

Criminal Justice in the Information Age: A Punishment Theory Paradox

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I. CRIMINAL JUSTICE IN THE INFORMATION AGE

The Federal Bureau of Investigation has established a national DNA database. All states are contributing to it, submitting DNA exemplars from persons sent to prison or even arrested.¹ As the list of database-solved criminal cases grows, one can expect pressure to broaden the pool of offenders or potential offenders from which exemplars are taken. With the availability of even faster computers and the decreasing cost and increasing reliability of DNA testing, it is not too difficult to imagine a future in which any body scraping or remnant—a hair or body fluid, such as a smear of sweat—left at a crime scene will be enough to generate a specific name and address.

DNA advances are just one source of increased crime fighting power in the information age. Video surveillance cameras are increasingly used in public and private spaces. They are now common in England and in much of Europe.² Advances in facial recognition and photo enhancement technology allow quicker creation and distribution of more accurate images of suspects.³ Special software helps criminal investigators organize information and search it for leads.⁴ The use of global positioning satellites makes it possible to track potential and past offenders.⁵ Developments in encryption technology allow government to better investigate white collar offenses in which a computer is used.⁶ Advances in infrared technology allow more effective yet undisclosed police searches.⁷ Improved fingerprint technology⁸

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¹ See Nicholas Wade, *FBI Set to Open Its DNA Database for Fighting Crime*, N.Y. TIMES, Oct. 12, 1998, at A6.

² See, e.g., Steve Coll, *Britain's Omnipresent Private Eyes; Widespread Use of Police Cameras Sparks Rights Debate*, WASH. POST, Aug. 8, 1994, at A1; Richard Thomas, *National City has "Robocop" for Speeders*, THE SAN DIEGO UNION-TRIBUNE, Dec. 12, 1990, at B1; Richard Thomas, *Computer Video Technique Helps Police Face the Future*, CHI. SUN-TIMES, Oct. 18, 1998, at 33; *Spy Cameras to Be Set Up at Key Areas in London*, STRAITS TIMES (Singapore), July 23, 1997, at 4.

³ See David Reyes, *Technology Puts New Face on Police Work*, L.A. TIMES, May 24, 1993, at B1.

⁴ See Scott Baldauf, *Gigabyte Gumshoe; Detectives Turn from Shoe Leather to Software*, CHI. SUN-TIMES, July 12, 1998, at 32.

⁵ See Matt Lait, *Bringing the LAPD into the 21st Century*, L.A. TIMES, Sept. 7, 1997, at B1.

⁶ See L.A. Lorek, *Clipper Chip Scrambles Debate Over Communications Decoding*, SUN-SENTINEL (Fort Lauderdale), June 12, 1994, at 1F.

⁷ See Jonathan S. Landay, *Police Tap High-Tech Tools of Military to Fight Crime*, CHRISTIAN SCIENCE MONITOR, Apr. 2, 1997, at 1.

and the development of new biometric markers—scent and voice prints—increase investigators' power to identify suspects.⁹

One can imagine a world, even within a democratic society that values personal privacy, in which high clearance rates (the rate at which police identify and arrest a suspect for reported offenses) are the norm and in which the availability of reliable evidence produces high prosecution and conviction rates—in other words, a world in which most crimes are solved and most perpetrators caught and punished.

The possibility of such a future suggests it is worth considering this question: What would criminal law look like in a high-punishment-rate world, and how would it differ from what it is today?

II. A SKETCH OF THE CURRENT CONFLICTING VIEWS ON THE PROPER DISTRIBUTION OF CRIMINAL LIABILITY AND PUNISHMENT

A standard long-running dispute in criminal law pits those who want to distribute liability and punishment in the way that most effectively (and efficiently) avoids future crime (commonly called the “crime control” view) against those who want to distribute punishment according to the moral desert of the offender (commonly called the “desert” view).

The primary mechanisms of the crime control view are deterrence and incapacitation. That is, the view seeks to distribute liability and punishment in a way that most effectively deters future offenders by threat of punishment, or in a way that most effectively incapacitates those who are not likely to be deterred.

The crime control view is criticized by desert advocates because distributive principles of deterrence and incapacitation would impose punishment according to criteria that desert theorists think unjust. Greater punishment in high-profile cases makes good deterrence sense—maximizing the deterrent effect of the punishment dollar—but violates principles of desert because it does not track an offender's degree of moral blameworthiness. Giving long prison terms to young offenders who commit minor offenses but who are predicted to offend more seriously in the future makes good incapacitation sense but again violates desert. (The effects can be the reverse as well: incapacitation theory might not waste punishment on a serious offense that will not reoccur, but a desert distribution might insist on it.)

In other words, a crime control distribution is criticized because it either does injustice or fails to do justice. A desert distribution is criticized because it allows avoidable crime—those offenses that could have been deterred or that could have been avoided by incapacitating the dangerous.¹⁰

Crime control principles are also criticized on their own terms: A deterrence

⁸ See Ralph Vartabedian, *The Power, Peril at Our Fingertips*, L.A. TIMES, Apr. 2, 1995, at A1.

