# ECONOMIC COSTS, MORAL COSTS OR RETRIBUTIVE JUSTICE : THE RATIONALE OF CRIMINAL LAW

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# ECONOMIC COSTS, MORAL COSTS OR RETRIBUTIVE JUSTICE:

## The Rationale of Criminal Law

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Over the past few years, evidence of the many and varied costs that crime imposes on its victims has been rapidly mounting. There is now little doubt of the large quantitative importance of this problem (Rizzo, 1979a). Indeed, research continues to uncover more and more costs which the earlier direct-estimate approaches either failed to notice or were inherently incapable of noticing (President's Commission, 1967; Rizzo, 1979a).

The question to be discussed here is intimately related to the increasing realization of the impact of crime. We shall explore and evaluate the hypothesis that the essential rationale of the criminal law is to minimize the social costs of crime. This general hypothesis breaks down into two subcategories or variants. The first is the more familiar to economists and it derives from the largely normative work of G. S. Becker (1968) and the more recent positive analysis of R. A. Posner (1972, 1977). The costs minimized in these approaches are of the usual variety and include physical injury costs (lost market and leisure time as well as medical costs),

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damage to property, the fear induced by the threat of crime, the costs of crime-prevention measures, etc. The second variant is that recently proposed by R. P. Adelstein (1977; 1978). The costs which the criminal law is hypothesized to minimize in this framework include all of the "conventional" items but also include a new category, "moral costs," as well. Moral costs, as we shall see in more detail later, are a less well-defined externality of "outrage" induced by the commission of a criminal act. Whether or not it is necessary or even useful to resort to a notion of moral costs in an effort to rationalize the criminal law is a central question on which we shall focus.

There is no serious doubt that deterrence plays at least some role in explaining features of the criminal law, but the main issue here is whether deterrence can be viewed as the primary rationalizing characteristic (regardless of the precise conception of costs involved). If deterrence is not the main rationale of the criminal law then it would be incumbent upon us to provide at least some indication of its unifying element. It ought to be emphasized at the outset that this task is largely explanatory or positive in nature. No attempt is being made to make recommendations as to what the criminal law should aim at accomplishing. A task such as this would require not only the insights of economics and law but those of ethical theory as well.

Even a satisfactory theory of the criminal law would not

explain every major feature. In fact, we ought to be highly suspicious of hypotheses which explain "too much" because of the strong possibility that they are little more than disguised tautologies.[1] The real test is whether we have explained most of the central features and whether we have provided an explanation that is superior to its rivals.

Any discussion of the rationale of criminal law is intimately connected with the issue of whether there is any essential difference between crime and tort. This is especially relevant in view of the position which holds that the function of tort law is to minimize the social costs of accidents[2] (Calabresi, 1970; Posner, 1973, 1977). If the function of both crime and tort is to minimize costs or deter optimally certain kinds of behavior then, at least to a large extent, the distinction between them is blurred.

## The "Economic" Cost Minimization Hypothesis

"The function of the criminal law, viewed from an economic standpoint, is," according to Richard Posner (1977: 163-164), "to impose additional costs on unlawful conduct where the conventional damages remedy alone would be insufficient to limit that conduct to the efficient level." In many crimes, of which murder is the prime example, the perpetrator is unable to pay damages equal to the (high) social costs of the crime.[3] Therefore, the criminal law imposes punishments so as to avoid the criminal's wealth constraint and to

increase the deterrent capability of the system toward the optimal level. The criminal law's concern with intent is similarly rationalized along economic grounds. We are told that ". . . the concept of intent . . . appears to serve three functions . . . : identifying the pure coercive transfer; estimating the probability of apprehension and conviction; and determining the effectiveness of the criminal sanction in controlling unlawful conduct." (Posner, 1977: 173-174) The first function serves to identify those cases in which social cost-benefit analysis is inappropriate because the criminal himself can be relied upon to perform the calculation if penalties are attached to his act. The second and third functions are more important from our current perspective. A deliberated criminal act is more likely to remain undetected than one committed in the heat-of-passion since in the former case avoidance of apprehension is likely to have been part of the overall "plan." Finally, the more deliberately calculated an act is the more responsive (elastic) it probably is with respect to punishment. (This provides an economic rationalization for the insanity defense.) The implications for criminal penalties of the latter two factors should be clear. The smaller the exogenous probability of apprehension and conviction, the greater should be the counterbalancing punishment (Becker, 1968: 211). The smaller the <u>elasticity</u> of a criminal act with respect to punishment, the less severe punishment ought to be. As long as there are social costs of imposing criminal penalties (e.g., maintaining the prisons), it is uneconomic to impose them when they have

little, if any, deterrent value (Becker, 1968: 189). Consequently, the cost-minimization model implies that premeditated crimes (e.g., murder) ought to be punished more severely than unpremeditated crimes both because the exogenous probability of apprehension is lower and the elasticity with respect to sanctions is higher. This is consistent with what we in fact observe in the criminal law.

