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The Ex Ante Function of the Criminal Law

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Criminal legal codes draw clear lines between permissible and illegal conduct, and the criminal justice system counts on people knowing these lines and governing their conduct accordingly. This is the "ex ante" function of the law; lines are drawn, and because citizens fear punishments or believe in the moral validity of the legal codes they do not cross these lines. But do people in fact know the lines that legal codes draw? The fact that several states have adopted laws that deviate from other state laws enables a field experiment to address this question. Residents (N = 203) of states (Wisconsin, Texas, North Dakota, and South Dakota) that had adopted a minority position on some aspect of criminal law reported the relevant law of their state to be no different than did citizens of "majoritarian" states. Path analyses using structural equation modeling suggest that people make guesses about what their state law holds by extrapolating from their personal view of whether or not the act in question ought to be criminalized.

A legal code in a complex society is designed to have several functions. First, it is designed to announce beforehand the rules by which citizens must conduct themselves, on pain of criminal punishment. Second, if a person violates one of these rules of conduct, the criminal law must determine whether the violator is to be held criminally liable. Third, another part of its adjudicatory function, where liability is imposed the law must determine the general range, or "grade," of punishment to be imposed.

It is the first function that is of interest to us here, the so-called ex ante function of the criminal law. The code announces in advance what actions count as criminal; thus the citizenry can use the announcement to guide their actions to avoid criminal conduct. The law, in other words, draws "bright lines" between

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allowable and unallowable conduct, and those lines enable the citizens to regulate their conduct so they do not break the laws. To use a familiar metaphor, the criminal law specifies what sorts of actions are "out of bounds," and the penalties for those actions, so the players will "stay in bounds." The criminal justice system relies on people knowing the law and knowing where the boundaries for their conduct lie. Ignorance does not excuse unlawful conduct, a fact summarized in the phrase "ignorance of the law is no excuse." Such a rule is defended as a useful means of creating an incentive for citizens to learn the law.

Citizens need to know these codes if these laws are to function successfully in an ex ante mode. If, for instance, the code requires that a person who is aware of the location of a felon report that location to the police, people need to know that the code requires such conduct. If the code requires that a person help another person whose life is in danger, then for the code to guide the behavior of the potential rescuer, he or she has to be aware that the code requires that helping action.

We have argued elsewhere (Robinson & Darley 1995) that to produce law-abiding behavior it is important for the citizens to agree that the code drafters generally got things morally right, but that is a somewhat separable issue. The purpose of this study is primarily to test the first construction; that is, to determine whether people are aware of the lines drawn by legal codes in the United States. Do people know what the law says?

Obviously, it is important to specify what kinds of laws we are talking about. There are many possibilities. As John Coffee (1991:193), a leading legal commentator, points out, "[T]he dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law." This statement means that many actions that do not fit the prototype of a criminal action have, for a number of reasons, been criminalized in order that they may be assigned the penalties that are only available within the criminal justice system. For the moment, set these criminalized actions aside.[1] People are unlikely to know about them, and it is not the knowledge of these rather esoteric types of laws we are talking about.

By contrast, everyone is usually aware that the codes criminalize murder, not because they are aware of the specific statute that criminalizes murder but because they cannot conceive of a criminal code that would not criminalize such an action. So as not to turn the question of whether people are aware of the content of laws into a straw man issue, we decided to test whether people

[1] But don't set them aside forever. If these kinds of actions are criminal, it is particularly important that people know they are criminal and govern their actions accordingly. As Coffee (1991) comments, "[T]his blurring . . . will weaken the efficacy of the criminal law as an instrument of social control."

are aware of the content of laws that are genuinely important and not simply derivations from consensually-held moral intuitions.

For our research, we chose to see whether people are aware of the laws about such issues as being required to assist a stranger in distress, report a known felon, or retreat before using deadly force in defense of self or property. These laws struck us as being about important conduct, about situations in which many of us may find ourselves and in which the guidance of the legal code would be invaluable. More important, however, is that they struck criminal code drafters as important.

In the United States, the bulk of the criminal codes are set by the states rather than the federal government. Prior to the 1960s, the criminal codes of many states were a somewhat disorganized and internally inconsistent amalgamation of survivals from English Common Law. Laws were passed to deal with the circumstances that confronted the states as they became settled, and other idiosyncratic determinants. In the 1950s, having recognized the legal complexities and the moral disproportions created by these discrepancies, the influential American Law Institute set a committee of distinguished scholars to the task of creating a unified criminal code that had consistent doctrinal underpinnings, one that could be a model for adoption by the various states. The results of this work, the *Model Penal Code,* was published in 1962 and has since been adopted, in whole or in part, by more than 36 states. This shared reliance on the *Model Penal Code* (American Law Institute 1980) has created some uniformity among American criminal codes; nonetheless, many states have adopted minority positions on one or another aspect of criminal law.

The fact that some states have deviated from the majority concerning certain laws has created the possibility of a natural experiment about the ex ante function of the legal code. Do the citizens of states holding majoritarian legal views and the citizens of states holding deviant legal views know the different "bright lines" drawn by their legal codes? If the laws are successful in their ex ante function, the citizens of both the deviant and the majoritarian states will be able to correctly say what is and is not criminalized by their state of residence. This is a test of what we have called the "ex ante function." They may or may not *agree with* what the law does and does not criminalize, but they are aware of it.

Our hypothesis is that people do not have a clue about what the laws of their states hold on these important legal issues. This hypothesis stems from various sources and from our own experiences; in doing our research (Carlsmith et al. [under review]; Darley et al. 2000; Robinson & Darley 1995) we learned some of the laws that define criminal conduct, and they are not always or

even often what we thought they would be. (Robinson, who is a law professor and specializes in criminal law, had over the years marked a number of laws that seemed to him to violate citizens' intuitions.) If we were to have guessed what lines the laws draw between criminal and noncriminal conduct, we nonlaw professors would often have guessed entirely wrong. Also, in a previous study (Darley et al. 1996), we asked citizens to report what they understood their state laws to be, and we were struck by how wrong their guesses were.

