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CODIFYING CRIMINAL LAW: DO MODERN CODES HAVE IT RIGHT?

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Many jurisdictions in this part of the world and elsewhere are contemplating or are in the midst of criminal code reform. I want to talk today about the most basic decisions that face those criminal code reformers: How should a criminal code be structured? Which liability rules should be codified? What kinds of information should be taken into account in formulating a code's provisions? What ought to be the primary purposes and drafting principles of a code?

My general plan has two parts: first, to look briefly at the trends in codification during the past thirty years and to draw from this some lessons on the most useful reform approaches; and, second, to suggest other kinds of reforms, and approaches to reform, that are not reflected in existing codes but ought to be.

I shall talk about "modern codes" as a group, but clearly there are differences among modern codes, sometimes important differences. On the other hand, modern codes do share many general characteristics, and it is these general characteristics that I want to focus on. Nonetheless, even in discussing the most general features, what I say about modern codes generally, often will not be true of all of them. This is true even among the thirty-five modern criminal codes in the United States.

I WHAT MODERN CODES DO RIGHT

First, then, what is it that modern codes do right? The codes drafted within the past twenty or thirty years differ from the previous codes in structure, form, and theory. And most of what is different is better. The three most important kinds of improvements are advances in what I will call rationality, conceptual clarity, and legality. Rationality and conceptual clarity are virtues in any code in any area of law. Legality is a special virtue in the criminal law, for reasons that I will speak of in a moment.

Rationality

By improvements in rationality, I mean that modern code drafters have implicitly, or in some cases explicitly, adopted a set of underlying purposes or goals and have formulated the code's provisions to further these purposes. Older codes typically have no such unifying purposes, but rather are often accumulations of provisions, sometimes logically inconsistent with one another.

Now different modern codes have different dominant purposes, but they share the common characteristic of having some organizing principle to guide the drafting. For example, one of the thousands of decisions that code drafters must make is to decide whether to punish inchoate conduct, such as attempt, the same as the completed substantive offence or to punish it less. Once the dominant purposes of the code are established, the issue of grading inchoate offences can be logically derived. If the dominant purpose is incapacitation of dangerous offenders, then liability ought to be the same in completed-conduct attempt cases as it is in the substantive offence.

Where the shot misses the intended victim because the victim unexpectedly moves, for example, the shooter is no less dangerous than the shooter who hits and kills the victim. If the dominant purpose is punishment in proportion to blameworthiness, however, and if blame is perceived as greater where a death occurs, then the completed murder ought to be graded higher than the attempt.

There is nothing revolutionary about the use of such underlying purposes, of course. It is simply a matter of applying rational analysis to the drafting of a criminal code. What is unusual, from our current perspective, is the idea that the provisions of past codes could be drafted without such coordinated rational analysis.

Making the code's underlying purposes explicit rather than implicit has the additional advantage of giving its readers a means to more accurately interpret its provisions. Where an ambiguity exists, a judge can simply look to the interpretation that best furthers the code's underlying purposes.

Conceptual clarity

A second kind of improvement that is characteristic of modern criminal codes is an increase in conceptual clarity, achieved in part by having the code's written structure reflect its underlying conceptual structure. This was not possible, of course, before drafters had the conceptual underpinnings clear in their own minds and had reduced them to an identifiable set of purposes. But once this is done, it becomes possible and useful to structure the code accordingly.

For example, the most basic conceptual distinction — between the requirements for liability and the general conditions of defense — is reflected in a modern code structure in which offences are defined in the "Special Part" of the code and the general principles of exculpation are contained in the "General Part" of the code.

The General Part defenses are further subdivided into conceptually distinct groups. Justification defenses, for example, exculpate an actor who violates a prohibition but whose conduct is deemed proper under the circumstances. Such is the rationale for defense of self or others, law enforcement authority, the lesser evils defense, and so on. The person who breaks into a cabin for needed food while lost in the wilds satisfies the elements of burglary but may be thought to have done the right thing under the circumstances.