On this level, the optimal deterrence hypothesis is no better than the traditional mens rea - blameworthiness explanations, i.e., the greater the criminal intent involved in any act the greater is the individual's blameworthiness and, therefore, the more deserving he is of punishment. This is because "blameworthiness" is frequently positively correlated with the elasticity of response with respect to punishment and negatively correlated with the exogenous probability of apprehension. Any attempt to test the relative merits of these two explanations must therefore seek circumstances in which the two hypotheses yield different implications.

In what follows, we shall attempt to test the consistency of the cost-minimization or optimal deterrence hypothesis with some major features of the criminal law. On the most general level, however, there is a striking problem. If cost minimization requires that the law impose "additional costs" where conventional damage remedies are inadequate, then why must this be restricted to the criminal law? In those tortious acts which are not simultaneously crimes (e.g., ordinary negligence resulting in severe personal injury), why are "criminal"

sanctions not imposed when the defendant is unable to pay the full extent of damages? The relationship between crime and tort is close enough that one would expect some consistency in this matter if criminal sanctions were serving to supplement a deterrent function of ordinary damages.

Murder. It is absolutely essential to the crime of murder that the homicide be committed with "malice aforethought." There are several states of mind that constitute malice (none of which need correspond to the meaning of the word in nonlegal language), but we shall concern ourselves with only two of these: (1) the intent to kill and (2) the "intent to act in wanton and wilful disregard of unreasonable human risk " or recklessness (Perkins, 1969: 42). Either of these states of mind is sufficient to substantiate a charge of murder if there are no circumstances of justification, excuse or mitigation. At common law, murder on either of these theories was punished by the same penalty: death.

From the economic perspective, let us contrast murder with intent to kill with murder on a theory of recklessness. In the first case, the death of another is a direct means to the murderer's end. In the second situation, however, death is the byproduct of a means to the perpetrator's goal. It appears plausible that, on average, the death would be more easily avoided in the second case than in the first, given the constraint of achieving the respective goals in both. In other words, if we look at the death as a factor of production, it

seems plausible that the elasticity of substitution between death and the other factor(s) is larger (in absolute value) in the recklessness case than in the intent-to-kill case. If this is true, then it readily follows that murders committed on the basis of recklessness will be more responsive to potential punishment than those committed with intent to kill.[4] A cost-minimization theory implies that murders of the latter variety ought to be punished less severely than the former. At common law, they are punished equally. Statutory modifications of the common law typically make intent-to-kill cases murder of the first degree and recklessness cases murder of the second degree (Perkins, 1969: 89-90). Therefore, to the extent that the law differentiates between the two bases for murder, the punishment it applies is in direct conflict with the dictates of the cost-minimization hypothesis. On the other hand, this appears to be quite consistent with a blameworthiness view because intent-to-kill murder would seem more deserving of punishment than reckless murder.

Consent. Except in certain obvious cases, such as rape, the criminal law does not permit consent of the victim to be used as a defense. In particular, consent is not a valid defense to a charge of murder regardless of the circumstances. Consider that a husband who poisoned his wife at her request to end her suffering from a fatal disease was found guilty of murder (People v. Roberts, 211 Michigan 187, 178 N.W. 690 (1920)). Furthermore, the lover of a married woman who killed her as part of a mutual suicide pact (and who later lost his

nerve and did not kill himself) was convicted of murder in the first degree. The Court was quite explicit: "Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head." (Turner v. State, 119 Tenn. 663, 670-71, 108 S.W. 1139, 1141 (1908))

The absence of consent as a defense to criminal charges is clearly inconsistent with the cost-minimization rationale of criminal law. An act does not impose costs on its "victim" when it is desired. This inconsistency cannot be explained away by an ad hoc appeal to high external costs (say, to those who were supported by the victim). If this were the case, then the courts would treat people with and without dependents differently, and yet they do not. In Roberts, for example, the court did not think it relevant that the dying woman was herself a dependent and hence that her death was without social costs.