Why is it that people often think they know their state's laws? We suggest a several step process: First, general attitudes determine whether a person thinks a particular action is morally acceptable or unacceptable. Second, when people are asked their personal view on the criminality of the action, their own moral attitudes determine whether they perceive the action as criminal, and if so, they decide the liability appropriately assigned to that action. Finally, when people are asked whether the state in which they reside criminalizes that action, they answer yes or no not because they know what the code says but because they assume that the state, in its moral wisdom, shares their personal moral views. We believe citizens follow this process consistently when asked to respond to questions about their state's laws.

Why do citizens assume that the legal code corresponds to their moral intuitions? Psychologists have frequently found what they call a "false consensus effect"; thus, a person tends to overestimate the prevalence in others of his or her own opinions and preferences (Ross et al. 1977). We suggest that this overestimation is particularly likely to occur when value-laden beliefs are at issue. In such an instance, people may simply feel that "others agree with me about this law, and so that is what the law says." The premise a person requires for this inference is that the legislators agree with the majority or will go along with the majority opinion, and this is what produces such a correspondence.

Nevertheless, we suspect that it is unlikely that the person goes through this inference chain. The inference is more likely to be spontaneous and automatic. As Krueger and Clement (1994) suggest, "[F]or most people there is a fundamental association between the self and the social norm, an association operating independently from controlled statistical reasoning" (p. 609). By this account, citizens should not be accurate about state laws; instead, their answers about their own state's laws should correlate with their personal views about the criminal or noncriminal nature of the action, which in turn should be predicted by the relevant attitudes. We thus have gathered evidence about this assertion and present our results herein.

Method

Overview

Our research concerns whether various elements of the criminal code are fulfilling their ex ante function—whether they provide the bright lines that set off criminal conduct from allowable conduct. We translated this idea into the following questions: Are citizens of a state aware of the criminal laws of that state? More specifically, does the presence of a particular law in a state cause those citizens to report that their state law is anything close to what the law actually holds? Do they deviate at all from what people in other states think the governing law is? We also provided an initial test of the second version of the ex ante hypothesis: that the presence of a state law comes to affect how people view the behavior in question and thus influences their attitudes and personal beliefs.

We selected four states, each with a somewhat deviant law about what counts as criminal conduct. We asked selected residents of these states to read a series of scenarios (see Appendix A). One scenario described an offense that is criminal in most states, but not in the deviant state, or an action that is criminal in the deviant state but not in the other states. Respondents assigned liability or no liability ratings. If they assigned liability, they were also asked to assign punishment ratings to the actor in the different scenarios. Each state served as an experimental group for one scenario, and as a control group for the other three.

Our first question is whether the citizens of a state with a deviant law knew the content of that state's law; therefore, the residents were asked to report what liability and punishment would be assigned by the law of the state in which they lived. To test our hypothesis, they also reported their own opinions on what liability and punishment was appropriate for the actor, and their attitudes on issues directly relevant to the law in question.

Participants

The 203 participants (37% female) resided in one of four states and were employed by their state university system.[2] We selected individuals from state universities because they represent a relatively diverse population in terms of occupation, income, and education. There were 49 respondents from the

[2] Although it is possible to quarrel with the representativeness of the sample, in a sample consisting of university employees, respondents are, on average, better educated than other citizens of the state. Moreover, people working at an institution in which discussions of legal questions are likely to be more frequent are likely to be better informed about legal codes than are other citizens of the state.

University of Texas at Austin, 50 from the University of Wisconsin at Madison, 46 from the University of South Dakota at Sioux Falls, and 58 from the University of North Dakota at Grand Forks.

We primarily targeted staff members from each university, although faculty and student-employees were not removed from our study. Eighteen percent of our participants held doctorates or professional degrees, 30% held master's degrees, 28% held bachelor's degrees, 13% held associate's degrees, and 10% held high school degrees. The mean age was 42, with a range of ages from 18 to 64.

We excluded respondents who had lived in their current state of residence for less than one year ($N = 6$). Those retained in the sample had lived in their home states, on average, 28 years. Our sample was somewhat racially homogeneous, reflecting the fact that the institutions sampled were in small Midwestern towns: Eighty-six percent described themselves as Caucasian, 3% Asian, 3% Hispanic, and the remainder self-described as "other" or declined to state. Thirty-seven percent identified their political affiliation as Democrat, 17% as Republican, 25% as independent, and the remainder identified themselves with smaller groups (e.g., Libertarian, Green/Environmental).

Materials

Participants read four short vignettes that described potentially illegal behaviors. As we mentioned previously, for each participant one of the vignettes corresponded to a law that was particular to his or her state. The descriptions averaged 143 words. What follows are the particular issues used in the vignettes.

Duty to assist. Following English Common Law tradition, most legal codes do not impose a duty to assist a person in trouble, even if that assistance can be given without much risk or inconvenience to the potential assister. Wisconsin, however, has a state law (Wis. Stat. Ann. §940.34 [1], [2]) that requires its citizens to provide aid, assuming that doing so does not constitute a reasonable threat to the rescuer's own safety. Our vignette describes a person who comes across a victim of a recent mugging who is lying unconscious in the street. Although there is a telephone nearby, the bystander chooses to continue on his way.

Duty to retreat. All states permit the use of force, up to and including deadly force, in self-defense. North Dakota and Wisconsin, however, require that a person attempt to retreat prior to the use of deadly force (N.D. Cent. Code §12.1-05-07; Wis. Stat. Ann. §939.48). To capture views concerning this law, our scenario describes a person whose life is clearly being threatened and

who opts to employ deadly force rather than to retreat by driving away from the scene. He knows he could safely retreat.

Misprision of a felony. In South Dakota, there is a legal obligation to report a known felon (S.D. Codified Laws Ann. §22-11-12), whereas in the rest of the country one need not report such knowledge. Our vignette describes a character who fails to report the whereabouts of an old friend who had recently committed a felony.

