

Chapter 1: PERSPECTIVES ON THE PRIMARY ROLE OF THE CRIMINAL LAW

Existence precedes essence.
Sartre

INTRODUCTION

Contrary to what is commonly believed, there is no single, decisive perspective that everywhere and at all times determines the primary societal role of the criminal law. The following introductions to various underlying perspectives illustrate the diversity of approaches. Each perspective presents an advocacy argument as a zealous, occasionally *overzealous*, supporter might urge it. These perspectives are not simply in the air: They infiltrate our legal consciousness and our political and legal structures. They provide underlying frameworks for articulation of our criminal law purposes, our preferred policies, and our arguments involving specific cases and statutes. Understanding them adds depth that will help you to spot and resolve issues in class, on exams, and in practice.

A. CONTROLLING CRIME

The primary role of the criminal law is manifestly the prevention and control of crime. Civilized life presupposes social and personal lives reasonably free from the intrusions of killers, robbers, rapists, and thieves of all sorts, including corporate predators. Of what value are liberty, self-determination, privacy, and other core democratic values if we are prey to human predators? It is the cardinal role and purpose of the criminal law institutions (police, prosecutors, courts, prison, probation, and parole) to provide basic safety to citizens. This is indisputably what the people want in our democracy and public officials at all levels must be appropriately responsive to their priorities. After all, it's the people's criminal law.

Both philosophically and jurisprudentially, a traditional justification for sacrificing unfettered individual freedom in the natural order of life for the limitations inherent in organized political and social life is that it is a justifiable trade off: The state will limit our liberty somewhat for an assurance of state-provided personal safety. The systematic provision of personal safety is a public, not an individual or family, duty.

Since the capacity of the state to guarantee personal safety is not unlimited, this assurance does not mandate an absolute guarantee of such safety at all times and in all circumstances — an impossible task in a complex society of almost three hundred million people who also value privacy. While individuals, as well as our institutions and culture, must also contribute to the goal of personal safety, the paramount role of the criminal law in achieving the prevention and control of crime is undeniable. All other functions served by the criminal law are distinctly secondary.

B. PROTECTING INDIVIDUAL RIGHTS BY REGULATING THE POWER OF POLICE, PROSECUTORS AND JUDGES IN EXERCISING THEIR CRIME-CONTROL ROLE

The glaring weakness in the crime-control justification is that it lacks context. It improperly isolates the crime-control role from its inevitable context in two ways. First, though sometimes briefly acknowledging as above that all our institutions and culture contribute to crime prevention

and control, this perspective does not address a crucial policy question: Do we expect these criminal law agencies to prevent and control most crime, or do we expect them to make a vital, but more modest, contribution to such prevention and control? If the latter choice is made, then we also look to our economy, our families, our communities and our schools, our churches and temples, in short our private and civic culture, to also make a robust contribution to prevention and control. After all, responses to crime vary widely from country to country and sometimes even from state to state. Witness the strikingly lesser reliance on imprisonment in many developed countries in Europe and elsewhere. Witness also the great reliance on capital punishment to combat murder in Texas and Florida, and its rejection in Massachusetts, and eleven other states.

Clearly, quite different consequences follow from our choice. From the strong crime-control perspective, an increase in crime typically calls for more police, more vigorous prosecution, and harsher penalties. From the broader perspective, some of the crime-control projects could certainly be pursued, but there would be more emphasis on community policing, working closely with local civic and religious groups, improving the schools, including after-school academic and athletic programs, as well as enhancing job-training and actual jobs.

Second, the crime-control perspective does not address what we can learn from the horror of the twentieth century. Crime control in Stalinist Russia espoused Stalinist purpose, priority and horror; crime control in Nazi Germany espoused Nazi purpose, priority, and horror; and crime control in authoritarian societies espoused their purpose, priority, and horror. In military dictatorships and in authoritarian societies in many lands, crime control is aimed at opponents of the regime and in advancing the regime's repressive policies. When one examines the horrific wars, Holocaust, massacres, and other atrocities that pervaded the twentieth century, the bloodiest century ever, it is clear that tyrants and authoritarian of many stripes have used the criminal law as one crucial mechanism to arrest, torture, kill, repress, and control their opponents and to terrify and silence would-be opponents.