Suicide is another striking example of the common law's refusal to recognize consent as a valid defense. Completed or successful suicide, a felony, "was punished by ignominious burial and forfeiture of goods and chattels to the king." (LaFave and Scott, 1972: 82) Since the latter penalty imposes costs on the heirs of the "victim," it is hard to rationalize the law's antagonism toward suicide by its concern for dependents. The first penalty may well have had deterrent impact in an age with greater religious values than our own. That deterrence, however, would have served no efficiency-enhancing purpose in the cost-minimization

framework. The (unsuccessful) attempt to commit suicide, on the other hand, was not treated as attempted murder. Suicide was in a category distinct from murder (felo de se) and its attempt was only a misdemeanor (Regina v. Burgess 258, 169 Eng. Rep. 1387 (1862) and LaFave and Scott, 1972: 83). The milder treatment accorded attempted suicide lends some credence to the belief that the consent factor was operative here, although in an indirect way, and only to reduce the severity of the crime rather than to eliminate it.

Necessity. The criminal law does not recognize grave duress of circumstances as a defense to the intentional killing of an "innocent and unoffending" person. The two most famous cases here are Regina v. Dudley and Stephens (L.R. 14 Q.B.D. 273 (1884)) and United States v. Holmes (26 F.Cas. 360 (No. 15, 383) (C.C.E.D. Pa. 1842)). In the first case, three sailors and a cabin boy were 1600 miles from land in a lifeboat as a result of a shipwreck. Their food ran out and, to maintain their lives, the three sailors killed the already close-to-death boy and fed upon him until rescue. The boy would probably have died before the rescue (four days later) as would the sailors had they not fed themselves in this way. The court did not recognize this as a defense and the defendants were found guilty of murder and sentenced to death.[5] In Holmes a lifeboat was overloaded on the high seas when a violent storm came up. There was grave danger that the boat, weighed-down as it was, would sink. To save the lives of the other passengers, some of the "human freight" was jettisoned. The boat thus managed to

stay afloat and the next day the surviving passengers were rescued. Holmes, however, was found guilty of manslaughter.

Posner (1977: 175) has attempted to justify this result by making an analogy with a hypothetical case of a starving thief stealing from a cabin. ". . . (I)t is preferable," we are told "to make the thief strike the (cost-benefit) balance himself, by forcing him to pay whatever costs his act imposed on the cabin owner." There are, however, a number of critical problems with this analogy. First, Posner confuses the proper tort result with the proper result in the criminal law. In tort, the thief would have to pay the ordinary damages inflicted on the cabin owner. As between the thief and the cabin owner the costs should fall on the former, the causal agent. While the starving thief had a difficult choice the cabin owner had none at all. (Epstein, 1973: 160-189; 1974: 169). In criminal law, on the other hand, the defense of necessity would probably be successful in cases not involving intentional killing. For example, if starving sailors on a disabled ship break into boxes of food (which they were carrying as freight) as the only method of saving their lives, they would not be held guilty of larceny (Perkins, 1972: 960). In fact, it might be reasonably claimed that the requisite "intent permanently to deprive" the owner of his food was lacking and so even the prima facie case for larceny cannot be successfully made. In cases such as this the law seems willing to engage in the cost-benefit analysis.

On strictly utilitarian grounds it is highly plausible that

cases such as Dudley and Holmes involve no net damages at all. These are computed, at least conceptually, by subtracting the gain to the "criminal" from the harm inflicted on the victim (Becker, 1968: 173). If the law were to value all lives equally then, for example, in Dudley, because the death of one saved the lives of three, there would be no net damages at all. Cost minimization requires that the sum of net damages, the costs of combatting crime, and the total social loss from punishments be minimized (Becker, 1968: 181). Since the latter two factors have positive social costs, the optimal solution in this case is to consider duress of circumstances a valid defense. Admittedly, there are costs of determining net damages but these must be weighed against the costs of combatting and punishing the act. Where the determination of net damages is easy (as it would be in Dudley and Holmes on a utilitarian-based equal weighting of all lives assumption), the court probably ought to do so.

Finally, the elasticity of the act with respect to punishment is likely to be quite low in cases of severe necessity. Hence it is unclear that anything whatever is gained by the imposition of criminal penalties in these circumstances.