Excuse defenses exculpate on a different rationale: what the actor has done is admittedly wrong (unjustified) but the actor cannot be held to blame for the violation, because of insanity, immaturity, duress, or other excuse. Thus, the psychotic attacker's use of force is not justified, but neither can he rightly be held responsible for it. By grouping conceptually similar defenses together, justifications in one article of the code and excuses in another, the drafters can make clear the underlying theory that all such offences share, and can signal appropriate limits on their application. For example, persons lawfully may resist an excused attack but not a justified attack.

A third category of general defenses might be called non-exculpatory defenses. They provide a defense even though the actor's conduct is neither justified nor excused. The actor may well deserve liability but, by providing the defense, some other societal interest is advanced. Diplomatic immunity is a defense, even if the diplomat deserves liability, because, by giving the defense, the state's own diplomats abroad are immune from prosecution.

Other non-exculpatory defenses include such doctrines as statutes of limitation (on the time period to commence a prosecution), judicial and executive immunity, and entrapment. Non-exculpatory defenses are generally disfavoured and, therefore, are best narrowly construed to apply only where necessary to advance the societal interest at stake.¹

The General Part also contains general principles of liability, such as complicity, omission liability, liability for inchoate conduct, and so on. In each instance, the use of a General Part provision creates efficiency because the liability provision need be defined and stated only once, yet it will apply to every offence in the Special Part.

The Special Part of modern codes similarly contains a conceptually coherent structure, with related offences grouped together, as offences against the person, offences against property, offences against the family, offences against public administration, and so on. This is a change from earlier codes that often simply listed the accumulated offences in alphabetical order. Within each conceptually-related offence group in a modern code, the offences are reformulated as needed to avoid overlaps or gaps among the group. For example, the wide variety of common law theft-related offences — larceny, embezzlement, obtaining by false pretences, cheating, blackmail, extortion, fraudulent conversion, receiving stolen property, and the like — typically are combined into a single consolidated theft offence,² for which the grade of the violation is set according to the amount of the property taken and the existence of other aggravating factors, such as a trespass or a breach of fiduciary duty.

Legality

The third and final major category of modern reform is advancement of what may be called legality interests. By “legality,” I mean the preference for liability only upon application of *clear, written, prior* criminal statutes. The concern for legality is reflected in a host of modern code reforms.

Most modern codes are comprehensive in their coverage. They codify all offences, abolishing all common law offences, and prohibit judicial creation of additional offences.

As I noted earlier, modern codes also codify all general principles, including both general defenses such as insanity, immaturity, duress, self-defense, law enforcement authority, and the like, and general principles of liability, such as complicity, inchoate offences, and the like. I understand that New Zealand has a proposed criminal code that would not have a complete General Part and, in that respect, it would be different from most existing modern codes but not all.

Modern codes also tend to limit the number of terms used and give statutory definitions of the terms that are used. The most dramatic instance of this is the reform of offence culpability requirements. Instead of the eighty or so undefined culpability terms used in older codes — carelessly, wantonly, heedlessly, willfully, intentionally, maliciously, recklessly, corruptly, negligently, deliberately, accidentally, knowingly, premeditatedly, consciously, methodically, purposely, and so on — modern codes typically use just four culpability terms in the definition of all offences, and give each a detailed definition.

1 For a discussion of these defense categories, see Paul H Robinson, *Criminal Law Defenses: A Systematic Analysis* (1982) 82 Columbia Law Review 199–291.

2 See, eg American Law Institute, Model Penal Code ss 223.1 (1980).

Many of the reforms described previously as enhancing conceptual clarity also enhance legality. A better organized code and a code whose structure mirrors its important conceptual distinctions is a code that will be more clearly and more easily understood.

