The Limits of the Criminal Sanction, by Herbert L. Packer

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Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol44/iss3/7
BOOK REVIEW


Even a casual reading of the daily news demonstrates quite clearly the existence of a division in our society between those whose respect for law is minimal and those to whom the law, particularly the criminal law, represents a panacea. This latter group is characterized by its blind assurance that simply making conduct illegal, making penalties harsh enough, and enforcing the criminal laws vigorously will somehow bring a better day when crime no longer threatens the existence of society as we know it.

The suggestion that if there were no criminal law there would be no crime is surely too cynical a response to this view, but it does make the point that crime is largely a definitional matter. Conduct is only criminal if we say it is. What purposes are served by labelling conduct "criminal"? What benefits does employment of the criminal sanction give us, and at what cost? Are there better ways to deal with conduct we dislike than to brand it a crime? What functions can the criminal law perform, and what functions are beyond its useful scope? How do we find the answers to these questions? In short, "[H]ow can we tell what the criminal sanction is good for?"[1]

Professor Herbert L. Packer rhetorically asks that question at the beginning of this excellent book, and then goes about the business of searching for its answer. He develops a view of the criminal justice problem which leads him to counsel great caution in the use of the criminal sanction. The net result of this caution would be a considerably restricted sphere of operation for the criminal law, reserving its use for those areas where most would confidently agree it deserves respect even from those who regularly flout existing laws with abandon.

Perhaps the most important feature of Packer's book is that it is directed at a wide audience. Indeed, the author suggests that his argument is addressed to "the Common Reader."[2] Packer is no popularizer, but addressing his book to the common reader tells us immediately that his work is not technical. One need not be a lawyer to understand it. In fact, those persons who most clearly should read the book are non-lawyers,

2. Id. 5.
who, in one short volume, can obtain a very high level introduction to one of the major problems of our day.

Packer hypothesizes a rational lawmaker and asks what kind of questions that man should ask before deciding whether to make certain conduct criminal. This is the person for whom The Limits of the Criminal Sanction ought to be required reading. A noted scholar has already called the book a classic. Every man whose office permits him to exercise control over the criminal law must read it to properly perform his task. Hardly less can be said of the voter who would intelligently exercise his franchise.

Inevitably, the suggestion that a book's topic is what conduct should be criminal raises the spectre of the enforcement of morals debate. Fortunately, Packer does not rehash that conflict at length, and when he does, his tone is more that of a lawyer than a philosopher. Indeed the lawyer cannot help smiling as he reads this book and sees the seal of the lawyer stamped on every page. The author makes no effort to hide his utilitarian underpinnings, and his philosophical expertise is not questioned, but first and foremost he is a lawyer. His argument, addressed to the common reader, shows why good lawyers are so successful at persuading non-lawyers. The argument is concrete, logical, practical. There are no flights of fancy, but only a very careful setting of the stage followed by argument liberally illustrated by apt examples. In short, Packer has given us a nearly perfect brief.

At the outset, the author notes that the adherents of the behavioral theory of crime have attempted to categorize all who refuse to accept their views as proponents of retribution, and to force potential critics to choose between accepting all the directives of the behavioral persuasion and being characterized as retributive. Packer rejects the dilemma as unreal and refuses to make the cheerless choice between resting his views on a desire to see people suffer and total rejection of moral responsibility in the criminal law. He adopts a middle ground, based initially on utilitarian philosophy, but deviating from the traditional utilitarian formulation. He argues that while crime prevention is the primary purpose of the criminal law, that purpose does not exist in a vacuum. It must be qualified by other social purposes, such as the enhancement of freedom and the doing of justice, which require placing limits on the goal of crime prevention. The

3. Id. 3.
6. Packer, e.g., 5.
principal limit is that moral responsibility is a necessary, although not a sufficient requirement for the determination of legal guilt. We ought not to punish persons who commit offenses simply because their conduct is blameworthy, but neither ought we to punish persons who commit offenses unless their conduct is blameworthy.

The necessity and insufficiency of culpability represents one of the two chief tenets of what the author calls an "integrated theory of punishment." The other is that it is a necessary, but not a sufficient, condition for punishment that it be designed to prevent the commission of offenses. The adoption of this integrated theory enables Packer to avoid both the Scylla of the retributive position, which would normally find blameworthy conduct a sufficient condition for the imposition of punishment, and the Charybdis of behavioralism, which would justify the incapacitation and "rehabilitation" of persons before they commit an offense as a means of preventing crime. Whatever the arguments may be in the future, today it is surely difficult to quarrel with an unwillingness to permit punishment (or treatment, if the euphemism is more comfortable) of persons who have not demonstrated their dangerous propensities by the commission of blameworthy acts because, with present knowledge and resources, we know neither how to predict who will commit crimes nor how to rehabilitate offenders.

The integrated theory of punishment leads to the integration of various organs of government in the punishment process. Since Packer continues to find relevance in conduct, he preserves a role for the legislature, not only in determining what conduct is to be labelled criminal, but also in determining what punishment is to be imposed. The legislature is to divide the conduct it calls criminal "into a comparatively small number of rather gross categories," assigning a maximum and a minimum sentence for each. The legislature necessarily focuses solely on conduct; the criminal is not before it. The judge, on the other hand, does have the violator and a small amount of information about him at hand. He is able to make the basic decision in the process of individualizing punishment, i.e., whether to follow the legislative prescription or to deviate from it either to mitigate or aggravate the statutorily prescribed punishment.