Criminal Negligence and Tort Negligence. Conduct that is actionable under the criminal law requires a higher degree of negligence than similarly actionable conduct in tort. In most jurisdictions the requirement is "that the defendant's conduct create an unreasonable and high degree of risk of death or serious bodily injury to another person

or to others." (LaFave and Scott, 1972: 586) In general, the case law is not clear on whether subjective realization of this higher risk ("recklessness") is also required. Some cases explicitly reject the subjective awareness requirement and impose a reasonable man test (e.g., Commonwealth v. Welansky, 316 Mass. 383, 55 N.E. 2d 902 (1944)) while others accept the requirement (e.g., Bussard v. State, 233 Wis. 11, 288 N.W. 187 (1939)). In any event, it is clear that criminal negligence is found in many situations where the defendant's realization of the great risk is considered irrelevant. If the death of another results, the relevant crime is criminal-negligence manslaughter and if only personal injury to another comes about, there is criminal-negligence battery. If the level of negligence is not high or gross but merely "ordinary" the act will not be actionable under the criminal law. However, tort remedies are still available. In cases of the victim's death, statutes in every jurisdiction provide for wrongful death actions for the survivors. Dependents of the deceased, for example, may sue for the support they would have received. In personal injury cases, the plaintiff may sue under the general law of negligence for damages sustained.

Compare now a case of ordinary negligence which results in either death or personal injury to the victim with one of criminal negligence with exactly the same outcome. In the first case the defendant incurs only the usual damage costs; he suffers no criminal penalties. His total costs are lower. Why should this be? From the

cost-minimization point of view, the differential treatment by the law makes no sense. The net harm to society is the same in either case. On this basis alone, the costs imposed ought to be the same. Furthermore, there is no reason to believe that the elasticity of response to cost imposition is lower in ordinary negligence situations than in criminal. In fact, there is some reason to believe that the reverse is true. The class of those cases in which precautionary activity falls far below the reasonable care standard (criminal negligence) probably includes a greater proportion of cases not very responsive to or significantly deterred by criminal penalties. These may include cases in which the defendant is unaware of the risks associated with an act.[6] If the elasticity of response is lower in criminal negligence cases, then the theory of optimal criminal sanctions implies that the penalties should be less severe rather than more.

In tort the contributory negligence of the plaintiff is a valid defense to a prima facie case based on the defendant's negligence. The criminal law, on the other hand, recognizes no such defense. In a criminal-negligence manslaughter case, the court reasoned, "(T)he defendant was not indicted for a crime or offense against (the deceased), but against the state," (State v. Moore, 129 Iowa 516, 519, 106 N.W. 16, 17 (1906)) The relative merits of the two parties are not at issue in the criminal law; what is at issue is the conduct of the defendant measured against an "ideal" standard (Epstein, 1977: 243). For example, ". . . it is no defense to a charge of manslaughter or reckless homicide

arising out of the defendant's operation of an automobile that the deceased driver was also negligent." (LaFave and Scott, 1972: 410) The cases could be multiplied but the principle is the same. Clearly, this is not consistent with the cost-minimization hypothesis. The absence of a contributory negligence defense can, under certain circumstances,[7] create incentives for the defendant to undertake uneconomic precautionary activity.

Mistake of Fact. In general, mistake is not a valid defense in the tort law but it does have an important role in the criminal law. Traditionally, mistake is divided into two categories: mistake of fact and mistake of law. It is often said that while mistake of fact is a valid defense, mistake of law is not. This is somewhat of an oversimplification on several counts. At present, however, we shall confine our attention to mistakes of fact. Strictly speaking, these mistakes are not usually defenses at all; rather, they negate the mens rea required for the crime. In abstract terms, at least, the doctrine is relatively simple: ". . . an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense (sic)." (Regina v. Tolson, 23 Q.B.D. 168, S.C., 40 Alb. L.J. 250 (1889)) Suppose, for example, a man takes someone else's umbrella because he mistakenly believes it is his own. If the facts had been as he thought, his act would have been totally innocent. Hence he is not guilty of larceny because the mistake negated the requisite mental state for the

crime: the intent to steal another person's property (LaFave and Scott, 1972: 356-57).

The key question for our purposes is whether the mistake of the defendant must be reasonable or not. In cases of specific intent crimes (i.e., where the perpetrator intends to do more than the act he has completed) there is no reasonableness requirement. In larceny, for example, the criminal must intend not only to steal the property of another but also to deprive him of use or ownership permanently. Larceny is thus a specific-intent crime. Consequently, the mistake of fact committed in our hypothetical need not be reasonable in order to function as a valid "defense." Unreasonable mistake of fact can often validly negate the mental requirement of a crime (Perkins, 1969: 941). This, then, is clearly inconsistent with the social costs-minimization rationale for criminal law. Reasonable mistake will clearly not be deterred by criminal penalties precisely because it is reasonable in light of the potential harm it can cause. Unreasonable mistake, on the other hand, is deterrable if the criminal is made to bear the costs of his acts. Therefore, while the "defense" of reasonable mistake is efficiency-enhancing, the "defense" of unreasonable mistake is not. In a mens rea-blameworthiness framework, on the other hand, lack of subjective awareness of the relevant facts will shield the defendant from guilt and make him "unworthy" of punishment.

