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# THREE PERSPECTIVES ON CRIMINAL JUSTICE

## INTRODUCTION

*Michael T. Cahill\**

The three contributors to this symposium all offer interesting and useful empirical material and draw provocative conclusions from that material. Any serious student of criminal law should find each of these contributions individually compelling and informative; together, they practically comprise a primer on contemporary issues in and social-science approaches to criminal law.

The articles offer such cumulative impact and utility because the authors cover so much ground. While the authors share some core concerns as to the criminal justice system's reputation and as to improving the satisfaction of its participants, they offer three very different visions of criminal justice. One might say that they collectively focus on the "three P's" of the justice system: punishment, procedure, and participation.

Professor Darley discusses justice as proper *punishment*.<sup>1</sup> That is to say, he deals with the substantive question of how to balance crime and punishment. In its support for "just deserts" rather than an explicitly deterrence-oriented agenda, his vision suggests a backward-looking approach: it sees the punishment as a response to the crime rather than a purely instrumental means of achieving

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\* Assistant Professor, Brooklyn Law School. Many thanks to the other participants in the Three Perspectives on Criminal Justice conference, which was held at Brooklyn Law School on January 30, 2004, and to Professor Larry Solan and the School's Center for the Study of Law, Language and Cognition for organizing it.

<sup>1</sup> See John M. Darley, *On the Unlikely Prospects of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189 (2005).

some future goal (though he has argued that such a desert-based approach also yields utilitarian benefits).

Professor Heuer examines justice as fair *procedure*.<sup>2</sup> Here too a balancing act takes place, but the interests being balanced are those of the state (as law enforcer) and the individual accused. One might also say that the proceduralist's vision looks neither backward nor forward, but focuses its attention on the present moment. That is, the proceduralist is not concerned with the relation between the punishment and the crime, or with any benefits that might later flow from that punishment, but with the nature and propriety of the process that the system employs to arrive at the chosen punishment. Heuer's work suggests that the factors underlying the perception of a process as "fair" are complex and difficult to pin down, and may include an individual's relative position within the system.

Professor O'Hara focuses on the system's *participants*: the people affected by the system, whether defendants, victims, or others.<sup>3</sup> Her discussion of the role of victims in the criminal process implicates a vision of justice as a resolution or reconciliation that brings closure and thereby facilitates progress for all affected parties rather than merely enabling the state's imposition of punishment on an offender. In her analysis, the balance to be achieved directly relates to the interests of the victim as well as the wrongdoer. In its ultimately instrumental approach—its desire for movement toward a better social situation, here meaning one in which both offenders and victims are made whole—O'Hara's vision might be described as more forward-looking than either Darley's or Heuer's. O'Hara's conception may also be more aspirational and affirmative, as it seeks the realization of some positive good rather than the satisfaction of minimal, required goals or rules.

Though these are very different visions, they are not necessarily in direct tension; they are not offered as mutually exclusive options that squarely conflict with one another. All three

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<sup>2</sup> See Larry Heuer, *What's Just About the Criminal Justice System?: A Psychological Perspective*, 13 J.L. & POL'Y 209 (2005).

<sup>3</sup> See Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229 (2005).

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authors identify distinct problems with the present state of the criminal-justice system, yet their solutions to these problems seem entirely compatible, at least at first glance. Does this mean we can have all three of the P's—just punishment, fair process, and full participation—at the same time? Could we create a system that reflects all of these values without developing conflicts or requiring compromises between them? Or alternatively, are these general perspectives so fundamentally at odds as to talk past each other, so that any effort to devise concrete, specific methods for implementing them will be doomed to incoherence and confusion? I offer here no firm conclusion to these questions, only a reminder that the apparent harmony of these perspectives might fade when they are placed in a particular context that demands specific decisions.

Further, although the three views put forth in the following articles are very different, the articles provoke some general responses, three of which I will briefly discuss. The first is a question about priorities. The debate between substance and procedure is hardly new, but both Darley's and Heuer's work place this debate in a somewhat new context. The authors do not advance a principled *normative* commitment to either substance or procedure, nor do they take a clear moral stance as to whether or when one should trump the other. Instead, their work poses a related but distinct *empirical* question: not "which is more important," but "which do *people think* is more important?"

