

The Community's Role in Defining the Aims of the Criminal Law

By

James B. Jacobs

Professor Hart's Essay, "*The Aims of the Criminal Law*" covers so much ground that it might seem churlish to point out what he hasn't thoroughly canvassed. However, in seeking to flesh out Professor Hart's analysis still more broadly by focusing on the "community's" role" in the design and operation of the criminal law and the criminal justice system, I do not imply fault with his magisterial article.

Professor Hart's strategy for illuminating the aims of the criminal law is to analyze the "institutional considerations" of constitution makers, legislators, courts, prosecutors and corrections officials. The community is not an "institution," but, as Professor Hart recognizes, community condemnation does play an essential role in defining what is distinctive about the criminal law. There is no other body of law that draws its purpose and meaning from values as starkly as criminal law. Using Professor Hart's references to the community as a starting point, I attempt to illuminate the various ways that the community shapes the criminal law. In the second part of the article, I offer some reflections on shaming sanctions and on the current proliferation of criminal background checks.

Professor Hart's Understanding Of the Role of Community

In "*Aims of the Criminal Law*," Professor Hart frequently mentions "the community." The following passages mostly conceive of the community as a reservoir of moral values that justify the existence and use of criminal law.

(1) p.401 -- "Suppose, for example, that deterrence of offenses is taken to be the chief end [of the criminal law]. It will be necessary to recognize the rehabilitation of offenders, the disablement of offenders, the sharpening of the community's sense of right and wrong, and the satisfaction of the community's sense of just retribution may all serve this end by contributing to an ultimate reduction in the number of crimes."

(2) p.404 "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition."

(3) p.405 "The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct... Indeed, the condemnation, plus the added consequences may well be considered, compendiously, as constituting the punishment."

(4) p.406 "The core of the difference [between civil commitment and penal incarceration] is precisely that the patient has not incurred the moral condemnation of the community, whereas the convict has."

(5) p.408 "Or should the legislature be enabled to say, "If you violate any of these laws and the violation is culpable, your conduct will receive the formal and solemn condemnation of the community as morally

blameworthy, and you will be subjected to whatever punishment, or treatment, is appropriate to vindicate the law and to further its various purposes?”

(6) p.412 “If what was said in part two [of *The Aims of the Criminal Law*] is correct, it is necessary to be able to say in good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and hence deserving of the moral condemnation of the community.”

(7) p.413 “If the legislature does a sound job of reflecting community attitudes and needs, [the defendant’s] actual knowledge of the wrongfulness of the prohibited conduct will usually exist.”

(8) p.419 “To engage knowingly or recklessly in conduct which is wrongful in itself and which has, in fact, been condemned as a crime is either to fail to comprehend the community’s accepted moral values or else squarely to challenge them.”

(9) p.425 “In determining that described conduct shall constitute a crime, a legislature makes necessarily the first and the major decision about the appropriate sanction for a violation of its direction. For it decides then that community condemnation shall be visited upon adjudged violators. But there remains hosts of questions about the degree of condemnation and the nature of the authorized punishment...”

(10) p.426 “Are comparatively severe punishments to be favored over comparatively lenient ones?...Punishments should be severe enough to impress not only upon the defendant’s mind, but upon the public mind, the gravity’s of the society’s condemnation of irresponsible behavior.”

According to Professor Hart, U.S. criminal law begins with the community. (In most other countries the creation and application of criminal law is much more a matter for the state and the criminal defendant.) The criminal law gives expression to the community’s values and, in addition, shapes those values. Unless there is community condemnation of a particular species of conduct, there should not be a criminal law prohibiting that conduct. Unless there is community condemnation of a particular offender’s criminal law violation, no criminal sanction should be applied.

Professor Hart recognizes and approves the deterrent role of community condemnation. “[A constitution maker] will be likely to regard the desire of the ordinary man to avoid the moral condemnation of his community...as a powerful factor influencing human behavior which can scarcely with safety be dispensed with. (p. 409)” In other words, deterrence is served by the would-be law violator’s anticipation of being condemned, embarrassed and humiliated in the community. I will ask later whether this necessarily means that members of the community have an obligatory or permissible role to play in communicating condemnation to the convicted offender.¹

The community is also involved in the construction and implementation of the criminal law in some ways that Professor Hart does not deal with. For example, there is the institution of the grand jury (in about half of American states) and the petit jury (constitutionally required for all states). The Anglo-American criminal justice process,

¹ Cf. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-632 (1996); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1528 (2002).

unlike most other countries', gives lay representatives of the community responsibility for making the ultimate determination of guilt or innocence. And the commitment to general jury verdicts (guilty or not guilty) means that the petit jurors have the de facto power to nullify the criminal law if it does not correspond with their view of right and wrong. Moreover, up until the twentieth century, juries in many states also exercised sentencing authority. Jury sentencing is rare today except when it comes to capital sentencing where we still require a community determination of whether the defendant should or should not be executed. This alone, I think, makes a strong case for including the community in Professor Hart's explanation of the distinctiveness of the criminal law.