Deadly force against property. All states permit the use of deadly force to protect oneself from mortal danger, and all states permit the use of force to protect one's property. With the exception of Texas (Tex. Penal Code Ann. §9.42), however, there must at a minimum be a reasonable belief of a possibility of death or unlawful force before one can employ deadly force in retaliation. In other words, the mere taking of property does not suffice as a defense in the use of deadly force, except in the state of Texas. Our scenario describes an individual who shoots and kills a retreating burglar in order to reclaim stolen property.

Attitude scales. At the conclusion of the study, participants completed a short attitude scale related to each of the ex ante laws we were testing. (See Appendix B for complete scales.) Each subscale consisted of three items that tapped opinions close to the underlying principle of the ex ante laws. Using a 7-point attitude scale, we asked participants to agree or disagree with a series of opinion statements.

Procedure

Recruitment. To identify potential participants, we obtained university phone book listings of university employees, which included e-mail addresses. In two cases this involved our using physical phone books, and in the others it involved virtual, or electronic, phone books. From these lists we selected random individuals, culling out students and faculty when possible.

After generating this list of potential participants, we e-mailed each person a request for their help. We first introduced ourselves and the nature of our project and indicated that we would donate $2 to the United Way (or other charity if they preferred) as a way of thanking them for their participation. We asked them at this point to respond to the e-mail with a simple yes or no. This two-step process provided us with a better response-rate measure. As with random-digit phone surveys, a lack of response is ambiguous at best: It is not clear, e.g., whether the recipient chose not to respond or never existed in the first place. In our particular situation, it became clear that some schools as-

signed e-mail addresses to all employees regardless of whether the employee intended to use the account.[3]

We sent a follow-up letter to the individuals who responded that asked them to point a browser to a World Wide Web site containing our on-line survey. We also gave participants the option to receive a paper version if they preferred. (Ten individuals requested a hard copy.)

We sent 700 requests: 29% complied, 25% refused, and 46% failed to respond to two separate requests. Our response rate, therefore, ranged from a low-estimate of 29% to a high of 54%, depending on how one interprets the lack of response. These numbers compare favorably to responses garnered from phone-bank surveys.

Survey. The opening page of our survey consisted of an informed consent statement, with links to more-detailed descriptions of the study and the researchers. Anonymity was assured. After giving their consent, participants were shown the four vignettes and were asked to indicate whether the perpetrator was guilty of any crime, and if so, what they believed was an appropriate punishment. Respondents replied to the question "What do *you* think is an appropriate punishment?" using a 13-point scale, which began with "no liability" then progressed to "liable, no punishment," "1 day," "2 weeks," etc., and finally to "life in prison" and "death penalty" (see Figure 1).

No liability	Liable, no punishment	1 day	2 wks.	2 mos.	6 mos.	1 yr.	3 yrs.	7 yrs.	15 yrs.	30 yrs.	Life in prison	Death penalty

Figure 1. Punishment scale

It was important to us that the respondents separate their own views about liability from the liabilities they thought the authorities would impose. We therefore told them that we would ask both questions, but on the first question, we made clear that we were interested in their personal opinions, and not what they thought the law stated.

We asked participants, after responding to the four vignettes, to repeat the process a second time, but this time in accordance with what they believed their state law said. We explicitly stated that if they did not know their state's law, guessing was perfectly appropriate, and told them their responses may be quite similar to their personal sentence recommendations or they may be quite different. We asked, "What does your *State* consider an appropriate punishment?" and we used the same 13-point scale for the participants' responses.

[3] We used a variety of techniques to ascertain whether the e-mail accounts were in active use. Although there is no single method that works for all e-mail systems, it was possible for us to "query" several of the servers and to discover that many of the e-mail accounts had never been accessed.

The survey concluded with the attitude scales and a variety of demographic questions, such as age, race, political affiliation, education, and residence history.

Results

Preliminary Analyses

Demographics. Not surprisingly, there were a few preexisting differences in our sample. Texas, e.g., was slightly more racially diverse than the other three states. South Dakota represented a slightly older, more educated, wealthier, and more conservative group relative to our other samples. Although significant, these differences were nonetheless small (e.g., the average age difference was less than 5 years). All subsequent analyses were unaffected when these variables were controlled.

Survey format. Ten of our respondents asked for hard copies of the survey instrument. This sample did not appear different in any meaningful way, and the results do not change appreciably when they were removed. Accordingly, we pooled these responses with the rest of the data.

Attitude scales. The four attitude subscales revealed acceptable reliability as indicated by the Cronbach alpha. The individual reliabilities for each 3-item subscale ranged from 0.53 to 0.73, with an average of 0.64, indicating that the three items correlated with each other and together represented a coherent construct. We coded all items so that higher scores corresponded to respondents' attitudes predicting longer prison sentences.

Power Analyses

It is our assertion that the ex ante function of these laws is failing: People do not know their state laws. Thus we are asserting the null hypothesis, and it is incumbent upon us to demonstrate that, had a difference truly existed, we would have detected its existence. Accordingly, we first conducted a power analysis to show that we were providing a fair test of the ex ante hypothesis.[4]

A power analysis requires a known, or at least a predicted, effect size (e.g., the magnitude of an effect, as opposed to the statistical significance or reliability of the effect). Since this type

[4] There are two classes of inferential errors that researchers seek to avoid through the use of statistics. The first, referred to as a Type I error, is defined as the probability of erroneously concluding that an effect does exist. By convention, we set that probability level at 0.05. The second, referred to as a Type II error, is relevant in this situation. It is defined as the probability of erroneously concluding that an effect does not exist, when it in fact does exist. By convention (Cohen 1977), we set the probability of accuracy at 0.80 or above.

of research has not been conducted before, and since the authors of the ex ante laws certainly did not quantify the expected effect size in writing the law, we were left to estimate this number ourselves. In certain circumstances (Prentice & Miller 1992) small effects can be important, but in the present context this does not strike us as the case. Applied researchers generally argue that small effects rarely have any real-world implications and that effects that are only detectable through carefully calibrated statistical techniques have little or no practical application. In the present case, the authors of the law are generally expressing the desire to change the behavior of the citizenry, which by almost any standard is considered a very "large" effect. According to Cohen (1977), a large effect translates into an effect size of 0.80, and a medium effect translates into 0.50.[5] Based on these estimates, our study had an 85% chance of detecting a medium effect (at $p = 0.05$), and a greater than 95% likelihood of detecting a large effect, had they truly existed (Rosenthal & Rosnow 1984:360). Based on this result, we are reasonably confident that if the ex ante function of these laws is operating, this study had the power to detect it.