Heuer's work (as well as the larger underlying body of work to which he refers) suggests that people care about procedure as a value, even independently of the tendency of proper procedures to ensure accuracy. At the same time, Darley points to widely shared and deeply held intuitions about substantive justice, in that people tend to support punishment based on "just deserts." Of course, people desire both fair process and appropriate substantive results. This leads us to the question about priorities: how much do people care about process *as opposed to* substance when the two conflict?<sup>4</sup>

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<sup>4</sup> The work of Linda J. Skitka, among others, finds that perceptions of the significance of procedural fairness recede, perhaps to the point of irrelevance, when people consider the substantive outcome to have a moral dimension—as is surely true of many criminal cases, possibly to an extent unmatched by any other

To be more specific, focusing on an issue in which I take a personal interest,<sup>5</sup> what happens when there is a categorical procedural rule, grounded in notions of fair play, that seems likely in many (if not all) cases to impede rather than promote the achievement of an accurate outcome on the merits? Do people prefer a “fair” process—whatever that means—or a correct result? The empirical work of Heuer and others suggests that fairness is a thorny, multivariate issue, and the literature thus far strikes me as mixed, or else uniformly inconclusive, on this question.<sup>6</sup> Perhaps

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part of the law. See Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305 (2001); see also Linda J. Skitka, *Do the Means Always Justify the Ends, or Do the Ends Sometimes Justify the Means? A Value Protection Model of Justice*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 588 (2002); Linda J. Skitka & Elizabeth Mullen, *Understanding Judgments of Fairness in a Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1419 (2002); Linda J. Skitka & Elizabeth Mullen, *The Dark Side of Moral Conviction*, 2 ANALYSES OF SOC. ISSUES & PUB. POL’Y 35 (2002).

<sup>5</sup> See PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: HOW, AND WHY, CRIMINAL LAW SACRIFICES DESERT* ch.7 (Oxford U. Press, forthcoming 2005).

<sup>6</sup> For a discussion of the relative strengths and weaknesses of morality (substance) versus legitimacy (procedure) as methods of inducing compliance, see generally Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 724–37 (2000). For indications of the relative importance of substance, see works cited *supra* note 4; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 59–60 & Table 5.1 (1990) (study showing that compliance with law has much stronger correlation with its connection to “personal morality” than with its perceived “legitimacy”); *id.* at 32–37 (comparing past studies finding higher correlation based on law’s instantiation of shared normative views than on perception of legitimacy); *id.* at 60 (“The most important normative influence on compliance with the law is the person’s assessment that following the law accords with his or her sense of right and wrong[.]”); *id.* at 68 (“[P]ersonal morality is clearly a more important influence on compliance than legitimacy.”); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 L. & SOC’Y REV. 837, 853–54 (1990); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980) (stating that certain variables, including

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O'Hara's work says something about this debate, at least as it is played out in the area of victims' involvement in the system. There is an interesting interplay between victims' desire to have substantive authority over punishment versus mere participation or voice in the process.<sup>7</sup> Further exploration of this dynamic may teach us about the layperson's perception of the relationship between substance and procedure.

The second issue, which relates to the first, concerns the overlaps and distinctions involved in offering a descriptive observation as compared to a normative justification or policy prescription. A recurring issue with respect to law in a democracy is the extent to which law should *track* people's preferences (give them what they want) and the extent to which law should try to *shape* people's preferences (tell them, or at least suggest, what to

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"moral commitment" and "threat of social disapproval," act as factors inhibiting illegal behavior).

