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RESPONSE

CRIMINAL LAW'S "MEDIATING RULES": BALANCING, HARMONIZATION, OR ACCIDENT?

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Before offering a few thoughts about Professors Richard Bierschbach and Alex Stein's "Mediating Rules in Criminal Law," I would like to highlight just two of the several significant contributions it makes to the criminal law literature.¹ First, it both spotlights and combats the tendency of theoretical work in criminal law, particularly work in the retributivist camp, to focus on certain criminal justice issues at the expense of others. Such work typically orients itself toward (admittedly crucial) questions about the proper justification, scope, and amount of punishment in the abstract, while giving significantly less consideration to the various institutional and procedural aspects of any concrete system of imposing such punishment. Even if the substantive punishment rules were perfect, their implementation in any real world scheme would involve compromises, if not outright distortions. Too little attention is paid to

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¹ This essay is a response to Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 Va. L. Rev. 1197 (2007).

the translation of principle into practice, and Bierschbach and Stein's article is a welcome effort to bridge that gap.²

A second and related strength of the article is that by widening the scope of analysis, it expands the sense of what tools can be used, singly or in combination, to achieve fundamental criminal justice goals. Noting the dynamic interaction between substance and evidentiary rules might facilitate the proactive use of what they call "mediation" as an alternative, as well as perhaps subtler or more nuanced means of advancing substantive goals. For example, all too often the perceived "solution" to the problem of an offense being—or seeming—underinclusive (in either deterrent or desert-based terms) is simply to enact another offense designed to make up the shortfall. That method of remedying the problem, however, can itself introduce new problems of application, interpretation, and possible excessiveness in the scope or amount of punishment.³ More broadly, it is unavoidably difficult—and perhaps impossible as to some questions—to craft substantive rules of general application that will perfectly capture all the cases suitable for punishment and no others. How nice it is, then, to recognize the option of tailoring evidentiary rules in ways that might correct for some of the excesses or shortcomings of the rules in specific cases, thereby overcoming some of the inevitable inadequacies of law or language. Notably, the possible benefits of such tailoring are not limited to its potential to mediate between deterrence and desert (the article's focus). Rather, it also might improve the system's ability to advance either of those goals in isolation—perhaps to "mediate" between the dictates of desert or deterrence in an ideal world and the budgetary or fact-gathering limitations of the real one.

Interestingly, Bierschbach and Stein do not highlight the possible benefits of deliberately manipulating evidence rules to improve

² This is not to say that these matters have been ignored entirely. Several observers have written about the tradeoffs and sacrifices involved in the practical pursuit of substantive punishment goals, and specifically retributive goals. Some of my own work addresses these issues, and discusses other work that does as well. See Paul H. Robinson & Michael T. Cahill, *Law Without Justice* (2006) (discussing conflicts between retributive goals and other principled and practical goals of the criminal justice system); Michael T. Cahill, *Real Retribution*, 85 *Wash. U. L. Rev.* (forthcoming 2008) (discussing options for pursuing retributive goals where enforcement is subject to practical constraints).

³ See Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 *U. Colo. L. Rev.* 879, 936–38, 952–55 (2007).

substantive outcomes (whether the "improvement" is in terms of desert, deterrence, or the kind of balancing of the two that they discuss). Even the article's normative support for mediating rules does not quite advocate their adoption for any specific situation or even as a general rule, but largely focuses on their possible justification *given that they exist already*. If there were no such rules—if both substantive criminal law and the rules of evidence were thoroughly designed, and even coordinated, to maximize just one goal, whether desert or deterrence—the normative case for mediating rules as promoting liberalism or consensus-building would fall flat, for then such rules would be forcing a compromise between one goal everybody seems to like and another nobody seems to want. In other words, Bierschbach and Stein can assert the value of mediating rules in promoting consensus because they operate from the premise that there is otherwise social dissensus (either on the whole, or as to specific issues) as to which substantive goal is appropriate: a premise supported, it seems, by the observed fact of mediation itself. Thus the evident multiplicity of purposes within and between the *existing* formulations of substantive and evidentiary rules, rather than the inherent desirability of having multiple purposes, is what underlies Bierschbach and Stein's normative case.