Primary Analyses

In this study we first tested the "weak" version of the ex ante hypothesis: that people are aware of their state laws. We did this, first, using a chi-square analysis on whether participants predicted that their state would assign punishment for the given offense and, second, using a more sensitive Analysis of Variance procedure (ANOVA). Next, we tested the "strong" version of the ex ante hypothesis: that a change in state law will drive a change in personally held social norm beliefs and, eventually, although not tested, a change in behavior. This hypothesis was tested with a two-way ANOVA, using the attitude scales and personal punishment recommendation as dependent measures, and case and state as independent variables. Finally, we concluded by generating a path analysis through structural equation modeling (SEM) to test the hypothesis that people are aware of their state laws against our more complex hypothesis described previously.

Chi-square analysis. Are respondents aware of the character of the laws of their state? Can they discriminate between behaviors that the state has criminalized and those that are condoned? Our first concern is not whether citizens could accurately predict the sentence that a judge would hand down in a case but whether

[5] An alternate way to think about an effect size is in terms of the variance accounted for in the dependent variable (DV) by changes in the independent variable (IV). In this study, a "medium" effect size indicates that 25% of the variation in people's estimates of their state's reaction to the crime (the DV) is attributable to how the law is written (the IV). A large effect indicates that 64% of those estimates can be explained by state law.

they know if a behavior is criminalized at all. We tested whether the proportion of citizens who believe a behavior is criminalized differs between states with differing laws. We dichotomized respondents' estimates of state sentences on the basis of whether or not punishment was assigned, and we tested whether citizens of states that criminalize the given behavior are any more likely to predict punishment for the perpetrator than are the citizens of states that do not prohibit the behavior.

A chi-square analysis revealed a similar pattern of results across three of the four vignettes (see Table 1). A similar propor-

Table 1. Percentage of Respondents Predicting State Punishment

Case	*Majority States* Actual (Expected)	*Deviant States* Actual (Expected)	*Deviant* State	Chi-Square
Duty to assist	39 (0)	36 (100)	WI	0.16
Deadly force	77 (100)	49 (0)	TX	13.16*
Duty to retreat	71 (0)	79 (100)	ND & WI	1.85
Misprision of a felon	76 (0)	80 (100)	SD	0.30

Note: * indicates $p < 0.001$

tion of respondents from both deviant and majoritarian states predicted punishment regardless of their state's law. E.g., 36% of Wisconsinites believed their state would punish someone for failing to assist a person in need, whereas 39% of all other respondents believed this would be criminalized.

In other words, in three cases, state law does not appear to be a factor in how people come to "know" their state law. The exception to this pattern comes from the Texas law that permits the use of deadly force in defense of property. It is clear that Texans do, in fact, know or guess that their state law does not punish a person for this behavior. For now, simply note this possible exception to the generalization that people do not seem to be aware of the laws of their state.

ANOVA of predicted state sentence by case and state law. In the preceding analysis we took a dichotomous approach to the data by coding all of the responses as either punishing or not punishing. In the next analysis we employed a more sensitive test by utilizing the full range of responses. Figure 2 displays the average predicted state sentence for each case, grouped according to whether or not the state has a deviant law.[6]

[6] For this analysis, we treated our scale as a continuous interval scale, although it does not meet this assumption. The differences between "no liability," "liable but no punishment," "one day," and "one week" are clearly not equivalent; similarly, the differences between "30 years in jail," "life in jail," and "capital punishment" are not the same. We conducted the same analyses without the endpoints and with true interval scaling (according to actual sentence length) and obtained essentially identical results under both conditions.

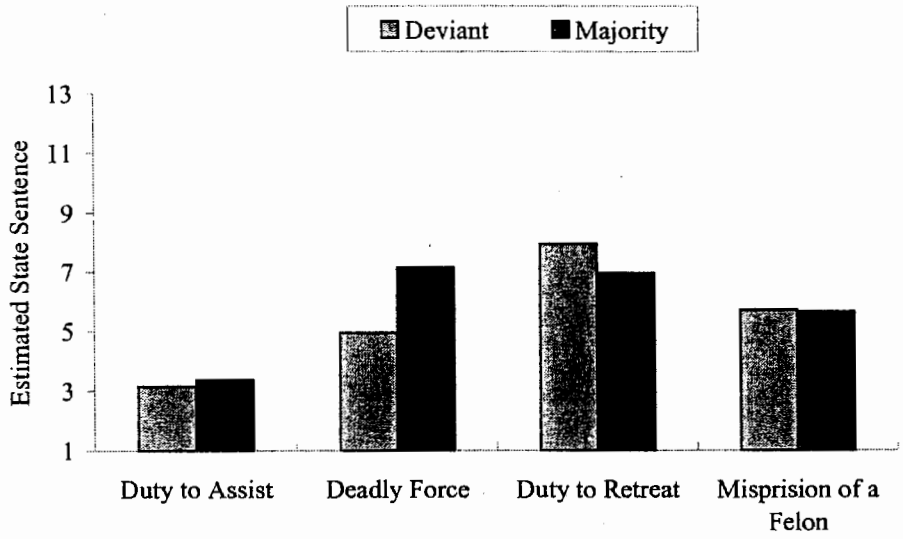


Figure 2. State sentencing bar graph: 2 (deviant/majority) x 4 (scenario)

As before, state law seems to make little difference in people's predictions of their state's sentence: With respect to "duty to assist," respondents from Wisconsin (the deviant state in this case) predicted a sentence of 3.2 (corresponding to slightly more than one day in jail), whereas all of the other respondents predicted 3.4 (t (86) = 0.51, *ns*).[7] Similarly, the difference was negligible for the "misprision of a felon" case (5.7 versus 5.6, t (64) = -0.14, *ns*) and was marginally different for the "duty to retreat" (7.9 versus 7.0, t (167) = -1.63, p = 0.11). Finally, as expected from the chi-square analysis, the residents of Texas predicted that their state government would respond more leniently toward the use of "deadly force." The average Texas sentence was 5.0 (corresponding to two months in jail), whereas residents of the other three states averaged 7.1 (approximately one year in jail). This difference was significant (t (63) = 3.35, p = 0.001), and it continues to suggest that Texans might know their state's rules on the use of deadly force.