The Community and the Creation of Criminal Law

For Professor Hart criminal law begins with "the community" because, in his view, community condemnation is what makes criminal law necessary and meaningful. He is highly critical of criminal offenses that prohibit conduct that the community does not regard as morally wrong and favors purging such offenses from the penal code. But this assumes that there is a community consensus on the morality of a vast range of conduct and that such a community consensus can be reliably determined.

According to Professor Hart, it is the legislature's job to discern community values; where legislators find community condemnation, they should create criminal laws. Professor Hart does not explain how he or a legislator could determine which conduct commands sufficient community condemnation to warrant a criminal law and which do not. He does not tell us what percentage of public opinion should be regarded as "sufficient" or how solid or intense this opinion needs to be. How can we tell when the legislature has gotten it right or wrong? What if, as is often the case, the legislators disagree among themselves?

It is not easy to identify the existence, much less the extent and intensity, of community condemnation in a large diverse society like ours. The morality of many behaviors (e.g. drunkenness, abortion, resistance to military recruiting, music and video sharing, marijuana possession for personal use, sharp business practices, sports gambling, physically disciplining children, dog fighting, aggressive tax shelters, recording conversation without the other party's knowledge, lying under oath about sex, donating huge sums to a political candidate) is contested. Substantial populations believe all these behaviors to be wrongful and properly punished criminally; substantial minorities disagree. How strong must the community's consensus be to warrant a criminal law? Might not community opinion change or fluctuate based upon a particularly egregious case, increase in the frequency of a particular type of injurious conduct or prestigious/persuasive advocacy? And how is the conscientious legislator to know how to vote on a proposal to increase or decrease the maximum or minimum sentence for a particular offense?

How is the conscientious legislator to determine whether a community consensus that warrants use of criminal law exists? Would Professor Hart favor direct voting as the preferred way of deciding on new criminal laws? Even if direct voting were thought desirable, would a criminal law be justified by a bare majority or should it supermajority support be required? Would it matter if only 25% of eligible voters bothered to vote? Can legislators intuit their constituents' attitudes toward arguably immoral conduct? Should legislators only consider "informed opinion." Do we want legislators to weigh the rationality of community opinion and so play a modulating role in "toning down" the

passions of the community which may tend to fixate on the most egregious examples of a species of conduct?

Would Professor Hart think it permissible for a legislator to campaign for (and/or vote for) a new criminal law that is not yet, but might soon be, supported by majority or supermajority community condemnation? Politicians and interest groups frequently believe that passing a new criminal law will call attention to a species of injurious conduct whose seriousness was previously insufficiently appreciated. The campaign for criminalization (highlighting a particular form of injurious conduct) may itself change public opinion. Moreover, once the conduct is criminalized (or made punishable by a more severe sentence) more community members might regard it as morally condemnable or *more* morally condemnable. In other words, just as community sentiments lead to criminal laws, so too do criminal laws shape community sentiments.

Is a criminal law ever warranted when majority opinion does not support it? Suppose, for example, the majority does not condemn a type of conduct that involves victimization of a minority (e.g. gay bashing, abortion providers), should that automatically exclude use of criminal law? If not, what criteria should legislators use in deciding whether to vote for a criminal law in spite of majority opinion?

Professor Hart offers an essay in criminal law jurisprudence, not sociology of law. It is not part of his project to explain how new crimes are added to the books, old ones removed, and how (maximum and/or minimum) sentences are increased or (rarely) decreased. If we were inclined to expand his article in a more sociological direction, we could examine how and why certain interest groups and “moral entrepreneurs” seek to pass new criminal laws or increase punishments for existing offenses.

Community Condemnation and the Application of Criminal Sanction

Professor Hart sees community condemnation playing a crucial role in the *imposition* of criminal sanctions in individual cases. In pronouncing judgment and imposing sentence, the judge should, in Hart’s view, communicate the community’s moral condemnation. In fact, Hart chides a federal judge, whom he knows personally, for being unwilling to lecture convicted defendants on the wrongfulness of their conduct. For Hart, this formal expression of community condemnation is an essential, perhaps *the essential*, aspect of the judge’s role. In a large percentage of cases it constitutes the criminal justice system’s principle response to criminal wrongdoing.