Why this preference for precision, order, and comprehensiveness? The characteristics are thought to serve many functions. They increase procedural fairness by giving each person a better opportunity to know what the criminal law commands: what and when conduct is criminal and under what conditions it nonetheless may be justified. This knowledge of the law's commands also provides a basis for blaming and thus punishing the violator; if the prohibition is known, its violation is condemnable. The knowledge also makes deterrence possible; one cannot deter conduct that people do not know is prohibited. In addition, by requiring a prior, concise statute, the legality principle reserves the criminalization power to the legislature, the most representative branch of government. That is, it limits the authority of judges to alter the scope of offences or defenses through their interpretation of vague provisions. Written, concise statutes also limit the discretion of judges, jurors, and prosecutors in the application of the statutes, and this limitation of discretion in turn promotes consistency in the adjudication of similar cases and limits the potential for abuse and prejudice.

These virtues argue for as comprehensive, precise, and well-ordered a code as drafters can provide.

II WHAT DO MODERN CODES DO WRONG?

Most of what I have said so far will be old news to the criminal law professors and lawyers here. Even in jurisdictions that do not yet have modern criminal codes, these typical reforms are known and discussed. Let me now try to say something somewhat more radical.

What is it, if anything, that modern criminal codes do wrong? Certainly most criminal law professionals have a laundry list of improvements that they would suggest for specific code provisions. And I am one of that group. But just as I focused on larger issues in saying what I liked about modern codes, let me stay with that broad focus in describing what I don't like. With regard to the broader issues of structure, form, and theory, what could modern codes have done better?

I want to offer three proposals for a different approach to code reform. The proposals are too preliminary for me today to seriously advocate their adoption, but they are not too preliminary to call for an explanation of why they are wrong. And that discussion could produce useful insights.

Specifically, for the purposes of this talk:

- (1) I will argue that, first, we should have not one criminal code but two; a code of conduct addressed to the general public and a separate code of adjudication written for the courts;
- (2) second, I will argue that utilitarians ought to give up their centuries old struggle against retributivists and join them (sort of) in support of a single, simple code drafting principle, to wit: liability and punishment should be distributed according to what an offender deserves (sort of); and
- (3) third, I will argue that criminal code drafting should be informed by social science studies of the community's shared intuitions of justice.

A code of conduct and a code of adjudication

As to the first proposal — for two distinct criminal codes — I assume that there is little dispute that one function of criminal law is to communicate to the public the rules of lawful conduct. But recent empirical studies confirm what many have suspected for some time: current criminal codes, even modern codes, have little or no real effect in teaching the public the rules that ought to govern their conduct. Accumulating empirical evidence also suggests that public knowledge of law is embarrassingly low.³ In multiple choice questionnaires about general principles of criminal law, for example, subjects commonly do no better than chance guessing.⁴ One researcher found no significant difference between adult knowledge of the law and that of teenagers.⁵ After a review of the literature, one researcher concluded that “most statutes are unknown to a majority of the population.”⁶

Now there is a good side to this. If the public knew the law, they might not need lawyers and, therefore, might not need law professors to train lawyers. (Of course, this would not endanger some American law professors I know who have never been accused of teaching something relevant to law or lawyering.)

Public ignorance of the law has a bad side, of course, especially for the criminal law. As my earlier comments on legality suggest, criminal law has a special obligation to make itself known and understood. It governs every person in their everyday conduct, and threatens sometimes severe sanctions for a violation. Further, unlike civil liability, criminal liability both requires and announces moral blameworthiness. Thus, public ignorance of criminal law undercuts the justification for its imposition: there can be no blame for violation of an unknown prohibition.

Now we certainly have our helpful legal maxim: All persons are presumed to know the law. But the social science data increasingly suggests that the presumption has no basis in fact: people, even very reasonable people, do not know the law. This suggests that it is unreasonable to assume, under present conditions, that people *should* know the law.