One might expect longtime residents of a state or those who have higher levels of education to have a better sense of what their state laws are. For the most part, the respondents did not. For two of the four actions, misprision of a felon and duty to assist, there was no significant correlation between a person's educational level and the severity of the predicted state sentence for residents of either the majoritarian or the deviant state. For the two actions concerning the limits of self-defense, there was no relationship between educational level and the predicted severity of the state sentence for residents of the majoritarian states. Concerning the use of deadly force in defense of property,

[7] All tests in this analysis assume unequal variances to control for our often-disparate sample sizes.

citizens of the deviant state, Texas, showed a modest but significant negative correlation ($r = -0.17$), indicating that the more educated the citizen, the less severe the sentence he or she thought the state law assigned. Since, in Texas, the state law assigns a zero sentence to use of deadly force in defense of property, the more-educated citizens were slightly more correct about the true state sentence. Concerning the necessity to retreat before using deadly force, North Dakota and Wisconsin explicitly require retreat, thus, one might expect respondents in those states to assign higher sentences to an actor who uses deadly force rather than retreats. However, we found that the more-educated citizens of these states actually assigned lower sentences ($r = -0.30$)!

No significant correlations emerged between the length of time the citizen had lived in his or her state of residence and the duration of the sentence assigned to the relevant crime in any of the states.

ANOVA of personal sentence recommendation by case and state law. As we have mentioned, a possible function of the legal codes is to morally educate the citizens who are governed by these codes. Even though citizens may be unaware of the exact laws of their states, it is a possibility that they were, nonetheless, educated by the debates surrounding the passage of these laws, which is reflected in their views of the appropriate punishments. This is the "strong" version of the ex ante hypothesis. This fact directs our attention to the liability ratings made by respondents reporting their personal views.

We determined whether respondents from the states with deviant laws reported personal punishment preferences differently from all of our other respondents. In Figure 3 we illustrate that there were no consistent differences among our respondents. We

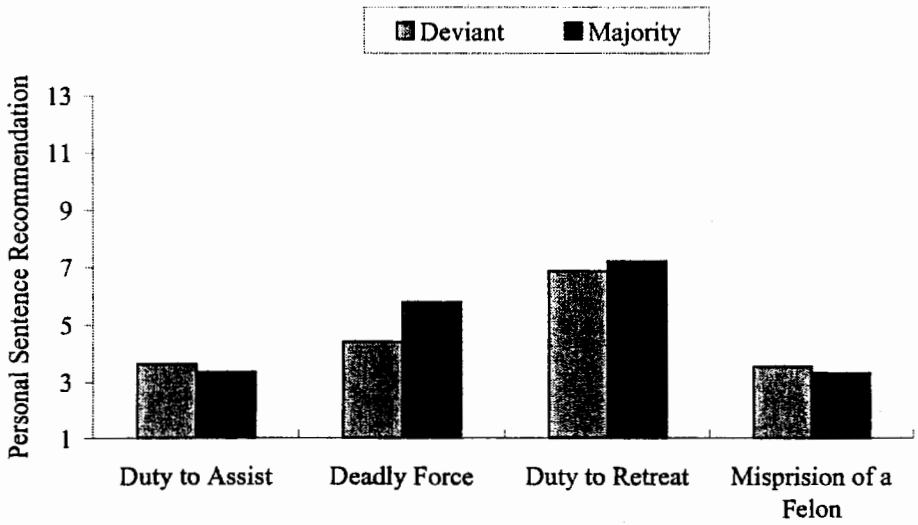


Figure 3. Personal sentencing bar graph: 2 (deviant/majority) x 4 (scenario)

observed large differences for the different vignettes (F (3,540) = 68, $p < 0.001$), but relatively small differences according to the presence or absence of the particular ex ante law (F (3,180) = 2.39, $p = 0.07$). E.g., residents of Wisconsin are required by law to render assistance to a person in need, but Wisconsin respondents were no more likely to impose jail time for an actor who failed to do so than were nonresidents (3.64 versus 3.34, t (78) = -0.84 *ns*).

Similarly, although residents of South Dakota are obliged to report felonious activity, their ratings of criminal liability were indistinguishable from that of the respondents from the other three states (3.57 versus 3.31, t (74) = -0.82, *ns*). In North Dakota and Wisconsin there is a duty to retreat and to use only the minimum force necessary for self-protection. However, residents of these states were actually more forgiving of violators of this code than were residents of states with no duty to retreat (6.87 versus 7.21, t (200) = 0.57, *ns*). Finally, with regard to the use of deadly force in the protection of property, Texans were found to be slightly more permissive in assigning criminal liability (4.42 versus 5.78, t (82) = 2.24, $p = 0.03$).

The simple conclusion is that the presence of a law that might have changed personal views about what the law should be appears to have little effect on ordinary citizens for three of the four actions we studied. In the case of Texans and killing in defense of property, we found an interpretative ambiguity. They, more than the citizens of the other states, reported that their state law permitted deadly force in defense of property, which was true. They also reported personal punishment preferences that were more permissive, and thus directionally in accord with their state law.