⁹ See *Human Bar Codes; Forget Those Passwords: Biometrics is the Future—and Present—Identifier*, THE SAN DIEGO UNION-TRIBUNE, May 13, 1998, at E1.

¹⁰ See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 25–28 (1987).

distributive principle makes little sense, some argue, because manipulation of rules to maximize deterrence has little chance of having an effect, in large part because the deterrent threat of the present criminal justice system is so ineffective. The present criminal justice system is a sieve: many offenses are not reported, often because the police are seen as impotent to do anything; most reported offenses are not cleared (no arrest is made); and of those arrested, most are not convicted (and of those convicted, many are not punished). The end result is a low likelihood of getting punished for an offense. In rough terms, a person contemplating a rape faces a twelve percent chance of going to prison for that offense. Robbery presents less than a four percent chance. Assault, burglary, larceny, and motor vehicle theft are each a 100-to-1 shot. Many potential offenders will not be deterred by these threats.¹¹

An incapacitation principle, in turn, is unwise, some argue, because under present conditions it would be inefficient and costly, both economically and morally. The criticism focuses primarily on the high false positive rate of predictions of future criminality—commonly two of three. Thus, three times as many people must be incarcerated as actually present a risk. In our present system, that means a staggering cost of incarceration. And the human cost also is high. When the proportion of incarcerated persons in any given community reaches a significant level, it can cause significant social dislocation (as in the District of Columbia, for example, where a significant proportion of black males in their twenties and thirties are under criminal justice system control at any given time). At the same time, it is also argued that using the criminal justice system as a preventive device provides poor social protection because of the logical constraints inherent in cloaking such preventive detention as criminal justice.¹²

The crime control picture is considerably more complex than this; I have just sketched the broad contours of the debate as background.

This continuing struggle between desert and crime control has resulted in a criminal justice system whose governing principles might be summarized this way: Desert commonly has more influence than crime control in assigning criminal liability, but the two share control of sentencing.

But if the information age did bring high clearance and conviction rates, one might predict that this would all change. Such a world would provide the conditions for a true and effective deterrent threat. Even a fifty percent likelihood of getting convicted and punished would make the deterrent threat real. And there is a spill-over benefit that supports use of the incapacitation mechanism: As more people are deterred, the population of undeterred people requiring incapacitation grows smaller and, therefore, the costs of such a program—financial and human—become more

¹¹ See, e.g., Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Social Science Investigation*, 24 OXFORD J. LEGAL STUD. (forthcoming 2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 757 (2003).

¹² See, e.g., JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47–49 (1981); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

feasible. One might predict, then, that an information age of high punishment rates would bring the crime control principles to their strong point and have them dominate desert as the distributive principle.

This is where things get interesting. I think it is possible that just the opposite may occur: The conditions that make crime control mechanisms finally relevant and even powerful, also ultimately may render such mechanisms obsolete as distributive principles. That is, the success of crime control mechanisms may paradoxically lead to the dominance of desert as a distributive principle.

III. THE PARADOX: CRIME CONTROL SUCCESS PROMOTES THE DOMINATION OF DESERT?

Why might the success of crime control mechanisms promote the dominance of desert? First, consider that an increased probability of punishment increases the deterrent threat of all punishment, even that distributed according to a desert principle. That is, even a desert system gets the benefit of improved deterrence. A pure deterrence-based system might deter even more, but the deterrent advantage of such a system over a desert distribution lies only in its *marginal* increase in deterrent effectiveness, which may remain as limited as it is today. To prefer a deterrence distribution, one must conclude that the additional deterrence coming from those instances in which deterrence violates desert outweighs the societal interest in distributing liability and punishment according to desert.

At the same time, a more effective deterrent threat is likely to result in a reduced public concern about crime generally. The deterrent effectiveness inherent in even a desert distribution might well be enough to cause crime to fade as the significant social problem that it is today. It would be easier to justify injustice necessary for crime control in a world where crime is out of control than in one in which crime is no longer a serious problem.

Of course, this analysis assumes there is some inherent value in having a desert distribution. Certainly the retributivists think so. And there also are utilitarian arguments in support of a desert distribution, as I have sketched elsewhere.¹³ But in this Commentary, I make a prediction about what will happen, not what should. My grounds for thinking that there will be some natural preference for a desert distribution comes from social science research that seems to suggest that desert is the “default” criterion that people naturally prefer in the distribution of criminal liability and punishment. It is an actor’s perceived blameworthiness, as reflected in the extent of the person’s culpability and the harm caused, for example, rather than the prediction of future harms that might be avoided or the factors relevant to effective deterrence, that naturally guide people’s judgment about how much punishment should be imposed.¹⁴

¹³ See generally sources cited *supra* note 11.

¹⁴ See John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659 (2000); Kevin M. Carlsmith, John M. Darley &

This suggests that people's distributive preferences may be altered by contemporary conditions. If they feel threatened and embattled, they may think justice is a luxury they cannot afford. But as punishment rates go up and crime rates go down, the fading sense of fear may make people feel that justice is a luxury they can afford again.