For indications of the relative importance of procedure, see TYLER, *supra*, at 63 ("Respondents are almost equally likely to comply with the law because they view it as legitimate . . . whether or not they think their peers would disapprove of law breaking, and whether or not they think law breaking is morally wrong."); HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 89 (1989) ("Once a demand is categorized as legitimate, the person to whom it is addressed enters a situation where his personal preferences become more or less irrelevant . . ."); *id.* at 16 ("Through authorization, the situation becomes so defined that the individual is absolved of the responsibility to make personal moral choices . . . [A] different kind of morality, linked to the duty to obey superior orders, tends to take over."). See also DAVID BEETHAM, *THE LEGITIMATION OF POWER* 4-5 (1991); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571, 579 & n.2 (1995).

Indeed, Heuer's work indicates that substance and fairness perceptions are deeply intertwined. For decisionmakers, the two seem almost inseparable. See Heuer, *supra* note 2, at Part II.A. Even for the parties to a legal dispute, a complex link between substance and fairness appears to follow from the conclusion that notions of "deservingness" (which often seem to be connected to the substantive merits of one's position) are closely tied to perceptions of procedural fairness. See Heuer, *supra* note 2, at Part II.B.

<sup>7</sup> See O'Hara, *supra* note 3, at 246-47 (noting victim interest in both substantive results, such as obtaining conviction, and procedural role, such as having a voice in the proceedings, even if participation does not affect outcome).

want). This issue resonates with all three authors, in my view, because their work relies on empirics, but also often implies policy prescriptions. Yet absent an independent normative judgment, data about human psychology might suggest at least three very different bases for policy: (1) policy should simply follow from our shared psychological intuitions; (2) shared psychology is not decisive, but suggests a norm that could ground policy choices; or (3) to the contrary, sound policy demands active steps to *overcome* our natural psychological inclinations or biases. A fourth option—a more modest claim, and perhaps the only one these authors are embracing—is that researchers and advocates should simply be aware of the empirical data, even if the data’s normative implications are up for grabs.

Tying the second issue directly to the first issue, if research indicates that people value process significantly, perhaps even more than substantive outcomes, is that a good thing? Should we structure the system to reflect that view, or try to shift attitudes *away* from a focus on process and toward attention to just results? Further, if apparently process-related issues such as respect depend on deservingness, as Heuer indicates, how are judges and others to decide how much respect is appropriate, other than by weighing the apparent substantive merits?

Darley hints that lay norms of justice (the desire for desert) should inform criminal law doctrine and that the doctrine, in turn, may help promote adherence to the law by strengthening respect for the underlying norms. But one might ask whether we should trust lay intuitions of justice if they are incoherent or not clearly morally defensible. On the other side, is the law the best mechanism for promoting norms—or for promoting social contexts that facilitate adherence to norms—or should we rely on extralegal avenues, such as moral instruction in educational or even religious institutions?

The third issue I find relevant to all three articles relates to the role of law enforcement as opposed to law. Darley, for example, suggests that deterrence is hard to achieve through increasing criminal penalties, but I think he would still agree that deterrence is important. That forces us, if we still seek to pursue deterrence, to focus on increasing either (1) the likelihood of detection, (2) the

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likelihood of punishment once detected, or (3) the swiftness of punishment once detected—or some combination of all three. Trying to improve results in any or all of these three areas, however, may increase pressure to limit various constitutional or procedural rights that stand in the way of doing so. Does Heuer's work offer any indication of how people would react to this? More generally, what conclusions can we draw about the relative significance of process during a police investigation or even during behind-the-scenes plea bargaining, as opposed to what the affected parties experience in a trial setting?

O'Hara discusses the role of victims within the system, but, as she acknowledges, one troubling fact is that many victims never make it into the system, for various reasons, some having to do with their own personalities and some with the system's view of them. What can we do, if anything, to create law-enforcement structures that encourage victims to come forward or encourage enforcement officials to take seriously all victims who do?

As the foregoing indicates, I have found all three of the following articles highly interesting and provocative. They collectively offer a concise introduction to several significant modern trends and concerns of criminal law scholarship, and both highlight and document the increasing significance of social-science work to legal theory and doctrine. Of course, even the best empirical work cannot resolve the relevant underlying moral considerations. It can, however, provide invaluable insights as to how we can achieve our goals and, perhaps, about how to structure our practical priorities.