independent variables [of deterrence by threat of legal punishment, social disapproval, and personal moral commitment] makes a significant independent contribution to the explained variance [i.e., the rate of criminal behavior].” Grasmick and Green, Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior, 71 J. CRIM. L. & CRIMINOLOGY 325, 326 (1980).
But this response assumes that the criminal law plays no role in the successful creation, spread, reinforcement, or internalization of norms. The response also assumes that the criminal law’s power in gaining compliance is independent of the extent to which the criminal law mirrors existing norms. But, as the following two sections suggest, we have every reason to think that, more than any other body of law, criminal law plays an important, central, role in the creation of new norms and in the reinforcement or dilution of existing norms, and that the criminal law can have a direct effect in gaining compliance when it is seen as a moral authority. As the following discussions also make clear, both of these sources of influence by the criminal law--in building and maintaining norms and in gaining compliance through moral authority--depend upon the criminal law having moral credibility with the community, which, I will argue, requires a distribution of liability that follows the community’s perceptions of principles of deserved punishment and requires a separate and distinct criminal justice system in which it can demonstrate its exclusive focus on blameworthiness and can effectively convey the special condemnation of criminal conviction.

**The Criminal Law’s Ability to Facilitate the Creation of Shared Norms**

The norms at issue here are of a limited sort, of course. Criminal law has little effect on, and ought to have little interest in, norms that influence everyday matters of style, dress, speech, manners, etc. Cutting in line, being rude, or wearing revealing clothing may be annoying to some people but it generally is not and ought not be criminal. Even if such violations of norms were frowned upon by most people, the conduct ought not be criminal unless it reaches the level of seriousness that deserves the condemnation of criminal liability, typically and properly limited to the violation of norms against violence and dishonesty.

As to these norms, the criminal law builds and maintains societal norms in several ways. First, the criminal law enforcement and adjudication activities send daily messages to all who read or hear about them. Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender’s conduct and confirms the condemnable nature of the conduct. At the same time, the public condemnation supports and encourages the efforts of those who have remained law-abiding. Having avoided breaking that law, people can feel good about

---

36 There are some exceptions, however. Eating human flesh and bestiality, for example, all remain criminal because the norms against such conduct remain strongly and widely felt.
themselves, which in turn reinforces their commitment to the norm expressed in the offense.

Further, every adjudication offers an opportunity to confirm the exact nature of the norm or to signal a shift or refinement of it. Thus, an endangerment or manslaughter prosecution of a polluter points out that some instances of polluting can violate the norm against endangering others. Finally, regular non-enforcement or a declination to prosecute or to convict tends to undermine the norm prohibiting the conduct. Thus, adultery may remain on the books but a policy of not prosecuting it takes away the criminal law’s support of any norm against such conduct that may have existed.

The criminal adjudication process is not the only forum for public debate and announcement. Legislative proposals for criminalization, or decriminalization, or increased or decreased punishment, also provide an occasion for public debate that can help build norms, with the (sometimes temporary) conclusion of that debate announced by legislative action, or inaction. The public discussion about the problem of hate speech and proposals to criminalize it, for example, helps strengthen the shared public understanding that such conduct is condemnable.

Passing a law cannot itself create a norm. The passage and subsequent failure of National Prohibition shows law’s limited ability to change norms even when the change is supported by a significant portion of the public. Some would argue that the continuing controversy over our “war on drugs” raises a similar issue. The law is, rather, a vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms. The passage of criminal legislation more often reflects a critical level of support for an incipient norm. The act of criminalization nurtures the norm, as does faithful enforcement and prosecution, and over time the community view may mature into a strong consensus. The criminal law is not an independent player in that process, but it is a central mechanism by which the norm nurturing process moves forward.

We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence. It has also been at work in diluting existing norms against homosexual conduct, fornication, and adultery. While it is difficult to untangle how much the criminal law reform followed and how much it lead these shifts, it seems difficult to

---

37 In December of 1933, the repeal of the Eighteenth Amendment was completed by the adoption of the Twenty-First Amendment. It was, "[i]n hindsight . . . the legal outcome of a foolish, unpopular reform." DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 3 (1979).
imagine that these changes could have occurred without the recognition and confirmation that comes through changes in criminal law enforcement, adjudication, and legislation.