The authors' ambivalent—or really unstated—stance toward the desirability of consciously developing more mediating rules is in keeping with their general silence about whether existing mediating rules are a result of some conscious decision. The authors observe that some rules have the effect of mediating between desert and deterrence, but do not explain where those rules come from, or whether their mediating tendencies are the product of choice or chance. The article's account is ahistorical, providing a snapshot view of rules as they appear and interrelate at the present moment, but not detailing which of the related rules came first or whether the later rule was meant to respond or relate to the earlier one in the way it actually does. I point this out not as a criticism—Bierschbach and Stein's identification of this apparent phenomenon is plenty interesting even if they are not able to explain how it works—so much as a question, or suggestion of a possible area of future investigation. Regardless of how mediating rules might develop, it is useful to note that the relationship between substantive

rules and evidentiary rules is, or can be, dynamic, so that changes in one might lead to responses, adjustments, or corrections from the other. Exploring how this process works, or should work, might be a fruitful area for further study, either from these authors or others.

I have two other reactions to share in this brief Response, both of which relate to questions the article raises for me about its own scope and implications. First, it would seem that other kinds of procedural rules might perform a similar mediating function to the evidentiary rules Bierschbach and Stein discuss. To take just one category of such rules, decisionmaking authority for different issues or elements in a criminal case may be allocated to the judge or to the jury. For example, the judge rather than the jury is sometimes responsible for determining whether a defendant should receive an entrapment defense,⁴ or for determining whether a false statement is material for purposes of perjury.⁵ More generally, and more controversially of late, issues may be allocated to the jury as elements of the offense or reserved for the judge to decide, perhaps with a reduced evidentiary burden, at sentencing. It is possible that judges and juries differ in terms of their inclination, or capacity, to apply desert-based versus deterrence-based considerations in making their decisions. As experts and repeat players, judges might be able to weigh the complex empirical information necessary to pursue a utilitarian strategy. On the other hand, lay juries might be better situated to make moral judgments of blameworthiness. It may be worth considering whether the law does, or should, allocate authority to judges and juries based on their tendencies or strengths, either as a way to further a single substantive goal or to “mediate” an overemphasis on one goal by taking account of another.⁶

Second, the article seems reticent, perhaps wisely so, about whether mediation is a zero-sum game. One version of its account is that when one goal, desert or deterrence, “loses” to the other at

⁴ See, e.g., Model Penal Code § 2.13(2) (1962).

⁵ In other words, the materiality question is categorized as an issue of law rather than an issue of fact. See, e.g., Model Penal Code § 241.1(2).

⁶ For a discussion of the relative decisionmaking strengths of judges and juries, as well as other institutional players such as legislatures and sentencing commissions, see Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 *Colum. L. Rev.* 1124 (2005).

the substantive-rule level, it might (or even is likely to?) "win" at the evidentiary-rule level, thereby somehow breaking even. This is obviously better from the perspective of that goal than if it had lost both times, but it's also worse from the perspective of the other goal than if that goal had won both times. Or is it? Another interpretation is that the mediation process, instead of involving I-win-you-lose tradeoffs or compromises, can lead to rule combinations that reconcile or harmonize both goals, accomplishing *both* desert and deterrence better than an alternative combination.⁷ In other words, it probably does not matter simply *that* mediation occurs, but also *how* the mediation occurs. For some issues, "offsetting" a deterrence-based substantive rule with a desert-based evidentiary rule might skew the overall balance in one direction (or it might achieve both goals less well) relative to a mediation process that pairs the goals with the rules in the opposite way.