It may be that we must keep the maxim in order to keep the system working but, nonetheless, a responsible government, faced with evidence of widespread public ignorance of its criminal laws, would try to do something to improve its communication of the law's prohibitions.

In difficult economic times, governments might look to methods that have little cost, and that is where criminal code drafting comes in. There are few costs to drafting a new criminal code in a different form that can be more easily communicated and understood.

Can codes be drafted in a way that more clearly communicates the law's commands to the people? Perform this mental exercise. Scan the provisions of a typical modern criminal code. How much of the code's language is needed to describe the criminal law's commands? The answer is, very little. The bulk of the code serves a different function: to describe for judges and

3 See LaVell E Saunders, “Ignorance of the Law Among Teenagers: Is it a Barrier to the Exertion of Their Rights as Citizens?” (1981) 16 *Adolescence* 711, 713. See also Note, “Legal Knowledge of Michigan Citizens” (1973) 71 *Mich L Rev* 1463, 1468. It appears that the public's knowledge of criminal law is commonly better than its knowledge of civil law, however. See Austin Sarat, “Support for the Legal System: An Analysis of Knowledge, Attitudes and Behaviour” (1975) 3 *Am Pol Q* 3, 12.

4 Saunders, *supra* note 3, at 716. See Note, *supra* note 3, at 1468.

5 Saunders, *supra* note 3, at 717.

6 François-Xavier Ribordy et al, *Legal Education and Information: Exploratory Study* 29 (1985).

juries the rules by which they are to determine whether a violation of the commands is to result in liability and the extent of that liability.

Homicide and related offences are something of an extreme example but let me start with them. The law's command is simple: Thou shall not engage in conduct that would create a risk of causing another's death. The remainder of the provisions go to telling the court how a violation of this rule is to be adjudicated. Different culpability levels as to causing death call for different degrees of liability. Liability levels also vary depending upon whether a death actually results or is luckily avoided. Provocation or extreme emotional disturbance or other mitigating factors may reduce the degree of liability. Certain kinds of killings may increase the degree of liability. By my rough count, roughly 95% or more of the code's language goes to state the principles of adjudication for courts rather than to state the rules of conduct for the public.

Of course, the homicide prohibition is one of the several that most of the public does know. But the same jumble of adjudication provisions obscures the law's conduct rules in every offence definition in the code. Culpability requirements, doctrines of mitigation and aggravation, and special grading provisions are all irrelevant to and serve to hide the law's typically simple rule of conduct.

Is it a crime to lie to a police officer (or is it just dishonourable)? Is it an offence to sign your spouse's signature to a check if your spouse requests it? Can a person lawfully resist an unlawful arrest? Few citizens know the answers to these simple questions, and it is a poor system for governing people's conduct that does not assure that they do know what the law requires of them. Yet, if you gave the average person a criminal code and asked them these questions, I would wager that they still would have difficulty answering. But if one pulled from the code the bare essentials — just those points that went to defining the prohibitions — one could produce a document that could be read and understood by the average person. And it would be short enough that it realistically could be printed as a pamphlet and widely distributed.

The crime control power of deserved punishment

As noted earlier, most modern codes can be congratulated for introducing rationality by either explicitly or implicitly adopting theories of punishment that assure some degree of coherence among the code's provisions. More often than not this is an uneasy and somewhat conflicted compromise between the standard retributivist and utilitarian views:

The retributivists argue that the imposition of deserved punishment is an end in itself and needs no further justification. Liability and punishment, the retributivists argue, ought to be distributed solely by examining all relevant factors at the time of the offence and asking what the actor deserves. Moral philosophers have done much to derive such liability rules from basic principles of right and good.

The utilitarians argue that the infliction of punishment does require independent justification, which is typically found in the potential of punishment to avoid or at least reduce future crime. In the utilitarian view, liability and punishment ought to be distributed in the way that most efficiently reduces future crime, a distribution that might be very different from a distribution according to pure desert.

