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HOFSTRA LAW REVIEW

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FOREWORD: IS JUSTICE JUST US?

*Christopher Slobogin**

In all cases of divergence between the standard of the common-law and the standard of the public, it goes without saying that the latter will prevail in the end. Sooner or later what public opinion demands will be recognized and enforced by the courts. A Bench and Bar trained in individualist theories and firm in the persuasion that the so-called legal justice is an absolute and a necessary standard, from which there may be no departure without the destruction of the legal order, may retard but cannot prevent progress to the newer standard recognized by the sociologist.

Roscoe Pound, 1908¹

The certitude evinced by this passage, written by the founder of sociological jurisprudence almost 100 years ago, belies its highly provocative nature. Is it true that law inexorably finds common ground with “public standards”? Isn’t it possible that, to the extent there is a synergy between legal and lay precepts, the impetus is in the other direction, with the law influencing the citizenry? More generally, is the convergence between law and popular will that Dean Pound described a good thing, as he implies? If so, should the law consciously incorporate lay views into its calculus? Or should it resist and try to change public

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1. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

opinion when legal theorists or policymakers think there are good grounds for doing so? In answering the latter two questions, should we care how much the public understands about fairness concerns and utilitarian, cost-benefit analysis? Assuming the "standard of the public" is an important or dispositive guidepost for the law, should we make attempts, outside of the political process, to discern what it is? If so, how?

This Symposium issue of the *Hofstra Law Review*, which is based on a program that took place at the American Association of Law Schools' Annual Meeting in January 2000, is devoted to a discussion of these issues.² The springboard for this discussion is a seminal book written by Paul Robinson, a law professor at Northwestern Law School, and John Darley, a social psychologist at Princeton University, entitled *Justice, Liability, and Blame: Community Views and the Criminal Law*.³ As the title suggests, this book provides a considerable amount of empirical information about how the public views various aspects of the criminal law.

More specifically, *Justice, Liability, and Blame* describes eighteen studies exploring lay perspectives on issues ranging from attempt liability to sentencing policy.⁴ Some of the findings reported in the book are dramatic, because they suggest that lay views often diverge substantially from Dean Pound's "common-law" and even more frequently depart from the conclusions of the lawyers, judges and professors of the American Law Institute who worked on the highly influential Model Penal Code ("MPC").⁵ For instance, Robinson and Darley's subjects vigorously rejected the MPC's stance that the punishment for attempt should be identical to the punishment for the completed offense and, contrary to both the MPC and the common-law, believed that renunciation of a completed offense should result in significant mitigation.⁶ They also required actual encouragement or assistance for accomplice liabil-

2. The panel, entitled *Is Justice Just Us?: Using Social Science to Inform the Substantive Criminal Law*, was sponsored by the Criminal Justice Section and the Social Science and Law Section of the American Association of Law Schools. It featured Paul Robinson, Deborah Denno, Dan Kahan, Christopher Slobogin (chair of the Criminal Justice Section), and Tom Tyler, with Cheryl Hanna (chair of the Social Science and Law Section) as moderator.

3. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995).

4. *See id.*

5. MODEL PENAL CODE (1985).

6. *See* ROBINSON & DARLEY, *supra* note 3, at 14-28. Throughout this paragraph of the foreword, the description of the "views" of Robinson and Darley's subjects reports the majority position; not all subjects agreed with the positions reported in the text.