This role of the criminal law is important to our present discussion of the criminal law’s distributive principles because the criminal law's power in nurturing and communicating societal norms is directly proportional to the criminal law's moral credibility. If criminalization or conviction (or decriminalization or refusal to convict) is to have an effect in the norm nurturing process, it must be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation and for decriminalizes and not punishing that which does not. If, instead, the criminal law’s reputation were one simply of a collection of rules, which do not necessarily reflect the community’s perceptions of moral blameworthiness, then there would be little reason for the criminal law to be relevant to the societal debate over what is and is not condemnable. People will object to a criminal law that punishes conduct they think is not condemnable, or object to the absence of a criminal law prohibiting conduct that they think is condemnable, only if they believe that the criminal law’s purpose is to express what is and is not condemnable conduct. People will criticize the system for convicting a person who they think is blameless or for failing to pursue and convict one who they think is blameworthy only if they see the system’s business as doing justice. If the system forsakes that purpose for another, it looses its relevancy and role in the norm-nurturing process.

Perhaps more than any other society, ours relies on the criminal law for norm-nurturing. Our greater cultural diversity means that we cannot expect a stable pre-existing consensus on the contours of condemnable conduct that may be found in more homogeneous societies. We require more public debate and discussion to reconcile conflicting views and more public education on the refinements and consensuses that result. Unlike many other societies, we share no religion or other arbiter of morality that might perform this role. Our criminal law is, for us, the place we express our shared beliefs of what is truly condemnable.

The Criminal Law’s Compliance Power as a Moral Authority

The discussion above describes the criminal law’s role as a forum and communicator in the process by which norms are reinforced, established, or diluted. The criminal law also has a more direct effect in shaping conduct, specifically in gaining compliance with its demands. If it has developed a
reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority in cases where there exists some ambiguity as to the wrongfulness of the contemplated conduct. This mechanism may have little effect in cases where the degree of wrongfulness of the conduct is clear, but it would be easy to overestimate the number of these cases. Public conviction and condemnation of an inside trader, for example, can help spread the word that this conduct really is condemnable. But even for homicide, public conviction and condemnation of one who kills another while driving drunk can and probably has helped to spread the word that driving while drunk is morally reprehensible because of its potential to kill.

To summarize, the criminal law can only hope to have people defer to it if it has earned a reputation as a reliable statement of what is and is not condemnable. A criminal law that is seen as having a different criterion for criminalization--such as, criminalization whenever the greater penalties of criminal law can provide useful deterents--is not likely to gain such a reputation. Further, the preliminary social science data suggests that the criminal law's power in gaining compliance to its commands through deference to its moral authority is directly proportional the degree of its moral credibility.38

**The Prerequisites of Moral Credibility**

Enhancing the criminal law’s moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is on doing justice. I have suggested elsewhere a number of reforms that would enhance the criminal law’s moral credibility in this respect.39 I will not repeat them here, but the general point is that the criminal law must earn a reputation for (1) punishing those who deserve it, under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less. This, of

---

38 See Tom R. Tyler, Why People Obey the Law 64-68 (1990) (describing the tie between a system’s legitimacy and people's willingness to obey it); studies listed in Tables 3.1, 3.2, and 3.3, id. at 32-37.

39 Paul H. Robinson, Moral Credibility and Crime, The Atlantic Monthly 72-78 (March 1995) (suggesting less use of the exclusionary rule to exclude reliable evidence, less plea bargaining for reasons unrelated to genuine factual disputes, less restriction on police power where affected citizens want more, restriction of non-exculpatory defenses, insistence that non-incarcerative sanctions have sufficient punitive bite to give punishment deserved, as well as suggesting rejection of strict liability, insistence upon maintaining an effective insanity defense, leaving purely regulatory offenses to administrative and civil law remedies, increased protection of inmates against prison violence, decreased use of dangerousness as criteria for setting prison terms).
course, requires a desert distribution of liability and punishment, not one governed by non-desert concerns, even if that non-desert distribution appears in the short-run to offer the possibility of reducing crime.