The dispute between these two irreconcilable positions has raged for decades if not centuries. I have no resolution to the philosophical conflict,

but I do want to offer a practical solution to criminal code drafters. I want to suggest that criminal codes should distribute liability and punishment according to what a person deserves, and that there are both retributivist *and utilitarian* reasons to do this.

Retributivists, of course, would be thrilled by such a development; they will have won the war. But we shall see if their enthusiasm endures to the end of my talk, when they have learned all the details of my proposal.

It is the utilitarians who will quickly oppose the proposal. They will present their standard arguments; and their arguments will be persuasive. In the realm of criminal law, utilitarian arguments have a special appeal. It is said that, for those who fail to appreciate the need to avoid future crime, there is nothing more effective than a good mugging. All of those philosophical niceties about doing justice are washed aside by the waves of pain from a whack on the head. Suddenly, a utilitarian is born. Justice is nice, but avoiding another whack tomorrow seems more important.

But this is what I would say to the utilitarians: on balance, the greatest utility in crime reduction may be found in a just distribution of punishment.

Consider some of the recent empirical studies about why people obey the law.⁷ The preliminary data might be taken to suggest that law's power to gain compliance from the general public is based less on people's desire to avoid the threatened sanctions of prison and the like, and more on people's vision of themselves as good people who do not generally do bad things, as they see it.

Part of the weakness of the law's deterrent threat of prison and the like arises from the real world difficulties in actually putting an offender in prison. The threat of sanctions is diluted by the fact that an offender is arrested in only one eighth of the crimes committed, and only one sixth of those arrested are convicted and jailed for any period of time.⁸ All and all, then, an offender has about a 2% chance of serving time for committing the average crime.

At the same time, we may grossly underestimate the compliance power of the criminal law's moral authority. Where the law has moral credibility, it can add to its deterrent arsenal the highly effective yet wonderfully inexpensive force of shame. It is a deterrent threat without either administrative headaches or financial burdens.

Even more underestimated, some scientists suggest, is the compliance power of the law as a moral example. That is, people will comply simply because they see themselves as basically good people who want to do the right thing. Violations come in significant part because many people have their own view of what is the right thing for them, given their particular

7 See Thomas Tyler, *Why People Obey the Law* chs 3, 4 (1990). Tyler cites a number of other studies that suggest similar conclusions. Id at 30–39. Other research supports the conclusion that a tension or contradiction between legal code and community standard does have some of the consequences suggested. Studies show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid. See also Harold G Grasmick & Donald E Green, "Legal Punishment, Social Disapproval, and Internalization As Inhibitors of Illegal Behaviour" (1980) 71 J Crim L and Criminology 325; H Jacob, *Debtors in Court: The Consumption of Government Services* (1969); Robert F Meier & Weldon T Johnson, "Deterrence as Social Control: The Legal and Extralegal Production of Conformity" (1977) 42 Am Soc Rev 292; Matthew Silberman, "Toward a Theory of Criminal Deterrence" (1976) 41 Am Soc Rev 442; Charles R Tittle, *Sanctions and Social Deviance: The Question of Deterrence* (1980). Tyler's recent Chicago panel study (1990) comes to similar conclusions. The degree to which his respondents saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities.

8 See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics — 1991* Tables 3.1, 4.1, 5.18, 5.48 (1992).

situation in the world. They can see themselves as basically good people even as they knowingly violate the law, because the law has insufficient moral credibility with them to persuade them otherwise.

Perhaps the most important finding suggested by the preliminary data is that for these complementary mechanisms — threatening shame and persuading the public that the criminal law describes serious moral wrongs — *the degree of effectiveness is directly proportional to the degree of the criminal law's moral credibility.*⁹ If people think that criminal liability and seriously wrongful conduct only sometimes correspond, then the law loses some of its compliance power. Specifically, criminal conviction has less shame if some persons convicted are perceived as morally blameless, or are punished more than they are seen to deserve. And the prohibition of criminal law is less persuasive as a statement of moral wrongs if the law prohibits conduct that is not seen as a serious wrong or if the law fails to prohibit conduct that is seen as a serious wrong.