ity, thus rejecting the MPC's imposition of punishment for unsuccessful complicity.⁷ Further, in contrast to both the MPC and the common-law, they recognized gradations of accomplice liability depending upon the actual assistance provided, under no circumstances giving the accomplice the same punishment as the principal.⁸ Also contrary to both the MPC and the common-law, the subjects indicated that even a person with no duty toward a drowning person should be liable for a failure to save, except when there is a significant danger in doing so,⁹ and that even a person with a significant duty to act and an ability to do so in an easy and safe manner should not be punished as severely as one with the same mental state who affirmatively commits the act.¹⁰ The subjects were much more generous than the drafters of the MPC and somewhat more willing than common-law courts to provide a justification defense, whether in connection with the retreat doctrine, the use of deadly force, or the defense of property.¹¹ They also indicated that spousal rape and rape involving homosexual couples deserved approximately equal punishment, contrary to the relevant MPC provisions, which treat spousal rape more leniently and homosexual rape more harshly.¹² As a final example, Robinson and Darley's subjects roundly rejected the common-law felony-murder doctrine by ascribing only manslaughter liability when the felon negligently kills during a robbery and only negligent homicide liability when a bystander kills a co-felon.¹³ This brief synopsis describes only a fraction of the lay views uncovered by Robinson and Darley, but it provides a sufficient flavor of the significant gaps between those views and the MPC and common-law positions.

What should the law make of all this? We could throw out any code provision that conflicts with the consensus of the public, as Dean Pound seems to suggest. Or we could treat the empirical information as interesting food for thought but otherwise ignore it. Finally, we could adopt some sort of compromise, for instance, one that changes doctrine only when lay views are consistent with plausible retributive or utilitarian rationales, or only when those views indicate that the law is "morally" outdated, as might be the case with the MPC's spousal rape and homosexual rape provisions. Ultimately, we need to decide whether

7. *See id.* at 33-42.

8. *See id.*

9. *See id.* at 42-50.

10. *See id.*

11. *See id.* at 54-79.

12. *See id.* at 161-69.

13. *See id.* at 161-81.

retributive philosophy should pay attention to lay views and whether utilitarian analysis should take into account the effect of ignoring lay tastes.

In *Justice, Liability, and Blame*, Robinson and Darley appear to adopt the position that community opinions should influence both types of reasoning. With respect to retributive analysis, they state: "[I]f a rule derived by desert theorists is judged overwhelmingly by the community to be unjust, such disagreement may cast some doubt upon the accuracy of the rule in assessing a person's moral blameworthiness, at least suggesting that closer scrutiny of the reasoning behind the rule is required."¹⁴ Further, when code drafters disagree about the "moral intuitions" of the community, "empirical findings . . . should be of considerable utility in resolving the controversy."¹⁵ With respect to the utilitarian calculus, they suggest that a criminal code that departs significantly from community views is likely to lose "moral credibility," and thus damage people's willingness to comply with the criminal law.¹⁶ If the criminal law is perceived as unjustly criminalizing conduct, society may "lose faith in the system—not only in the specific laws that lead to the unjust result, but in the entire code and criminal justice system enforcing that code."¹⁷ Conversely, if the system fails to criminalize conduct that the public thinks should be sanctioned, "[t]he community is likely to engage in extralegal vigilante actions, with all of the dangers that that suggests."¹⁸

In a previous review of *Justice, Liability, and Blame*, I expressed doubts about both of these reasons for paying attention to positions endorsed by the community.¹⁹ Put simply, I raised three concerns. In considering the advisability of relying on lay views for determining just deserts, I wondered whether ordinary citizens of the type polled by Robinson and Darley have thought deeply enough about the relevant issues, are sufficiently informed about the legal context in which a given code provision operates, and can be trusted to report stable beliefs rather than transient positions based on reactions to current events.²⁰ On the

14. *Id.* at 6.

15. *Id.* at 214.

16. *See id.* at 6.

17. *Id.* at 7.

18. *Id.*

19. *See* Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315 (1996).

20. *See id.* at 323-26. Consider the following analogy. Generally we do not allow a criminal defendant to make an important decision about waiving rights or asserting defenses unless, at a minimum, he or she understands the risks and benefits of the decision, as well as of the alterna-

loss of compliance claim, I conjectured that differences between lay and code positions on arcane subjects such as the *actus reus* for attempt and accomplice liability are unlikely to occasion the disruption hypothesized by Robinson and Darley and that, in any event, education of the public, rather than modification of the law, might be the better response to any divergence.²¹ Finally, while recognizing the sophisticated manner in which Robinson and Darley conducted their research, I pointed to several potential problems in their method of surveying the public, including the nature of their sample, the ambiguity of the grounds for the subjects' choices, and the potentially weak external validity of responses to paper and pencil scenarios.²² In sum, while I found the findings reported in *Justice, Liability, and Blame* extremely thought-provoking, I did not think they should be given much weight in policy-making circles.