7. Id. 9-16.
8. Id. 66
9. Id. 62.
10. Id.
12. Packer 55.
13. Id. 142.
14. Id. 141.
15. Id. 142.
Correctional authorities and parole boards are in the best position to individualize punishment. They decide exactly how long each offender remains in custody.16

The reader will note how heavy the emphasis on conduct is in this integrated approach to the administration of punishment. The legislature can only focus on the conduct involved. The judge is directed by statute and lack of information to focus primarily on the offender's conduct. And unless we are willing to make substantial additional commitments of funds for the training and salaries of high level social and behavioral scientists as prison and parole administrators, it would be naive to think that consideration of conduct is ever far from the mind of the average prison official or parole board member.

Since conduct plays such a large role in the integrated theory of punishment, the selection and definition of the conduct which will be made criminal is vitally important. Packer is aware, however, that little can be gained by legislative reform of the substantive criminal law without serious consideration of the problems, both theoretical and practical, of criminal procedure and administration:

The kind of criminal process we have is an important determinant of the kind of behavior content that the criminal law ought rationally to comprise. Logically, the substantive question may appear to be prior: decide what kinds of conduct one wants to reach through the criminal process, and then decide what kind of process is best calculated to deal with those kinds of conduct. It has not worked that way. On the whole, the process has been at least as much a given as the content of the criminal law. But it is far from being a given in any rigid sense.17

To decide what the criminal law is good for, we must assess the criminal process to determine how easy or difficult that process is to employ in general and how well suited it is for handling each specific type of behavior being considered.18 Professor Packer examines the process through two models,19 the crime control model, which he analogizes to an assembly line or conveyor belt,20 more administrative and managerial than

16. *Id.* 143.
17. *Id.* 150.
18. *Id.* 150-52.
19. At this late date I shall not describe the models in detail. Their essence has been available for several years in Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964).
BOOK REVIEW

adversary and judicial;\textsuperscript{21} and the judicially oriented due process model, which more resembles an obstacle course than an assembly line.\textsuperscript{22} He concludes that while the criminal process now fairly closely follows the dictates of the crime control model, the trend is toward the adoption of the due process model.\textsuperscript{23} Very few would quarrel with this conclusion, although there is considerable disagreement about the wisdom of making the criminal process an obstacle course for law enforcement officials to run. Since, however, the due process model is the one apparently required by the Constitution, and since it apparently is here to stay,\textsuperscript{24} the rational legislator should recognize that the criminal process has become a clumsy and difficult tool to use. Therefore, Packer suggests, the legislator should re-examine the uses made of the criminal sanction to determine which ones are indispensable and which we might eliminate with little or no loss, or even some gain.\textsuperscript{25}

His consideration of both the rationale of punishment and the nature of the criminal process leads the author to conclude that the criminal sanction should be resorted to only sparingly in a free and open society.\textsuperscript{26} He offers limiting principles to help his rational legislator decide in what few instances he should invoke the sanction and its ponderous machinery. The basic rule developed is simply to put "first things first"\textsuperscript{27} and, conversely, "last things last."\textsuperscript{28} Packer is a realist; he recognizes that we lack the resources, as well as the will, to effectively punish all the different types of conduct we find objectionable. Therefore, we must develop a set of priorities and assure the effective use of the criminal sanction where we really need it by relieving our law enforcement personnel and courts of the flood of trivia which engulfs them.

Little purpose would be served by reviewing his entire catalogue of limiting principles here. They are based on a realistic, hard-headed appraisal of the facts of life in a free society which must, and does, coexist with the criminal sanction. Each is worthy of serious consideration by the rational legislator, who can see the implications of the criteria in the last two chapters of the book, where the author applies them to several specific offenses.

\emph{The Limits of the Criminal Sanction} does not contain the answer to the problem of crime in modern America. It does not purport to. It

\begin{itemize}
  \item [21.] Id. 239.
  \item [22.] Id. 163.
  \item [23.] Id. 239-46.
  \item [24.] Id. 242-45.
  \item [25.] Id. 246.
  \item [26.] Id. 249-50.
  \item [27.] Id. 250.
  \item [28.] Id. 260.
\end{itemize}
does, however, serve several valuable purposes. First, it collects a number of very sensible ideas about the criminal problem, some of them original, some not, in one convenient place for easy reference. Second, it does a very good job of making the reader aware of how terribly difficult the questions considered are. The common reader who exposes himself to this book will find it difficult ever again to accept the simple dichotomies between good and evil which are offered him by certain partisans and some of the mass media.

Finally—and this is the crucial point—the book demonstrates that the criminal justice problem is not primarily a problem about good and evil at all. It is a problem about profit and loss and the wisest allocation of resources. What Packer has done is to combine utilitarian philosophy with a few very simple economic concepts to give us an exceptionally practical view of the dilemma of imposing punishment in a free society. His practicality has led him to recognize the central role that morality plays in popular thinking about crime; and since criminal law is directed to the populace, it must, as a practical matter, treat morality as a limiting criterion for the usefulness of the criminal sanction in at least two ways: first, immorality must be a (not the) prerequisite for punishment; and second, the system of punishment itself must not be immoral. Punishment is a morally ambivalent social device. If we are to use it, we should use it sparingly and only in those situations where the utilitarian gains are relatively sure to outnumber the losses.

Packer has said something that needed to be said. Criminal law discussion is filled with too much fuzzy talk about right and wrong with nothing more than feelings to tell people what falls into each category. Because the public thinks about criminal law, it is important that it be provided with a sensible foundation for its thought. In *The Limits of the Criminal Sanction* Herbert Packer has provided such a foundation. Now the rational legislators must build upon it a construct worthy of its base.

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