Mistake of Law. In the overwhelming majority of cases mistake or ignorance of the law will not serve as a valid excuse. The major

exception to this rule appears in the context of specific intent crimes where ignorance of the law may negate the requisite intent. Consider, for example, the man who takes another person's umbrella because he believed "that his prior dealings had vested ownership of it in him" (LaFave and Scott, 1972: 357). This can be interpreted as a mistake of law which negates the requisite mental state for larceny. Aside from examples of this nature, ignorance of the law is not a valid defense. The rationale for this rule appears consistent with cost-minimization approach because it might be expected to reduce the amount of ignorance. Yet there are many situations in which it is efficiency-reducing. Suppose, for instance, an individual is reasonably[8] ignorant of a statute which prohibits the conducting of a raffle for profit. The imposition of criminal penalties serves no deterrent purpose here: it would be socially wasteful for him to expend more resources on becoming better-informed. Therefore, the law's refusal to recognize mistake of law as a defense is consistent with the cost-minimization hypothesis only when that mistake is unreasonable but not when it is reasonable.

Impossibility. From the optimal deterrence viewpoint the law's handling of factual and legal impossibility is inconsistent. Cases of factual impossibility are those in which the defendant fully intends to do something which is proscribed by the law but fails "because of some circumstances unknown to him when he engaged in the attempt" (LaFave and Scott, 1972: 440). Standard examples of this

include attempting to kill someone with an empty gun, attempting to steal from an empty house, etc. Factual impossibility is no defense to a charge of attempt because the requisite mental state is the same as that of a person who was able to complete the criminal act. There is no deterrent value to punishing unsuccessful attempts but there may be an incapacitation effect. The individual who fails in his first attempt may well succeed in his second. Imprisoning him before that second attempt can prevent it altogether.

Legal impossibility, on the other hand, is a valid defense. Consider, for example, the case of a man who altered the numbers on a bank draft from $2.50 to $12.50 but made no effort to change the words "Two Dollars and Fifty Cents" or "Ten Dollars or Less." (Wilson v. Scott, 85 Miss. 687, 38 So. 46 (1905)). "Noting that the completed crime of forgery requires alteration of a material part of the document, which the figures themselves were not, the Mississippi Supreme Court concluded that the defendant had not committed the crime of attempted forgery." (LaFave and Scott, 1972: 442). From an economic perspective, it is difficult to distinguish legal from factual impossibility. The imposition of criminal sanctions will not deter in either case but may prevent crime through incapacitation in both cases. The law's approval of legal impossibility as a defense is not explicable on the cost-minimization hypothesis. It may, however, be explicable on traditional grounds. The law does not seek to punish all subjectively "evil" mental states regardless of how they relate to the objective situation. Instead

it is concerned with blameworthiness as it arises from the attempt to do what is genuinely proscribed.

## The Moral Costs Hypothesis

The concept of moral costs is an elusive and vague one. The reasons for this lie not primarily in imprecise exposition but rather in a fundamental methodological error. "(M)oral costs," according to Adelstein (1977: 7), "are a . . . measure of the personal welfare losses associated with whatever indignation or sense of injustice one experiences in the plight of the direct victim at the hands of the offender." These costs are widely dispersed throughout the community, and while each individual may bear only small losses the aggregate loss to the community may be very large (Adelstein, 1977: 12). Moral costs are to be contrasted with economic costs which are more easily "envisioned in material terms" (Adelstein, 1977: 6) and include such things as personal injury, property loss and even "decreased personal and material security" (Adelstein, 1977: 40, n. 8). This last type of economic cost shares the community dispersion characteristic of moral costs. In addition, it is hard to see how the costs imposed by the fear of crime not yet (or ever) inflicted on its victim are any more "material" than the outrage or disgust one feels upon hearing of a particularly gruesome crime. This confusion is compounded by Adelstein's characterization of the fear induced by actual victimization in "rape

or crimes of terror" as a direct moral cost (Adelstein, 1977: 7). Apparently, the fear of crime is an economic cost but the fear induced by actual crime is a moral cost. This is a mere semantical distinction and only serves to expose the weaknesses of his fundamental conceptual apparatus. Perhaps the real distinction sought is not that between moral and economic costs, but rather between costs which are relatively easy to measure and those which "are less easily translated into dollars and cents" (Adelstein, 1978: 787). This is doubtless a valid distinction but it is far from clear that it overlaps with the moral-economic costs division. Any cost that is widely dispersed throughout society may be difficult to measure.[9] This is because if people cannot escape the cost-generating activity they will have no easy way to express preferences or demonstrate costs through their behavior. In those cases where costs are less widely dispersed they can be measured through an implicit market. Moving, for example, from one community to another to avoid crime can be reflected in the relative property values between communities (Rizzo, 1979a). Generalized fear of crime throughout the whole society, on the other hand, can be quite difficult to measure, since the options for escape have been narrowed.