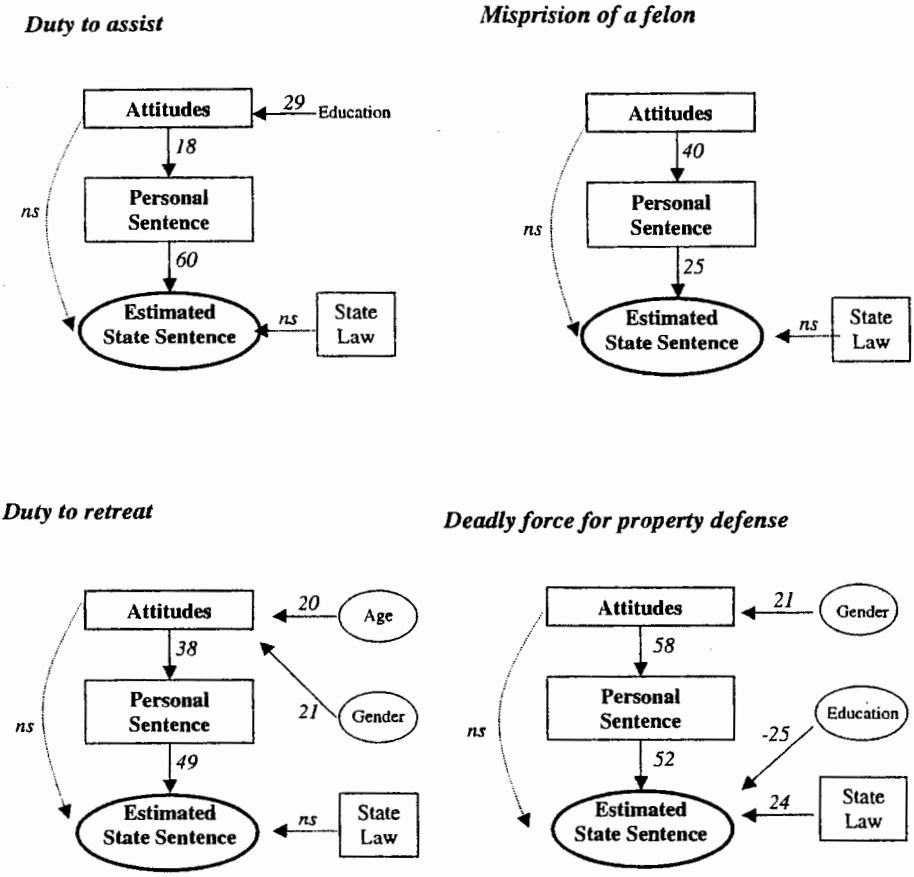
Thus far, the analyses are consistent with the interpretation that the Texas legislature passed a particular law allowing the use of deadly force in defense of property, that citizens of Texas (who had previously believed that deadly force in defense of property was wrong), became aware of the law and were persuaded of its moral validity by their generalized respect for the moral authority of the lawgivers. We, of course, do not believe this for a minute. We believe that the lenient laws concerning the use of deadly force stem from the Texas legislators' recognition of the attitudes of the state populace in a culture-of-honor state (Nisbett & Cohen 1996) and the legislators' own shared beliefs, which made it seem reasonable for them to encase this widely shared view into state law. There is some support for our viewpoint: In the deadly force scenario, the differences in reported state laws disappear completely when the relevant attitudes of the citizens are covaried out (F (1,199) = 0.94, $p = 0.33$). We will return to this question after the path analyses.

Path analysis for determinants of sentencing. As we signaled earlier, we are trying to identify which of two models better describes the relationship among state laws, individual attitudes, and individual behavior. The model that implicitly underlies ex ante theorizing (which we suspect is inaccurate) begins with the state law that criminalizes certain behaviors. The law presumably influences individual attitudes through direct information and through vicarious experience. The attitudes in turn influence people's beliefs about appropriate punishments for a given offense, which in turn influences their compliance. In contrast, the model that we propose begins with the attitudes people have formed about criminal conduct. These attitudes are shaped by past experiences, which are in part reflected in certain well-known demographics (e.g., gender, education, age, etc.). These attitudes then influence people's individual sentencing recommendations. When asked to guess their state law, people turned not to an encyclopedic memory of their state's laws, but to their own opinion about what the state law should be. As this sequence implies, the actual state code fails to influence people's estimates of the state code.

Through structural equation modeling we further explored the question of which of these two models better fits the empirical data. For each of the four scenarios, we specified a model in which the relevant proximal attitudes predicted personal sentence preferences, and personal sentencing thus predicted estimated state sentencing. We added to this model the pathways predicted by the ex ante hypothesis, that state law will predict attitudes, personal sentence, and estimated state sentence.[8] The resultant model produced estimates of each relationship, after partialling out shared variance, and calculated the overall fit of the model. We tested this causal model using RAMONA, a covariate structure modeling statistical program available within SYSTAT statistical software package. The fit statistic is the Root Mean Square Error of Approximation (RMSEA), by convention a value less than 0.10 is considered a good fit, and less than 0.15 is considered marginal (Browne & Cudeck 1992).

Figure 4 illustrates the relationship of these different variables and the ways in which they influence people's estimates of state law. The first path diagram shows the duty to assist scenario. Respondents' general attitude toward a person's obligation to help others predicts the criminal sentence chosen by each respondent (ß = 0.18). Estimates of the state sentence are deter-

[8] In addition, we entered all of the relevant demographic variables into the equation. As expected, different variables played a small role in various models. E.g., the gender of the respondent predicted the attitudes held in regard to the use of deadly force (b = 0.21), but not in duty to assist or misprision of a felon. However, the demographic variables did not affect any of the relationships we described in these models, thus we omitted them for parsimony.



Note: all paths significant $p < 0.001$, absent or broken paths $p > 0.05$.

Figure 4. Path analyses of state sentencing determinants

mined in large part by personal sentence (ß = 0.60), but not at all by the actual state law. As one would expect from our previous analyses, state law has no relationship whatsoever on either attitudes or personal sentence. The statistical measure of fit for this model is highly significant (RMSEA < 0.001), suggesting that there is little variance unaccounted for. This finding provides strong support for our model and suggests that state law is not driving attitudes, personal sentencing, or estimates of state sentence for this vignette.