And this is where the utilitarian must take note, for this suggests that there is a hidden cost *in future crime reduction* every time the criminal law imposes liability or punishment in conflict with the community's perceptions of deserved punishment. Each instance of perceived injustice undercuts in some small way the criminal law's moral credibility, which it then reduces in some small way the law's effectiveness in gaining compliance. The law loses some small measure of its ability to shame with subsequent convictions. It loses some small measure of authority in persuading what a good person would not do.

Community views as authority for criminal law

Are the retributivists still celebrating the previous proposal to have liability and punishment distributed strictly according to what is deserved? Probably not, for they see one minor detail of the scheme that bothers them immeasurably. The scheme does not call for punishment according to what is deserved, exactly, but rather according to *what is perceived by the community as deserved*.

Recall the utilitarian arguments for the distribution of punishment according to just desserts: doing justice enhances the moral credibility of the criminal law *with the community* and this, in turn, enhances the power of the criminal law to gain public compliance. It is public *perceptions* of the justness of the law that count, not notions of justice independently derived from moral philosophy.

And this is not what the retributivists want to hear. The community could be stupid, and poorly read. Who is Immanuel Kant? Who is G W F Hegel? Who is H L A Hart? Are we really to rely on people who don't know these names, people who have never struggled with the issues of moral philosophy? These are the people who we will depend on to decide the legal rules for just punishment?

From the utilitarian perspective, the answer is, yes. But let me be clear here. By "community views of justice", I do not mean whimsical railings by the public about the result in one high-profile case or another, but rather the results of careful empirical research by social scientists into shared rules intuitively used by people in assigning or withholding blame in ordinary cases. Recently developed research techniques can strip away the personal

⁹ See Tyler, *supra* n 7.

biases that infect personal judgements about individual cases, and can isolate the general intuitive principles that people use.

What must a person do to assist an offender to be held liable himself or herself for an offence? When should a person be held liable for attempting to commit an offence? When should a person be able to use deadly force to defend himself or another? When should voluntary intoxication or mental illness or duress provide a mitigation or a defense to a crime? How should liability and punishment be fixed when a person commits multiple offences? The community's answers to these questions and others have been or are being investigated by social scientists. Preliminary research suggests that people do share many notions of how criminal liability and punishment should be distributed.¹⁰ And it appears that many of these notions transcend class, racial, and cultural boundaries.

It is the articulation of these general principles shared by the community that, I argue, criminal code drafters should have available to them. Nonetheless, this is not what true retributivists want criminal codes to be based upon.

Now you may see why I introduced these last two proposals as a *practical* solution for code drafters, not a resolution of the philosophical debate. While the philosophers and the public may press for different rules, and thus continue the retributivist–utilitarian dispute, I am betting that shared community intuitions of justice will not deviate so far from the philosophical principles of justice; that to the extent that there are discrepancies, that they can be resolved over time by public debate; and, finally, that public debate can over time change public views.

Such a public debate, in which moral philosophers will play an important role, and such refinement of public moral opinion would become a realistic possibility if public moral opinion really mattered, if it had a direct and explicit role in drafting the criminal code. Issues of morality and justice would no longer be matters left to seminars in moral philosophy but would be matters for newspaper columns and letters to the editor. Perhaps the philosophical retributivist could learn to live with such a system after all.

As I said before describing these three proposals, they are meant to be radical. They are too preliminary for me today to seriously advocate their adoption, but they are not too preliminary to call for an explanation of why they are wrong. Perhaps that discussion could produce useful insights.

In any case, there is much that recent criminal codification efforts have done right. And we can all benefit immediately by learning from those successes.

¹⁰ See Paul H Robinson & John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (1994) (forthcoming).