Considering the matter at the broadest level—even assuming that mediation is desirable or inevitable—there are three basic ways mediation might be achieved: (1) adopting consistently retributivist criminal rules balanced by consistently utilitarian evidence rules; (2) adopting consistently utilitarian criminal rules balanced by consistently retributivist evidence rules; or (3) having both retributivist and utilitarian strands in both the substantive and evidentiary law, with each mediating the other where necessary, in piecemeal fashion, rather than across the board. The last option is reflected in existing law, as Bierschbach and Stein describe it. Is that the best of the three options, either from a neutral perspective (meaning one that favors neither desert nor deterrence in the abstract) or from the perspective of either goal considered separately? Given the choice, and forced to acknowledge that one set of rules will mediate the other, would a diehard retributivist choose to control all the criminal law, all the evidence law, or some of each? Would a diehard utilitarian give the same response? Some

⁷ It is worth noting here that a number of the rules Bierschbach and Stein discuss, whether substantive or evidentiary, might be overdetermined in the sense that they might advance, or be justified by, both desert and deterrence goals simultaneously. Pursuing desert is one good way—perhaps the best way—to promote deterrence also. See Robinson & Cahill, *supra* note 2, at 21–23, 118–19, 127–30; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453 (1997). Similarly, a good way to deter future violations is to punish those who have committed past violations—that is, those who deserve punishment.

have suggested that the best possible system is one that adopts a utilitarian strategy overall, but applies desert principles in individual cases.⁸ On the other hand, as Bierschbach and Stein note, the retributivist agenda tends to focus on substantive rather than procedural law and might be quite reluctant to let utilitarians have control over the substantive rules.⁹ In any case, it might be interesting to consider whether differing distributions of desert-based or deterrence-based rules as between substantive and procedural law would seem more or less palatable, appropriate, or effective, whatever one's underlying principled commitments may be.

I find Bierschbach and Stein's piece helpful and provocative in its willingness to break down (or at least knock a hole in) the wall between substantive and procedural (specifically evidentiary) law—a wall my colleague Professor Edward Cheng is more committed to keeping up than I am, which is probably in keeping with the fact that he thinks more about evidence law and I think more about substantive criminal law.¹⁰ Just as interesting, however, is Bierschbach and Stein's interest in breaking down a wall within the substantive law itself, separating utilitarians from retributivists. There seems to be a modern trend in the direction of finding commonalities between these theories or ways to pursue both of them, either by claiming that a desert-based scheme will promote deterrence;¹¹ or by defending a consequentialist version of retributivism that might more easily coexist with deterrence in a broadly consequentialist scheme;¹² or by giving each theory its own sphere of influence within the criminal justice system as a whole.¹³ “Mediating Rules in Criminal Law” is perhaps less optimistic than these other

⁸ See H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 3–13 (1968) (identifying utilitarian considerations as a “general justifying aim” for criminal law, but also finding retributive considerations relevant to “distribution” of punishment, that is, decisions about which individuals to punish); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955) (asserting that utilitarian concerns justify the existence of institutions of punishment, whereas retributive concerns should guide application of punishment in particular cases).

⁹ See Bierschbach & Stein, *supra* note 1, at 1205–06.

¹⁰ See Edward K. Cheng, *The Perils of Evidentiary Manipulation*, 93 *Va. L. Rev. In Brief* 191 (2007), <http://www.virginialawreview.org/inbrief/2007/09/24/cheng.pdf>.

¹¹ See sources cited *supra* note 7.

¹² See Cahill, *supra* note 2.

¹³ See sources cited *supra* note 8; John Bronsteen, *Retribution's Role* (Aug. 14, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007091.

efforts about the hope of finding common ground at the level of principle, in that it assumes that the two goals are at loggerheads and the rules must mediate their fundamental conflicts. Still, it shares the ambition to find, and perhaps build, connections between traditionally distinct visions of criminal law and between traditionally distinct aspects of the criminal justice system.

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