Adelstein uses the concept of moral costs in two related ways. First, he tried to explain why certain activities are crimes despite their negligible economic costs (e.g., consensual homosexuality and prostitution). Here "all the external costs appear to be moral in nature" (Adelstein, 1978: 799). Second, he generalizes his conclusions

to a theory of the difference between civil and criminal law. The costs imposed by tortious activity or breaches of contract are primarily economic in nature while crimes generate high moral costs as well (Adelstein, 1978: 799). The difference between tort and crime reduces, then, to a difference in the kinds of costs imposed by the relevant activity.

Adelstein's theory can be seen as just a particular variant of the cost-minimization hypothesis discussed in the preceeding section. In fact, he is apparently in explicit agreement with the view "that the law encourages the commission of 'efficient' offenses - those in which the gain to the criminal exceeds the cost to society" (Adelstein, 1978: 790). In addition to the costs Becker and Posner would seek to include Adelstein adds moral costs. However, introducing the concept of moral costs is not equivalent merely to adding another argument into a social cost function. There is a fundamental methodological cleavage that separates this hypothesis from the Becker-Posner cost-minimization hypothesis. Before we take up that question, however, there is a smaller matter that must first be gotten out of the way.

The aggregate moral costs which accompany an act vary inversely with the number of people who know about the act. This is in sharp contrast to the notion of moral blameworthiness which exists in the relevant degree independently of the public's awareness of the crime. Hence we should expect that on Adelstein's hypothesis homicide committed with relatively little publicity, for example, will be punished less

severely than homicide committed in broad daylight in the center of town. Nevertheless, the criminal law does not consider the privacy of the act as a mitigating circumstance. The moral reprehensibility of killing another human being would not seem to depend on how many people are upset by it.

The fundamental problem with Adelstein's hypothesis is that the concept of moral costs is a residual category, i.e., a category invoked only when economic costs apparently will not explain the existence or extent of a criminal sanction. Indeed, Adelstein himself partially and dimly sees this when he characterizes moral costs as "the 'something more' in our reaction to crime" (Adelstein, 1978: 787). He does not realize, however, that any activity or phenomenon can, ex post, be rationalized in terms of cost minimization if we are permitted to consider unobservable or not-easily-observable costs. All that need be done is to assume the existence of certain costs so as to ensure that the phenomenon to be explained is yielded as an implication of cost minimization. Then the phenomenon is "explained" as if it were the outcome of a social cost-benefit analysis. In Adelstein's framework this problem is especially acute because moral costs are, by definition, difficult (impossible?) to measure. This is partially because such costs ". . . need not manifest themselves in changes of behavior on the part of those bearing them . . ." (Adelstein, 1977: 7). This, as we have seen, is in turn due to the widely dispersed nature of the costs. One important result is that it is therefore difficult to find an implicit market on which they are revealed.

In general, the maximization-of-utility framework, of which "full" cost minimization is just the mirror image, is an irrefutable conceptual apparatus. It can be viewed as the "hard core" of economic theory (Rizzo, 1978: 46-48; Lakatos, 1970: 133). It is never possible to refute a cost minimization hypothesis with a residual category. That would be equivalent to refuting the maximization postulate itself which, in its abstract form, never specifies the content of the costs and benefits. To the extent that the latter can be assumed by the investigator the maximization fortress is impregnable.

The plausibility of Adelstein's hypothesis stems from at least two sources. First, and perhaps less important, is the observation that there must be some reason why society has criminalized such activity as incest, bigamy and adultery. To call that reason "moral costs" is not really very helpful. It is merely a deus ex machina designed to salvage the cost-minimization rationale of criminal law. Of course, we must not forget that these crimes do indeed have economic costs insofar as they can destabilize one of the most important economic units: the family. Consensual homosexuality and prostitution are more difficult questions but the label "moral costs" is not very informative. It ought to be noted, at least in passing, that none of these activities were common law crimes in England (Perkins, 1969: 383, 380, 377, 389, 392). They were originally ecclesiastical offenses and were later criminalized by statute and not by common law development. Whether they would have become common law crimes in the absence of the Church's desire

to handle them can be argued (Pollock and Maitland, 1968: 543-544). In any event, to base a theory of the criminal law as a whole on some inference from the existence of "victimless crimes" is totally inadequate.