The next diagram reveals the path model for the duty to retreat vignette. In this case, attitudes were predictive of the personal sentence chosen in our vignette (ß = 0.38). As in the first model, the estimated state sentence was predicted by personal sentence (ß = 0.49) but not state law. Again, there were no direct effects beyond those indicated in the model. This model was marginally significant (RMSEA = 0.15), possibly because we were forcing the model to include additional nonsignificant pathways. When we removed the path between state law and attitudes, and

between state law and personal sentence, the RMSEA improved to 0.001.

There was a similar set of results for misprision of a felon. In this case, attitude was predictive of personal sentencing (ß = 0.40). Estimated state sentence was predicted by personal sentencing (ß = 0.25) but not state law. The fit of this model was excellent (RMSEA < 0.001).

The last diagram of Figure 4 reveals essentially the same pattern, but with a twist. As in the other models, people's general attitudes toward the use of deadly force to protect property predicted the respondents' personal sentence (ß = 0.58), and their personal sentence predicted their estimates of the state's sentence (ß = 0.52). The presence of a state law that permits the use of deadly force was predictive of reduced sentencing (ß = 0.24), and it was somewhat predictive of attitudes (ß = 0.15). It is important to note, however, that there was no direct or mediated relationship between state law and personal sentence. The fit of this model was excellent (RMSEA < 0.001).

Discussion

We have demonstrated that, for a number of laws, the citizens of states that hold deviant versions of these laws are unaware of their content. The laws we chose to study, we again argue, are not the trivial ones that no citizen will bother to know; they are important laws, concerning whether one has a duty to help a person in distress, report a known felon, or retreat rather than respond with deadly force when threatened.

In our study (holding Texas aside), the citizens showed no particular knowledge of the laws of their states. But when we asked them to tell us about their state laws, they were able to tell us what they *thought* those laws were. What source did they draw on to answer this question if it was not their knowledge of the actual laws? We suggest that, consistent with the concept of the consensus bias, they decided what they believed to be the lines between criminal and noncriminal actions—essentially a moral judgment—by assuming that their state had "gotten it right"; they guessed that the law of the state was what their personal opinion thought it should be. This result is demonstrated by the moderately high and consistently reliable correlations between respondents' personal opinion about what the law should assign in the way of punishments and their reports about the punishments the state laws in fact assigned.

Before we suggest some conclusions that might be drawn from our study, we should clarify the limitations of our findings. First, there is the interesting case of Texas. We cannot conclusively rule out the idea that the citizens know the laws of the state and, because they are the duly pronounced laws, are authorita-

tively influenced to agree with them and thus assign personally preferred sentences accordingly. We favor the alternate view, that the lenient opinions of the Texans were there first and influenced the passage of the correspondingly lenient laws. Which of these views is true requires further research. Researchers doing field experiments using geographically contiguous states that have differing laws may help to sort out the possible alternative explanations of our results, such as a culture-of-honor explanation.

We were struck by the difference in our results between the variant Texas law and the variant laws of the other three states. In each of the other cases, the legislature is imposing an extra obligation on its citizens to act: to retreat rather than to retaliate, to assist a person in distress, or to inform the police if the location of a criminal is known. We presume that the Texas legislature, in promulgating its law concerning the use of deadly force in defense of property, was not attempting to impose on its citizens the *obligation* to shoot people who are stealing their property; instead, it was allowing them the choice to do so without fear of criminal prosecution. The Texas legislature, therefore, decriminalized something that is considered criminal in other states, while the legislatures in the other states deviated and criminalized something that is not considered criminal in most states.

It may be that the proper interpretation here is that citizens' lack of knowledge of the nature of the laws of their states generally arises when their legislatures attempt to impose extra obligations on their citizens. In these instances, we suspect, the legislatures believe that these extra obligations are morally required ones, and that many of the citizens believe this as well. Nevertheless, when a legislature decriminalizes an act, or resists adopting, for instance, the *Model Penal Code*'s recommendation to criminalize that act, it does so because it is convinced that the citizens of its state do not regard the act as criminal (and it is likely that the legislators do not regard it as criminal either). One way of expressing this asymmetry is that, on some occasions, one passes laws "in order to make the citizens morally better"—and this effort might be primarily a symbolic rather than a practical one.

Our samples of citizens in each of the four states are not large, and they were not drawn by careful, formally structured, sampling procedures. Our sample of the laws on which to test our hypothesis about knowledge of those laws was also not formally specified. We chose laws that we thought met the criterion of being important in guiding citizen behavior in instances that citizens might confront, and in which differences among states existed. We are thus heir to a number of the criticisms that can be leveled against field experiments in general, and ours in particular. Further, because we chose not to inflict a longer series of

questions on respondents, we were not able to do a complete job of tracing paths from demographics to punishment-relevant attitudes to punishments assigned.

Based on past research (Hamilton & Rytina 1980; Rossi et al. 1997; Rossi et al. 1974), we do not believe that demographic variables are strongly linked to people's attitudes about just punishments, so the low and occasional correlations we found between demographic variables and the proximate attitude measures are about what we would expect to find in larger-scale studies. We might, however, suggest what we would expect from studies more oriented toward tracing the paths between a broader sample of attitudes and views on just punishments. General attitudes—such as opinions toward the degree to which crime was rampant, or the low success rate of the police in catching criminals—may predict what we have called the more-proximal attitudes (e.g., allowing deadly force in defense of property), which would in turn predict leniency of sentence assigned to a person who does use force in defense of property. General attitudes would only occasionally be predicted by demographics, and rarely strongly predicted by them. Whether these expectations are true awaits further research.

Nonetheless, having acknowledged these limitations, we now suggest what will follow if our findings, tested in other studies, continue to hold true. First, a psychological point: People do report what they take the laws of their state to be. In this and another study (Darley et al. 1996) are results suggesting that people often generate their perceptions of what the law of the state must be from what they think is the morally appropriate form for that law to take. That is, people use their moral intuitions about whether various actions are permissible or proscribed to generate what they believe the laws must be. Given that people's moral intuitions vary considerably, many people are often wrong about what the actual law of their state holds. They are, in other words, ignorant about the content of the law.