In the worldwide challenge posed by the struggle for basic human rights against these depredations, an indispensable role of the criminal law in societies struggling to be democratic is clearly the protection of individual rights against the inevitable tendency of *any* state, including democratic states, to intrude on liberty, self-determination and privacy. Even if the argument is accepted that crime control is the paramount purpose of the criminal-law agencies, that interpretation must be understood in the context of the transcending protection-of-rights framework imposed on the criminal-law agencies by international treaties detailing civil and political liberties and by our Bill of Rights, our charter of liberty, especially the First, Fourth, Fifth, Sixth and Eighth amendments. The criminal law is *not an island unto itself, particularly in a society that prizes liberty*. Any search for its primary significance must be placed in the context of protection of rights.

Even in democratic societies, the preservation of liberty demands unremitting vigilance against intrusion into our liberty by criminal-law agencies. This preservation-of-liberty role is vital, first, to protect all those actually accused of crimes against arbitrary arrest, detention, indictment, trial, conviction, and punishment.

Second, though little understood or appreciated, this preservation-of-liberty role, by prohibiting arrests, indictment, trial, and punishment, except for claims of violation of specific pre-established crimes, is also an essential building block in our infrastructure of liberty. This limitation on arbitrary intrusions exemplifies the primordial rule of law and its principle of legality: no crime

without [pre-existing] law; and no punishment without conviction. In addition, constitutional criminal procedural law bars arrest, indictment, trial, and punishment except in accordance with carefully prescribed rules, including probable cause for arrest, the privilege against self-incrimination, and the reasonable doubt standard for conviction. Together, the substantive and procedural law* in a democratic society is supposed to restrain the power of state agents to intrude into liberty, self-determination, and privacy by means of arbitrary charges and procedures. A democratic criminal law respects citizens and fosters respect for the law. It is not about policing the people; rather, it provides a strictly regulated police service for a free people.

Thus, a liberty-respecting democratic criminal law, not just crime control alone, is a *sine qua non* for the preservation and enjoyment of the justice, liberty, self-determination, privacy and respect that are central goals of our civilization.

C. PROTECTING DOMINANT POLITICAL, ECONOMIC, AND SOCIAL VALUES

While the weakness in the crime-control justification for the criminal law is clearly its glaring lack of context, the equally glaring weakness in the protection-of-individual-rights justification is *its civil libertarian blinders in failing to focus on broad political and economic values*. Civil liberties are foundational, but there is much more at stake for a civilized society. It is true beyond argument that the criminal law in every state primarily exemplifies, protects, and legitimizes dominant political, economic, and social values and interests. In Saudi Arabia, the criminal law protects the feudal and often corrupt interests of the reigning thousands of princes in the royal family. In capitalist societies, the criminal law protects capitalist values and interests (for example, enforcing a robust notion of private ownership of land, mines, and commerce, including the activities of middlemen and speculators).

In stark contrast, the old Soviet law, embodying Marxist values, repudiated and criminalized capitalist conduct. Articles 153 of the Criminal code of RFSFR (the former Russian Republic) forbid “Activity as a commercial middleman carried out by private persons as a form of business for the purpose of enrichment,” and Article 154 forbid “Speculation, that is, the buying up and reselling of goods or any other articles for the purpose of making a profit . . .” With the transformation of the socialist economy into a fledgling capitalist economy in the 1990s, these provisions were removed. The odious, criminalized behavior from a socialist viewpoint that resulted in imprisonment becomes protected legal behavior admired by many with a new capitalist viewpoint.