The second factor which lends plausibility to Adelstein's hypothesis is the obvious fact that there does exist at least some outrage and disgust deriving from the knowledge of certain crimes. Yet it does not follow from this that there exists a causal relationship between outrage and criminalization. Indeed, there is reason to believe that in some cases the "outrage" attached to a given act may be the result of its criminalization (e.g., mala prohibita).

In any event, the crucial question is whether moral costs can be ascertained independently of the legal system that attaches penalties to certain acts. If they cannot be so ascertained with any reasonable degree of reliability, then the problem of postulating such costs in an "as if" type explanation reasserts itself. Adelstein shows us no satisfactory way in which moral costs can be measured. It does no good to say that legislative bodies engage in "guesses" about these costs (Adelstein, 1978: 797). How can these "guesses" be falsified or corroborated? If there is no way to check them, then we are really arguing in a circle: there must obviously be significant moral costs attached to an act which the legislature has criminalized because the legislature has criminalized it. The courts would seem to be in a not very much better position to perform this moral costs-benefit calculation.

If we are correct in arguing that moral costs cannot be

ascertained independently of the decisions that determine what acts are criminal and what their penalties shall be, then there cannot be much merit in this approach. Although moral outrage may exist in some unspecified degree it is not useful to view it in a cost-benefit framework. It ought to be recognized that Adelstein's hypothesis is fundamentally a quantitative one: the criminal law determines an efficient level or number of crimes. As such, it can only be tested if there is some way of measuring moral costs independently of the phenomenon we are trying to explain. Until Adelstein provides us with some method, all of the talk of cost-benefit calculations, efficient levels of crime, etc. is so much window dressing.

## The Rationale of Criminal Law

A much more satisfactory theory of the underlying logic of criminal law has been presented by R. A. Epstein (1977: 231-257) in the context of a paper that elucidates the difference between crime and tort. The tort law is essentially concerned with allocating a loss between two parties, and therefore it is very much concerned with the relative or comparative merits of those parties. The criminal law, on the other hand, measures the accused's behavior against an ideal standard. The law is here not allocating a loss but rather, given an act, it is deciding whether punishment is deserved or not. In fact, the actual harm to a victim is almost irrelevant to the nature of a

crime. Epstein exaggerates somewhat when he says, ". . . the actual harm itself is immaterial to the criminal law" (Epstein, 1977: 248). Although the overwhelmingly important aspect is the moral blameworthiness of the accused, no system of criminal law can divorce itself from the economic constraint imposed by scarce resources. So the criminal justice system will have to decide which cases of blameworthiness ought to be prosecuted and which not. It is hard to believe that considerations of actual harm imposed do not play some role - at least as a side constraint. In a slightly different context Epstein (1977: 251) attempts to answer an argument like this by emphasizing the distinction between the "fabric of substantive law" and "administrative" considerations. Yet in practice the two are not totally separate and the latter can affect the former. Nevertheless, the matter of actual harm <u>is</u> of subsidiary importance in the criminal law. Consider that the law of attempts does not require any actual harm or fear inflicted on a victim. In addition, the law here and elsewhere recognizes, as we have already seen, mistake of fact as a valid defense. If under the perceived facts the defendant's act would have been totally innocent, he is in the current situation thereby rendered blameless (Epstein, 1977: 250). In cases of criminal negligence the costs imposed on a victim may be no greater than those imposed in cases of merely tort or ordinary negligence and yet the defendant will suffer criminal penalties in the first situation and not in the second. This is because the quantitatively greater fault in a "gross negligence" context makes a qualitative

difference; the defendant's carelessness reaches the point of moral blameworthiness. Consent of the victim is no defense in criminal cases because the reprehensible nature of the act is independent of the costs inflicted. Duress of circumstances or necessity is also not a valid defense to, say, the killing of an "innocent and unoffending" person because - although people have a right to attempt to survive - they do not have the right to survive by any means whatsoever. Finally, factual impossibility is no defense in the law of attempts because the mens rea can be just as great when, for example, the gun (unknown to the defendant) is unloaded as when the intended victim escapes injury by ducking.