The prestigious authors in this Symposium have their own views regarding these issues. We are honored to have Paul Robinson, co-author of *Justice, Liability, and Blame* and a prodigious writer on criminal law issues, as the initial contributor to the Symposium. In his article, Robinson makes clear that he does not rely upon the first, deserts-oriented, rationale for reliance on lay views, but continues to adhere firmly to the utilitarian claim that attention to those views can enhance the moral credibility of, and thus compliance with, the criminal law.²³ Most of his article, however, is devoted to describing the methodology used in the studies described in *Justice, Liability, and Blame*. For those who have not read the book, this article is a useful synopsis of how the studies were conducted. Robinson adds a discussion—not in the book—about the difficulty of constructing scenarios that prevent subjects from reading more into the facts than the researcher intended.²⁴ Not only researchers but hypothetical-obsessed law professors should find this portion of the article enlightening.²⁵

tives, and has no fixed, false beliefs about relevant information. See Christopher Slobogin & Amy Mashburn, *The Criminal Defense Attorney's Fiduciary Duty to Clients with a Mental Disability*, 68 FORDHAM L. REV. 1581, 1594-98 (2000). The same level of knowledge could be required of those who make decisions about the content of the criminal code.

21. See Slobogin, *supra* note 19, at 326-27.

22. See *id.* at 327-32.

23. See Paul H. Robinson, *Testing Lay Intuitions of Justice: How and Why?*, 28 HOFSTRA L. REV., 611, 612-14 (2000).

24. See *id.* at 619-22.

25. Robinson elaborates on this issue in Paul H. Robinson, *Some Doubts About Arguments by Hypothetical*, 88 CAL. L. REV. (forthcoming 2000).

The second contributor to the Symposium, Kenneth Simons, from Boston University School of Law, has written extensively about criminal and tort law issues from a philosophical perspective. He devotes most of his article to a careful look at the role community sentiment might play in a retributive regime.²⁶ Simons notes that, at least on the surface, most retributivists have been “distinctively inhospitable to community views about justice,” relying instead on more abstract notions about autonomy and the need to redress the moral imbalances caused when one person harms another.²⁷ Simons nonetheless tries to identify several ways in which community sentiments could contribute to retributive analysis. Perhaps most interesting is his suggestion that retributivism might set the outer parameters of the criminal law, but at the same time “permit the state the option of criminalizing and punishing a significant range of behavior [through recognition of an] ‘optional’ normative space [in which] the expression of community values through the political process would be consistent with retributive norms.”²⁸ In the end, however, he concludes that “the relevance of community views to retributive principles is complex and uncertain.”²⁹ He goes on to make the same point, more briefly, with respect to the relevance of community views to utilitarian analysis. Here, he argues that the issues raised by an instrumental inquiry—issues concerning which lay views to consider, how much weight they should be given, and how the cost of securing correspondence between those views and the content of the criminal law compare to the benefits of increased compliance (if any)—are just as imponderable as the difficulties raised by a retributivist approach.³⁰

Norman Finkel, a psychologist at Georgetown University and author of the book *Commonsense Justice*,³¹ is much more optimistic about the role lay perspectives might play in fashioning criminal law.³² Finkel endorses Robinson’s argument that legal legitimacy and compliance would be diminished by gaps between the law and community mores, and adds the contention that because lay people are potential jurors and jurors are the ultimate arbiters of the law, we risk nullification or

26. See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635 (2000).

27. See *id.* at 636-38.

28. *Id.* at 639.

29. *Id.* at 640.