In the United States, the political and class character of the criminal law and its enforcement is revealed in another startling reversal. For the first time in memory, a new group of criminal predators — high corporate officials in major corporations — are being almost regularly arrested, handcuffed, and charged for corporate chicanery. Previously their violations (including gross depredations) were ignored or resulted only in civil proceedings by the sleepy and understaffed Securities Exchange Commission. The violations were mostly settled with monetary payments, without even an admission of wrongdoing. Critics called it a “kind of licensing system for wrongdoing,” with culprits saying in effect: “*I didn’t do it, and I definitely will not do it again.*”

* Substantive criminal law defines crimes and defenses and the principles and policies that underlie them. Procedural criminal law defines the rules for investigation, arrest, charging, trial, and appeal. This book mostly presents the substantive criminal law.

The remarkable turnabout in treatment is attributable to an explosion in public and political attention following the bankruptcy of Enron, World.Com, and other companies where high officials had enriched themselves by many millions. At the same time, many of their employees lost their retirement assets, their jobs by the thousands, and small and large shareholders throughout the nation not privy to insider information were devastated. Large state and private pension funds invested in these companies were also weakened. Indeed, the rippling harm to democratic, free-market capitalism has made these corporate officials into pariahs. Congress has responded to the public uproar somewhat by holding public hearings, requiring additional regulation, criminalizing additional business behaviors, and heightening penalties.

Our own history adds persuasive proof for the dominant political-economic-social nature of criminal law. It is replete with use of the criminal and related law against heretics (Quakers, Catholics, and “witches”); Native Americans (broken treaties, expulsion laws, and ignoring extermination efforts); and slaves and freed blacks (slave and black codes and Jim Crow laws). Criminal and related laws were also weapons against workers, anarchists and communists (conspiracy prosecutions and injunctions against organizing), gays (police raids and official persecution), women (arrests of suffragettes and lesbians), and demonized dissenters of all sorts (national security prosecutions and stiff sentences against many opponents of World War I including conscientious objectors, as well as communist leaders after World War II). More recently, though enforcement is often weak, criminal laws have penalized discrimination, hate crimes, and environment devastation, reflecting the evolution of political, economic, and social values.

In democratic societies, the politicizing of the criminal law may be defensible as an evolving expression of the popular will. In totalitarian societies, the politicizing of the criminal law as a weapon of dominant elites is a given, an everyday event, and requires no elaborate justification. But in all societies, the dominant political, economic, and social values pervade the criminal law. To ignore this indisputable reality is a distorting folly of the first order.

D. PROMOTING A SCIENTIFIC APPROACH: REFASHIONING THE PRIMARY ROLE OF THE CRIMINAL LAW

All of the prior perspectives share a common defect: they lack a focus on the scientific ethos and method. In the twentieth-first century, the purpose, nature, and scope of the criminal law must be recast in a form and substance that accords with the proudest achievement of modernity — science, including its ethos, method, and presuppositions. If the criminal law *raison d'être* and quest is for the truth of what is effective in devising crimes and defenses and thus of what the criminal law ought and ought not seek to accomplish, then science provides the clearest path for recasting the ancient criminal law into modern form. Since science provides the indisputably superior method for attaining truth and validity, all those analysts, judges, and lawyers who call themselves modern must embrace the scientific perspective as demonstrably superior to perspectives heavily laden with historical, political, religious, and emotional value judgments.

While respecting the struggles of all those in history who worked without scientific insight, the modern task is to reformulate the criminal law into neutral, specific and value-free concepts whose truth can be tested by application of the scientific method and verified or falsified on these

grounds. Only those concepts and claims, best viewed as hypotheses that are verified in practice by studies applying the rigorous scientific method, deserve the accolade of truth and validity.

Other truth criteria, whether derived from historical practice, moral philosophy, politics, or emotion, must give way to the truth criteria that are specified in the scientific method of hypothesis, experimentation, verification, and replication. This process alone offers the best chance for gradually uncovering the truth of what is effective in the criminal law. As an evidence-based medical practice gains sway, we must also develop an evidence-based criminal law, and then test its efficacy by outcomes-focused research. This scientific method also promotes the closely related values of rationality, clarity, coherence, and objectivity, as contrasted with the obscurity, subjectivity, and emotionalism characteristic of other approaches.

