1-1-2010

The Intuition of Retribution

Orin S. Kerr
Berkeley Law

The Intuition of Retribution

http://crim.jotwell.com/the-intuition-of-retribution/

Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 **Minn. L. Rev.** 1829 (2007).

Orin Kerr

I am a big fan of the criminal law scholarship of Paul Robinson. This article in particular is a valuable work of scholarship that should be helpful to any professor or student of criminal law.

To understand the value of the article, consider the beginning of first-year classes in criminal law. The standard way to teach criminal law is to begin with the two basic reasons why we punish criminal conduct: Utilitarian reasons, such as deterrence, and retributive reasons, such as to achieve "just deserts." Utilitarian theories are easy to explain and are intuitive to most students. On the other hand, criminal law professors generally struggle to teach retributive theory. The topic seems impossibly vague: Different academic theorists have different theories as to what they personally think retribution *should* mean, but those academic theories often seem quite apart from what most citizens actually feel. The result is an uncomfortable gap in which professors teach retribution without offering a clear sense of exactly what retribution actually is or how retributive theories should play into arguments about criminal punishment.

This article, co-authored by Robinson and Penn psychology professor Robert Kurzban, argues that whatever the difference among views of retribution and justice *among theorists*, widely-shared perceptions of justice exist *among laypersons* in a particularly important set of punishment questions. That is, there are types of criminal law problems that generate pretty fixed notions of retributive punishment among most people, as well as other types of criminal law problems that do not.

They make the argument primarily based on a series of experiments. In the first set of experiments, test-takers were provided a list of 24 different short scenarios involving possible criminal acts. The crimes included thefts, assaults, robbery, rape, various types of homicide, and other kinds of physical and property-based crimes, all in a range of situations, including some that brought up issues of self-defense, duress, the insanity defense, and the like. The test-takers were asked to rank the 24 scenarios in order of how much criminal punishment, if any, the wrongdoers deserved. The results revealed a tremendous amount of shared intuition among test-takers: They shared a great deal of agreement as to what facts deserved punishment and what scenarios deserved more or less serious punishments.

In the second set of experiments, test-takers were provided a list of 12 short scenarios involving crimes that have generated significant public debate: drunk driving, drug offenses, late-term abortions, prostitution, and a few others. Again, the test-takers were asked to rank the scenarios. This time, however, test-takers revealed a wide range of variation in their views, with different study participants disagreeing as to which crimes were more or less serious and how they compared to the traditional offenses.

The authors conclude with some normative ideas that they develop in subsequent work, the gist of which is that criminal law theorists need to grapple with these surprisingly fixed notions of justice in a wide range of traditional crimes. Whatever theorists may think people should feel as a normative matter, as an empirical matter, members of the public share surprisingly fixed notions of justice in traditional crimes—and especially the kinds of crimes discussed in a criminal law course.

From the standpoint of law reform, then, reformers likely need to accept these shared intuitions as settled. And from the standpoint of teaching criminal law, I would add, professors need to recognize that there are relatively fixed and surprisingly hard-wired judgments widely shared in society that help to generate the legal rules found in criminal law codes and casebooks.

Cite as: Orin Kerr, *The Intuition of Retribution*, JOTWELL (February 17, 2010) (reviewing Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 **Minn. L. Rev.** 1829 (2007)), http://crim.jotwell.com/the-intuition-of-retribution/.