Superficially, at least, Adelstein's moral-cost hypothesis may appear quite similar to the one that we are here advancing. It can be tempting to reduce moral blameworthiness or desert of punishment to the moral costs the criminal act imposes on society. To succumb to this temptation and cloud the distinction between these two hypotheses would be seriously mistaken. They are very different both methodologically and substantively, for reasons that we shall now explain.

(1.) Adelstein is clearly within an utilitarian framework. The causation in his system runs from moral costs to criminal sanctions. The goal sought is an optimal degree of deterrence and an efficient level of crime. The Epstein hypothesis, on the other hand, operates outside of the utilitarian framework. The causality originates from moral blameworthiness to punishment with perhaps "moral costs" as a

side effect when justice is not done. In the Epstein view a crime committed in private is no less a crime.

(2.) The moral blameworthiness view does not deny any role whatsoever to deterrence in the criminal law. Instead, it is argued that deterrence plays a subordinate role to the concern with moral blameworthiness. There are times when the two overlap in the sense that the pursuit of one will also achieve the other. This accounts, in part, for the plausibility of the deterrence theory. In this essay we have analyzed those areas in which the various theories yield different implications. It is only in this way that a choice can be made among them.

(3.) Adelstein attempts to incorporate the "moral" issues within the cost-benefit stage of analysis. They merely enter on the cost side of the ledger. The blameworthiness approach considers the moral issues paramount and a cost-benefit analysis can enter at a later stage. Given the nonutilitarian goals of the criminal law, efficiency considerations can enter at the administrative level. This method maintains the refutability of the cost-benefit framework and introduces moral considerations separately.

(4.) Moral blameworthiness, unlike the notion of moral costs, does not constitute a residual hypothesis. Both the idea and extent of blameworthiness is independently ascertainable in the written and otherwise-expressed moral views of society. As these views are not always consistent and not all equally sophisticated, there will be

elements of indeterminateness in the detailed features of the criminal law. Nevertheless, the broad framework and central doctrines should exhibit a reasonable coherence. Finally, it needn't trouble us, as it must Adelstein, that blameworthiness is not easily quantifiable. This is because he views the criminal law as seeking optimality while we view it as seeking justice.

## Conclusion

Despite the significant costs crime and the threat of crime have imposed on society, the essential rationale of criminal law is not the minimization of the social costs of crime. This is not to deny any role to theories of optimal deterrence but it is to deny them a fundamental role. Whether the criminal law ought to aim at some form of cost minimization is not our concern here. This essay has been an analytic description or rationalization of what the criminal law is. What it ought to become is a topic for another time.

NOTES

1. The opposite error, i.e., believing that all statements of universal generality must be tautologies, should also be avoided. On this matter see Rizzo, 1978.

2. For a detailed criticism of this view see Rizzo, 1979b. See also Epstein, 1973 for more criticisms as well as a positive alternative perspective.

3. This problem is made even worse if the punishments imposed by the legal system are increased beyond the social costs of the act to offset a probability of apprehension and conviction that is less than unity.

4. This can be easily seen from the standard elasticity relationship:

$$\eta^{X}_{AA} = \alpha^{X}_{A}\,\eta_{XX} + (1-\alpha^{X}_{A})\,W_{AB}$$

where $\eta^{X}_{AA}$ = the own-price elasticity of demand for the factor A in the production of X; $\alpha^{X}_{A}$ = the share of A in the total costs of producing X; $W_{AB}$ = the elasticity of substitution between factors A and B. The greater $W_{AB}$ is in absolute value the more elastic is the own-price elasticity of demand for X.

Now, reasoning analogously, let $\eta^{X}_{AA}$ be the elasticity of "demand" for murder with respect to its price - the penalty - in the

production or achievement of a goal (X). Let $W_{AB}$ be the elasticity of substitution between murder as a factor (A) and all other factors (B). As a byproduct in the productive process we ought to expect that, on average, A will be less "crucial" in that process and hence that $W_{AB}$ will be greater in absolute value. If this is true, then, ceteris paribus, the elasticity of recklessness murder with respect to punishment will be greater (in absolute value) than the same elasticity for intent-to-kill murder.

5. The Queen, however, commuted their sentence to six months imprisonment.

6. Doubtless penalties can induce a person to become aware of risks but, clearly, those who are already aware will be more likely to undertake precautionary activity in response to these penalties than those who are not.

7. This is true when the contributory negligence defense is used as a least-cost avoider defense. See Posner, 1977: 123-124.

8. There is a special meaning to the word "reasonable" when it is used in the economic sense. Reasonable behavior is the behavior of a maximizing individual when he is made to bear the full social costs of his activity.

9. Adelstein (1977: 6) admits that economic costs can also be widely dispersed.

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