It is time to purge the criminal law of vague, subjective, unquantifiable, and unverifiable core concepts such as retribution, revenge, just deserts, condemnation, and remorse. It is time to reject such emotion-laden terms of *mens rea* (evil mind) as blameworthiness, willfulness, and “evil-thinking mind” in favor of more factually oriented and neutral counterparts such as those recommended by the authors of the Model Penal Code: *purposefully, knowingly, negligently, or recklessly*. These matters are only illustrations of the challenge inherent in recasting the criminal law into modern form and substance.

Lest any critic dismiss this clarion call as an example of scientific triumphalism, it should be stressed that true science, unlike much of traditional religion, philosophy, and politics, is not absolutist. The truths of nature uncovered by the scientific method are always regarded as provisional, subject to later reformulation derived from a deeper understanding of the mysteries of nature, just as Einstein’s theory of relativity replaced the centuries-old Newtonian theory. There is therefore a true humility in science rooted in an abiding, even reverential, respect for the data. Thus, with the scientific ethos and method as guides, we can, step-by-step, construct a scientific-based criminal law worthy of our era.

A dramatic example of the power of a science-based technology to improve the fairness and effectiveness of the criminal law process emerged towards the end of the twentieth century: the use of DNA evidence to prove guilt and innocence. To illustrate, an elusive serial killer who murdered young women in different areas of Louisiana was convicted using DNA evidence, and many convicted inmates throughout the country, some on death row, have been found to be *actually innocent* through use of such evidence. Scientific evidence has proved demonstrably superior to the inherent vagaries of eyewitness testimony, the weaknesses of some circumstantial-evidence cases, confessions, and the inevitably unreliable, erratic, and unpredictable performances of many prosecuting and defense attorneys.

E. PROMOTING A DEFENSIBLE MORALITY

The briefest of historical and comparative surveys document that the criminal law is primarily a moral reality. Different moral values are exemplified in the criminal laws of Saudi Arabia, Israel, Iran, and the United States. Whatever moral values are dominant, including secular moral values as in Turkey, will be at least substantially codified in the criminal law. In the Roman Empire, in feudal Europe, in Imperial and Maoist China, and in Puritan New England, the dominant moral

values were codified in the criminal law. The point is not that such values are necessarily valid or invalid, but only that the criminal law *invariably reflects dominant moral values* and codifies many of them. Thus, the deeper question is which moral values are to be codified, with what weight (for example, as a felony or misdemeanor), and to serve which priority interests.

Thus, all the prior perspectives are reductive. Blinded by seductive modern preconceptions, they fail to see that the *intrinsic moral character* of the criminal law is an inconvertible fact of experience. It isn't simply that the language of the criminal law and its application is replete with words such as fault, willfulness, evil-meaning, culpability, blameworthiness, condemnation, just desert, etc. Rather, it is that this verbal coinage of the criminal law realm corresponds to the *actualities of everyday experience* for such core crimes as murder, robbery, arson, forcible rape, assault, and fraud.

The accusation of such crime by arrest and indictment, the determination of guilt or innocence by trial or plea, and the condemnation of such behavior by sentencing and punishment are *inherently moral-laden realities*. For the victims, defendants, prosecutors, defense lawyers, and judges who play central roles, this reality is obvious and widely shared. Only certain academic analysts who are removed from this moral cauldron can readily reject what is plain from the experience of most participants.

Thus, the use of moral-laden terms such as fault, willfulness, etc., is an entirely accurate basis for describing and assessing these moral-laden behaviors. To use only so-called neutral, allegedly more factually oriented, terms of *mens rea* such as purposely, knowingly, etc., is to obscure the intrinsic moral heart of these realities. It is to engage in a "humbling of reality to precept."