We have argued elsewhere that support for the criminal justice system depends on it being perceived as delivering just punishments to individuals who intentionally commit actions that they know are criminal (Robinson & Darley 1997). If the legal system contains many laws—the contents of which are not known and not intuited correctly by the citizens—and it punishes certain actions with criminal sanctions, and the citizens become aware of this practice, then the moral credibility of the law is sacrificed. This is not only our argument. Earlier, we quoted legal scholar John Coffee on the tendency to criminalize regulatory offenses, thus blurring the line between criminal and other kinds of offenses. As Coffee (1991) remarks in the same article, "[T]his blurring . . . will weaken the efficacy of the criminal law as an instrument of social control." Our current research suggests,

however, that perhaps respect for the system is preserved by the fact that one of the predicates of our argument is not always, or even often, fulfilled: People do not normally become aware that the laws are at variance with their moral intuitions. What might make them aware of these differences, and what the consequences of that awareness might be, remains a topic for further investigation.

The gap between certain laws and the moral intuitions of the community may put pressure on the court system at a different location. In general, the courts have held that "ignorance of the law is no excuse." It is not a defense for someone accused of a criminal offense to say, or even show, that he or she was not aware of the law that made that action criminal. As Davies (1998:341) remarks, "[C]itizens are compelled either to know the law or to proceed in ignorance at their own peril. While sometimes harsh, the gains secured by the maxim—a better educated and more law-abiding citizenry, and the avoidance of pervasive mistake of law claims—are thought to outweigh any individual injustice resulting from its application." But given the previously noted tendency to criminalize many "regulatory offenses," offenses that are far from what people think of when they think of intentional wrong actions, and given the size of the code book in which all of these laws are entered, many may feel that maintaining the "ignorance of the law is no excuse" maxim tips toward creating too frequent injustice.

It may be that the judges and juries are beginning to see this, or at least to feel the injustice of applying criminal sanctions to actions that few citizens would know are offenses. One way to avoid the application of criminal sanctions is to construe the statute in question as requiring a "willful" mens rea, as requiring, in other words, a realization on the part of the actor that the conduct was illegal and, since no such realization was plausible, acquitting the actor. Increasingly, this may be happening. Davies (1998:343) remarks that "the ignorantia legis principle has been seriously eroded over the last century, and in recent years, this erosion has threatened to become a landslide."

We were led to wonder how it was that the citizens of a state were meant to learn the laws of their particular corner of the land. But if we examine the ways in which the transmission of knowledge from the halls of the legislature to the heads of the citizens is supposed to take place, we find a puzzling silence. Not much is written about how this should specifically come about. Do legislatures assume that every citizen memorizes the state code and consults it when necessary (e.g., at the instant of seeing an individual in distress)? Do the drafters count on the debates of the legislatures penetrating the popular consciousness? Do they expect newspapers to hasten the news of drafting controversies to the waiting multitudes?

We did have a very preliminary look at newspapers as a transmission system; we did a search (via Lexis-Nexis) on newspapers in the capital cities of the states in our study for periods before and after the state codes were passed. For instance, the Wisconsin Code was enacted in 1983 and went into effect in 1984, and we searched 1980 to 1990. We used key phrases and words such as "duty to assist," "good Samaritan," "assist," and, finally, simply "duty" and turned up no leads. We also did similar searches, using the relevant key words we could think of, for the other states and found nothing. If we can use newspaper coverage as a proxy for attention paid by public media, then this is not the medium to count on for transmission of knowledge about criminalization rules to citizens. (See Garber & Bower 1999 for similar results regarding the transmission of judicial verdicts through newspapers.) A second point can be made here. Our search of the newspapers extended far enough past the date of the adoption of the relevant laws so that we should have found reports of trials of persons accused of violating those laws, but we did not find any such reports. This result may be another indicator that the passing of these "be a better person" laws is a symbolic activity, which does not have much effect on what actions prosecutors actually choose to prosecute. We are then left with the odd thought that those who got the written code of their state "wrong" are in some sense right about how the law is administered in reality, while those who got it "right" are wrong about who actually will be prosecuted. This seems an undesirable state of affairs.

By contrast, it is interesting to note that we were able to find numerous articles from Texas papers on a case in which a citizen chased a burglar (who had given up the unsuccessful burglary attempt) for three blocks before shooting him in the back and killing him with a concealed handgun.[9] The defendant, who declined to mount any defense, was acquitted by a jury. Even in this instance, though, it appears that the "story" was more about the defendant's use of the concealed weapon than about the defense of property statute.

As this example suggests, it is difficult to claim that the code drafters of the states are taking the steps necessary to make the laws known. We suspect that making them known is a problem that never even occurred to code drafters. Perhaps the reason for their obliviousness is that legislators believe that the codes they draft simply reflect the moral norms of the community. (They ignore the fact of the drafter debates on these issues, which they should have realized signaled disagreement, rather than consen-

[9] As one of the reviewers points out, this shooting came too late to come under Texas statute 9.42. That is, the actor was not entitled to shoot the fleeing felon after the long pursuit; and yet the jury acquitted him. This verdict does suggest that the legislature might have correctly perceived public sentiment regarding the use of deadly force in defense of property as legitimate!

sus, among even sophisticated citizens.) Given that "everyone would agree that" the entire content of the criminal code is exactly what is held as the morally right system by any right-thinking person, there is no need to make citizens aware of the code. They are already aware of it via the mechanism of their own moral intuitions. But as we, and others, have shown in a variety of studies (e.g., Finkel et al. 1996), people's moral intuitions often differ sharply from the *Model Penal Code* in particular and criminal codes in general. Thus, when ordinary people intuit what the code holds from their opinion of what it should hold, they often get the code wrong, and the ex ante function of the law suffers accordingly.

We suggest that wise code drafters take on the burden of educating the community on the lines that the code draws between allowable and criminal conduct. Even wiser code drafters should take on the burden of explaining to the community why it is that that subset of laws, which the legislature chooses to adopt and which violate the moral intuitions of the community, are nonetheless morally appropriate or otherwise justified.

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