30. See *id.* at 660-64.

31. NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* (1995).

32. See Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669 (2000).

legal anarchy if the criminal law strays too far from their beliefs.³³ Finkel then provides a summary of some of his most important findings about lay reactions to criminal justice issues, most of which are consistent with the findings of Robinson and Darley.³⁴ More importantly, his research shows that lay views can be quite sophisticated, even though often at odds with the law. "Commonsense justice," he infers from his research, "reaches for more ingredients than the Law," and is "decidedly unformulaic" (in contrast to the law's usual attempt at invariant rules).³⁵ Although lay justice inevitably rests on "past experiences, intuitions, sentiments, biases, heuristics, construals, and prototypes,"³⁶ it is neither "naive, gullible, nor pop, for it anchors itself in objective reality, to what is reasonable."³⁷ Finkel clearly believes the law needs to pay attention to commonsense justice and, although he does not say so, his conclusions suggest that jury instructions in criminal cases should be less constraining and provide more options.

Tom Tyler, another social scientist (specifically a social psychologist), and John Darley, co-author of *Justice, Liability, and Blame*, look more closely at the compliance rationale for recognizing lay views that both Robinson and Finkel endorse.³⁸ Following Tyler's analysis in his well-known work, *Why People Obey the Law*,³⁹ they identify three ways in which society can try to ensure compliance with the law: deterrence; the development of a moral consensus as to appropriate behavior; and the creation of government institutions which are viewed as legitimate and thus worthy of obeying.⁴⁰ Tyler and Darley are persuaded that the latter two methods of creating law-abidingness are as important as deterrence, and perhaps even more so. Most people follow the law, they assert, not out of fear of incurring sanction but because they believe the

33. See *id.* at 676-79.

34. See *id.* at 683-701. However, some of his findings vary noticeably, which raises the methodological issue of whether we can accurately discern community views. For instance, Robinson and Darley's subjects tended to be more willing than Finkel's to endorse an objective approach to culpability (i.e., one that focuses on the harm caused rather than the subjective intentions and beliefs of the actor). Compare Slobogin, *supra* note 19, at 316-318, which describes the results of Robinson and Darley's studies on attempt, objective, and accomplice liability, with Finkel, *supra* note 32, at 687, which states that "harm was not the major factor in [the subjects'] culpability analyses; rather, it remained intent."

35. Finkel, *supra* note 32, at 701-702.

36. See *id.*

37. *Id.* at 706.

38. See 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 (2000).

39. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

40. See Tyler & Darley, *supra* note 38, at 708.

law reflects the right thing to do and because they respect the authorities who promulgate the law.⁴¹ Thus, compliance can be enhanced by creating moral consensus and by improving the image of our institutions. Tyler and Darley note that we can try to accomplish the first goal both by changing the law to better reflect popular views, as Dean Pound would have us do,⁴² and by changing popular views. They also conclude, however, that in a pluralistic society such as ours—where there may be an unwillingness or an inability to define a common moral code—“effective legal regulation may need to be based on the legitimacy of state authorities.”⁴³ That legitimacy, Tyler’s earlier research shows, is based more on how authorities make decisions than on the precise values those decisions represent. If, as Tyler and Darley reiterate, “people often view their own moral values as irrelevant when a legitimate authority is present,”⁴⁴ then community views about procedural justice may be a more important variable in ensuring compliance than the public’s stance on substantive liability principles.

Deborah Denno, a law professor at Fordham University School of Law who also has a social science degree, focuses more forthrightly than any of the other authors on the methodology issue.⁴⁵ Looking closely at the demographics of Robinson and Darley’s subjects, she suggests that the sample was composed of “extraordinary” rather than “ordinary” people.⁴⁶ Reinforcing Tyler’s point that moral consensus may be difficult to obtain in our society, Denno also reports data showing the widely varying views of different groups, such as whites and blacks, and males and females, on criminal law matters.⁴⁷ Finally, Denno argues that even the collated views of a diverse sample of “ordinary” people are likely to provide a weak foundation for legal policymaking.⁴⁸ For in-