The point is that every deviation from a desert distribution can incrementally undercut the criminal law’s moral credibility, which in turn can undercut its ability to help in the creation of norms and its power to gain compliance by its moral authority. Thus, contrary to the apparent assumptions of past utilitarian debates, such deviations from desert are not cost free, and their cost must be included in the calculation when determining which distribution of liability will most effectively reduce crime.

Note that the desertists have not exactly won the day here. The distribution of liability and punishment suggested here is according to public perceptions of desert principles, not moral philosophy’s conclusions. This does not mean resolving individual cases as the public or press see them in the heat of the moment. We know that the public and the press can lose perspective when buffeted by the biases and prejudices inspired by the facts of any particular case. The tendency of people to be more sympathetic to defendants more like themselves is well documented. Over the long haul, the system will earn its moral credibility by relying not upon public opinion on the case but instead upon the community’s perception of just principles for determining liability and punishment. I do not underestimate how complex a task it is to determine liability rules that will capture such shared community intuitions of justice. But, as John Darley and I show in our new book, Justice, Liability, and Blame: Community Views and the Criminal Law, it is a feasible undertaking given the state of current social science methodology.

Even rules of liability capturing community intuitions of justice cannot give the law moral credibility outside of a system with a clear criminal-civil distinction. An earlier section of this paper reviews the practical reasons for a separate and

40 Certainly if one believes that only the threatened sanction affects a persons decision on whether to commit an offense -- as Shavell does, for example (see quote at note [12] infra -- then the extent to which the distribution of sanctions deviates from that perceived as deserved is irrelevant to the calculations. But one may also discount the importance of a distribution of perceived desert if one thinks that the effect of deviation are minor. See the discussion of the danger of any deviation, at text accompanying notes [44-49].


distinct criminal system.\textsuperscript{43} It makes it possible for the criminal law to focus exclusively on perceived desert by distinguishing it from other areas of law that can then be left to adopt whatever distributive principle serves best. More importantly, the criminal law's moral credibility will be greatest when it can publicly communicate its singular commitment to doing justice. As the criminal label is cultivated to more clearly stand for condemnation, its effectiveness increases. The system’s more clear commitment to doing justice makes it a more effective forum and communicator in nurturing the development of norms. The system’s more clear focus on the criterion of moral blameworthiness increases its moral credibility and thus its power to persuade people of the wrongfulness of criminalized conduct in ambiguous cases.

\textbf{JUSTIFYING DEVIATIONS FROM DESERT}

Some utilitarians apparently believe that only the threat of sanction or lack thereof determines whether a person will commit an offense.\textsuperscript{44} But other utilitarians may acknowledge that personal morality and interpersonal relations have some effect and that the operation of those forces can be influenced by the perception of the criminal law’s moral credibility. They nonetheless may be tempted by a system that intentionally and regularly deviates from a distribution of criminal liability according to the community’s perceived principles of desert. They might argue that the crime-control value of one or another deviation from desert outweighs the incremental loss in compliance power from that incremental reduction in the law’s moral credibility.\textsuperscript{45}

This no doubt would be an improvement over our current state, in which little regard is paid to the effect of deviations from desert on the law’s moral credibility. Nonetheless, I suggest that the utilitarian be cautious here. If we had perfect data on the dynamics of the forces at work and their relative effects, the cost-benefit analysis would be clear. We do not, of course, and are not likely to have even a crude understanding of the dynamics in our lifetimes. We can only speculate about the relative effects. Let me explain why I think we should err on the side of caution in deviating from the perceived principles of desert.

\textsuperscript{43} See text accompanying notes [20-21] infra.

\textsuperscript{44} See, e.g., Shavell, quoted at note [12] infra.