The nature and scope of the subject to be analyzed should determine the nature and scope of the corresponding analytical concepts and methods utilized. In not doing so, we make the categorical mistake of encapsulating our analysis with an *a priori*, and usually hidden, faith in the superiority of a particular analytical approach and method, such as science. By doing so, we embrace a methodological imperialism that translates the actual multi-dimensional reality to only those types of quantifiable data the scientific method postulates as real, or at least as worthy of observing, recording, and analyzing. Thus, for example, the *palpable morally charged atmosphere* permeating a courtroom arising, for example, from the trial of a kidnapper and murderer of a child, is difficult to quantify and yet an absolutely crucial reality in the trial. Hence, a scientific approach alone is truncated, using a tunnel-vision lens for knowing. It is radically reductionist, transforming a more complex reality to a simpler, different reality. *Method should emulate the reality, not reality the method.*

Consequently, the moral-legal choice inherent in assessing any criminal law system is not a matter of determining scientific truth and validity by uncovering some of the secrets of nature through its hypothesis-experimentation-verification procedure. That is a category mistake. Though it can significantly contribute, science is not the proper dominant perspective for assessment. Instead, moral truth and validity is a matter of our choice among humanly created moral alternatives, and is not akin at all to discovering a new star in the heavens, the origin of *Homo sapiens*, or unpacking the human genome.

Finally, to those political and economic addicts who believe that the criminal law is primarily a political-economic reality, the reply is simply that these realms of thought and action are *derivative* of the dominant moral consciousness: They are important and influential epiphenomena.

CONCLUSION

The insight suggested by this brief introduction to some of the influential criminal-law perspectives is that the role and significance of the criminal law is strongly influenced, if not determined, by the *particular perspective* that grounds and informs the articulated reasoning at macro and micro levels. Thus, any view at the level of advocacy argument, including doctrinal rules, principles, and policies, presupposes a viewpoint, a perspective, with a coherent, distinctive mode of arguing, including shared premises and priorities, as well as derived categories for formulating, analyzing, and concluding. As only suggested here, these perspectives are wellsprings for argument.

To attempt to comprehend criminal law doctrine without at least a beginner's awareness of these animating perspectives and their influence is to distort the significance of the doctrinal reality, to engage in a tunnel vision that equates the doctrinal tunnel with the complete reality. Similarly, to attempt to understand the embedded purposes of the criminal law, detailed in the following section, without a frame of culture and values to give meaning to these purposes, is to engage in obfuscatory analysis, to share in self-and-group deception.

The choice of perspective is powerfully existential (determined by a person's life experience). To illustrate, if a mugger or burglar has just victimized you, or if corporate predators have just decimated the value of your 401(k) pension account, the crime-control perspective is self-evident and compelling. But if you have just escaped from political or religious persecution in China, Sudan, North Korea, or Iran, the perspective centered on protecting individual rights against official violation may well be most persuasive for you. You may also choose this perspective if you have just been brutalized by police in Los Angeles, New York or elsewhere, or have been hounded by the Federal Bureau of Investigation because you are a Muslim from Pakistan, Indonesia, or the Middle East. The variety of responses is not just individual. African-Americans, Hispanic-Americans, gays, and dissenters of all sorts have a *group experience* with the police and the courts that casts a different general response than that forged by the experience of many middle-class white Americans.

For those who would adopt an eclectic perspective blending many, if not all, of the perspectives set forth, the question is: How is such blending to occur? Which analytical frameworks are to be blended and which ignored? In such blending, how are priorities and rank ordering to be determined? Is a mega-perspective to be selected to do such rank ordering? If so, which one?

There is no escaping the need for *choice* from among the perspectives. We are not detached analysts looking through a plate-glass window at the objective criminal law as if it were a product of nature, like a shooting star in the heavens. Rather, any people, or the tyrants who oppress them, shape the criminal law to reflect their core values including their hopes and fears. The criminal law is a distinctly human product for which there are human authors and human responsibility. *The struggle for a civilized criminal law is an integral part of the struggle for a civilized life.*

These perspectives also form a framework for examining the repertoire of issues and related arguments that arise at sentencing. This repertoire is detailed in the next chapter.

NOTES