41. See *id.* at 717.

42. See *id.* at 727-29. As an example of this phenomenon Tyler and Darley use my work arguing that the United States Supreme Court should consider aligning its definition of “search” under the Fourth Amendment with societal views on privacy. See Christopher Slobogin and Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 LAW & HUM. BEHAV. 183 (1993). Arguably a key difference between the search context and the one at issue here is that the Supreme Court has held that the Fourth Amendment protects “expectations that ‘society is prepared to recognize as reasonable,’” thus explicitly defining the law in terms of community sentiments. *Id.* at 184 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 749 (1979)).

43. Tyler & Darley, *supra* note 38, at 735.

44. *Id.* at 736.

45. See Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741 (2000).

46. See *id.* at 747-50.

47. See *id.* at 751-52, 55.

48. See *id.* at 752-57.

stance, those views may reflect ignorance of or misperception about crime, crime rates, offender groups, and legal reforms.⁴⁹ Moreover, lay viewpoints on key issues, such as the *actus reus* for attempt liability, may vary significantly depending upon the crime in question (e.g., burglary v. homicide) and other aspects of the researcher's scenario (e.g., the age and social class of the perpetrator and the victim).⁵⁰ Taken together, Denno concludes, these types of problems mean that "educating the public about the law is a preferred route for attempting to ensure that when the public does influence, it does so wisely."⁵¹

Dan Kahan, from Yale Law School, approaches the relevance-of-lay-views issue from a different perspective than the other authors.⁵² He starts with the proposition, derived from cognitive psychology, that all of us, including jurors, "make critical judgments, less by reflectively deducing what is important than by intuitively apprehending it."⁵³ If so, Kahan reasons, jurors will apply their own prototypes in arriving at a verdict regardless of the instructions given.⁵⁴ If Kahan's speculation turns out to be true, Dean Pound was right, at least in a sense—the law as applied by juries will always converge with the standards of the public. At the same time, note the consequence of Kahan's surmise for the non-compliance thesis endorsed by Robinson and Finkel: if verdicts conform to commonsense justice no matter what the law dictates, the public is unlikely to become aware of gaps between its views and legal doctrine. It may be that research on lay views is most usefully employed not by policymakers seeking legitimacy but by practitioners aiming to reach the jury.

The reader of these articles cannot help but be impressed with the complicated nature of the subject. Divining the content of the community's views accurately and fairly is a daunting and time-consuming task. Even if that objective is achieved, a consensus among the citizenry may not emerge, or any consensus that does surface may stem from common misimpressions about crime and the legal system, rather than informed judgments. Assuming we are able to identify accurately the content of informed commonsense justice, then policymakers still have

49. See *id.* at 752-54.

50. See *id.* at 757.

51. *Id.* at 761.

52. See Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793 (2000).

53. *Id.* at 794.

54. Kahan suggests a test of his hypothesis: Do mock jurors, supplied with the relevant doctrine from the Model Penal Code, decide the scenarios any differently than uninstructed subjects? See *id.* at 794-95. Another test might be to compare judicial and lay reactions to the scenarios.

to decide among four options when there is a conflict between those views and a particular legal doctrine: (1) Change the law to conform to community norms; (2) educate the citizenry about the law's norms and hope that it will accept, or at least acquiesce in, the divergence; (3) deceive the public about the difference (or perhaps avoid surveying it in the first place) so as to avoid generating hostility toward the law; or, in what may amount to the same thing, (4) ignore community sentiment. Although my preference is for the second approach when the legal doctrine in question is well-grounded in retributive or utilitarian principles, I confess to greater ambivalence about that position now that I have read the articles in this Symposium.

Surprisingly in this democratic society, there is very little commentary examining whether and why community views are important components of legal analysis and how we might go about determining what those views are. This issue of the *Hofstra Law Review* begins that exploration. It is hoped that the Articles published here will trigger a broad discussion on the usefulness of community sentiment to legal policy-making.