\textsuperscript{45} For a discussion of how such a hybrid distributive principle might operate, see Paul H. Robinson, \textit{Hybrid Principles for the Distribution of Criminal Sanctions}, 82 Nw. U. L. Rev. 19-42 (1987).
First, reputation is a fickle thing. Minor but regular deviations could do much to hurt the system’s reputation even if the number and extent of the deviations were small in comparison to the system’s overall operation. Lay persons and mass media tend not to see the larger picture and rarely are able to put reports in perspective. The more cynical observation is that news is more newsworthy when it exaggerates the significance and extent of a failure of justice.

More importantly, a large part of building a reputation is to persuade others as to your motivation. Any error can be forgiven if it is seen as out of character. People know that they cannot know what all aspects of the criminal justice system is doing at all times. Their view of the system is likely to be governed by what they think the system is trying to do, by what they see as its motivation. That assurance may require that the system publicly commit itself to never intentionally deviating from the principles of perceived desert, while conceding that inadvertent deviations are unavoidable. To admit a policy that intentionally authorizes failures of justice is to render the system suspect in all its workings, even if it generally does not deviate.

Further, I fear that one can easily underestimate the advantages to maintaining the system’s moral credibility. Unlike the threat of legal punishment, the sources of compliance discussed here are not dependent on the effectiveness of the system in arresting, convicting, and punishing offenders. The real sources of compliance power—the views of a person’s family or friends and the person’s own conscience—can know of an offender’s violation even if the authorities do not or cannot prove them. Thus, harnessing the compliance powers of social group and personal morality can reduce current crime levels even if policing and prosecuting functions cannot be made more effective.

Note as well that these sources of compliance power do not have the staggering costs of increased enforcement, adjudication, and imprisonment that would be required if reduced crime were to be achieved through deterrence (or incapacitation or rehabilitation). Again, their power comes not from catching and punishing every criminal but rather from the system’s moral power in obviously trying to do justice. That educational and symbolic function can be served in the adjudication of whatever cases are brought to justice, even if many are not. Nor does crime reduction through these mechanisms require the increased intrusions of privacy that more effective crime investigation would require or the increased errors in adjudication that easier prosecution rules would require. In other words, these mechanisms offer the possibility of better compliance at lower cost.
To illustrate the problems inherent in justifying selected deviations from desert, consider the issue of the whether we should continue to blur the criminal-civil distinction. Recall that the most troublesome, yet most common, blurring comes from extending criminal liability to cases of regulatory offenses, strict liability, vicarious liability, and to non-human entities, such as corporations. But these are just the cases where the likelihood of a prison sentence is remote; the sentences typically are fines and restitution, the sanctions that are available at civil law. And it is always the case, of course, that imposition of criminal liability on a corporation can result only in non-incarcerative sanctions.

But, many have argued, criminal liability provides the additional possibility of moral stigmatization that civil liability does not. It is true that stigmatization can be a substantial penalty; the previous discussion of the power of interpersonal relationships in shaping behavior only confirms this. But this attempted use of stigmatization is likely to be ineffective and, worse, self-destructive.

First, the use of stigmatization as an addition to the law’s deterrent threat suffers from the same weakness of all threats of official sanction: Their effectiveness is tied to the likelihood of capture and conviction, the chance of which is so low as to make the threat of limited relevance to an offender contemplating committing a crime.

Nor can this expansion of criminal law to such things as regulatory offenses hope to harness the real forces of compliance, the power of social norms. Passing a statute to criminalize conduct does not itself cause that conduct to be perceived as immoral. As the previous discussion suggests, law does not create norms but only acts as a participant in the process by which consensuses are built. Making a regulatory violation a “crime” is not in itself likely to do much to cause people to attach stigma to liability for the violation. Making 300,000 regulatory violations

---

46 The majority of these regulatory offenses are misdemeanors, for which a serious prison term is not authorized. Even the most egregious forms of these offenses, where danger to life or property is created, the likelihood of an incarcerative sentence is not high. In 1989, the number of convicted federal regulatory violators sentenced to prison was: 37 agricultural (15.2% of those convicted in federal court of that offense that year), 22 antitrust (19.6%), 2 labor (6.9%), 24 food and drug (20%). Table 5.17, Sentences imposed in cases terminated in U.S. District Courts, 1992 Sourcebook of Criminal Justice Statistics 488 (1993).


48 See text accompanying notes [28-33] infra.
“crimes” makes it even less likely that people will take the resulting liability as evidence that moral condemnation is deserved.

The dilution effect is the most problematic aspect of this expansion of criminal liability; it is what makes the expansion not only ineffective but destructive. The more criminal law’s stigmatizing effect is sought to be applied to non-condemnable conduct, the less stigmatizing effect there exists to apply. With each additional non-blameworthy use, the meaning of “criminal liability” becomes incrementally less tied to blameworthiness and incrementally less able to evoke condemnation. Thus, expanding the criminal law beyond the bounds of perceived desert can serve only to weaken the stigmatizing effect that that expansion seeks to enlist. This affects not just the meaning of liability imposed for regulatory offenses but has the potential to dilute the condemnatory message for all applications. Diluting the meaning of criminal liability by applying it where condemnation is undeserved reduces the ability of criminal liability to stigmatize in cases where it is deserved.

CONCLUSION

The evidence is relatively clear that the power of interpersonal relationships and internalized norms to avoid criminal conduct is dramatically greater than that of the threat of official sanction. The ability of the law to harness these forces is less clear. Studies suggest that increasing the law’s moral credibility can enhance its compliance power but the studies are preliminary and many important questions remain unanswered. Will research confirm my speculations about the mechanisms by which a morally credible criminal law can increase compliance, by nurturing norms and providing a moral authority? How much decrease (or increase) in credibility would cause how much increase (or decrease) in crime? Is the relationship a continuous one, or are there credibility "trigger" points below which crime dramatically increases? Will research confirm my speculations about the practices that most undercut the system's moral credibility and those that would most enhance it?

It will take some time for social scientists to answer these questions but we need not wait for those answers before we make some changes in what we do. Current data calls for some changes. Most importantly, it is clear that a utilitarian calculus in determining the rules for the distribution of criminal liability and punishment must take account of real world costs of deviating from the community’s principles of deserved punishment. The costs and benefits of moral
credibility may be more difficult to measure than those of the factors typically taken into account in the past but, if they are more powerful in their effect than the other factors, to ignore them risks rendering the calculation meaningless. What this may suggest is just how far we are from being able to reliably formulate rational policy.

While we do not know with any certainty the degree of importance of the criminal law’s moral credibility, we can be reasonably sure that it has some. Thus, a corollary to the above is that we ought not tolerate any deviation from desert, or any other measure that may undercut moral credibility, that does not have a clear and significant benefit. This suggests the foolishness of the current trend toward muddling the distinction between criminal and civil law. We know the sharpness of that distinction is critical to criminal law maintaining its special moral character. The discussion above points out the long-term impossibility of using the condemnatory power of criminal law to deter non-condemnable conduct, and the great potential of such practice to destroy the very power of stigmatization that it seeks to use. That should be enough to persuade that the dangers of muddling the distinction outweigh the potential benefits.

This confirms, in particular, the danger in extending criminal liability to what are essentially regulatory violations. Serious deterrent sanctions can and ought to be imposed but they can as easily and effectively be imposed under an administrative system that is distinct from criminal law and that carries a non-criminal label, perhaps “violation.”

The central point here is to see that there is practical value, not just aesthetic or philosophical value, in maintaining the criminal law’s focus on moral blameworthiness. What we have in the past taken to be instances of individual injustice we ought to understand now as injuring all of us, as each such instance incrementally chips away at the criminal law’s moral credibility and, thus, its power to protect us.

---

49 It also suggests a liability rule that requires not just a violation of the technical definition of the criminal code’s prohibition but also requires violation of an existing norm, as is required in many other countries. See text accompanying note [18] infra, regarding the requirements of the German Tatbestand.