How can/should the judge determine the right amount of condemnation in each case? This is even more complicated than the legislator’s task of deciding whether there should be a criminal law. While the community might have a view about a species of injurious conduct *in the abstract*, there will be no discernible community consensus about the degree of immorality/wrongfulness in a situation based upon a thick package of facts involving the circumstances of a particular crime and a particular offender. The defendant’s defense counsel will always argue extenuating and mitigating circumstances. Criminal cases almost always look more morally ambiguous when all the details are filled in.

Because most cases are the product of a plea bargain, the judge herself may have limited knowledge of the offense and offender. Defendants are often permitted to plead guilty to offenses less serious than the most serious one they committed (or arguably committed). Should the judge express condemnation in

accord with the offense to which the defendant pled guilty or in accord with the conduct in which the defendant (apparently) engaged?

How should the community's condemnation be communicated to the defendant? If Professor Hart is correct about the importance of the judge's communication of community condemnation to the convicted defendant, it is striking how little judicial and academic attention has been paid to the subject of judicial lectures to convicted defendants. Is there be a preferred tone, script and body language? Are there certain words and expressions that judges should employ or should refrain from employing? How does the same or similar condemnation not lose force and authenticity when repeated over and over again in case after case? Is it only necessary that the community's condemnation be expressed or, for the criminal law to work properly, must it be taken to heart? Does it matter whether the defendant internalizes the judge's expression of the community's condemnation, is indifferent to it or even rejects it?

Once the judge communicates the community's condemnation to the convicted defendant, is the community condemnation fully spent? Should it ever/never be mentioned again? Should probation officials have a duty to integrate community condemnation into their work with the defendant or do they have a duty not to integrate that condemnation into their work? In the event that the defendant is sent to prison, should correctional officials seek to reemphasize and reinforce societal condemnation or should they avoid the subject? (My own experience in studying prisons is that moral condemnation plays no role whatsoever in the contemporary "correctional" regime.) Is it appropriate to deny parole on account of the strength of community condemnation?

The Community's Role in Expressing Moral Condemnation in Individual Cases

If a conviction carried no negative community reaction whatsoever, wouldn't deterrence be undermined, especially when the sentence does not involve a jail or prison term? Suppose a citizen were to embrace the convicted defendant, loudly telling him that what he did (say, theft or fraud) doesn't matter, is acceptable, even praiseworthy? Wouldn't that subvert the criminal law? Isn't that the situation in the prosecution of organized crime groups and street gangs and one of the reasons that their criminality is so difficult to deter?

Should members of the community themselves communicate condemnation to the convicted defendant? Should they communicate conditional or unconditional forgiveness? Should they seek to avoid knowing whether neighbors, acquaintances and business associates have been previously convicted of criminal offenses and, if they do find out, pretend that they do not know?

In recent years, so-called "shaming sanctions" have become increasingly popular. They seek to mobilize public opinion and public action against the law violator in order to shame that person and deter potential offenders.² Shaming has been frequently used in the effort to deter street prostitution. For example, in 2005 the Chicago Police Department launched a website posting the names and photos of men arrested for soliciting prostitutes.³ In addition to posting arrestee information on its website, Arlington Texas

² Cf. ² Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-632 (1996).

³ <http://www.chicagopolice.org/ps/list.aspx>

mails postcards to the arrestee's home in order to get the attention and presumably mobilize the condemnation of spouses and family members.⁴ Fort Worth, Texas runs "John TV" on its Community Cable Television station and posts arrest information on its website.⁵ Arizona Stop DUI posts DUI arrests for all cities within Arizona that wish to participate.⁶ Orlando posts the names of individuals arrested for prescription drug fraud.⁷ Maricopa County, Arizona posts all arrests for three days,⁸ and maintains a "deadbeat parents" "Hall of Shame," naming parents who owe child support.⁹ Similar programs seem to be sprouting all over the country.

Some academic commentators, most notably Australian criminologist Professor John Braithwaite, argue that to be effective in reforming criminals the criminal law needs the support and participation of the community. According to Braithwaite, "[c]rime is best controlled when members of the community are the primary controllers through active participation in shaming offenders, and, having shamed them, through concerted participation in ways of reintegrating the offender back into the community of law abiding citizens."¹⁰ Braithwaite argues that unless there is community involvement in responding to convicted defendants, the "rule of law will amount to a meaningless set of formal sanctioning proceedings which will be perceived as arbitrary."¹¹ Therefore, he advocates "reintegrative shaming," sanctions which "shame while maintaining bonds of respect or love," but disapproves of "stigmatizing shaming" that alienates the convicted defendant and pushes him toward the embrace of a criminal subculture.¹² Likening reintegrative shaming to behavioral controls used by functional families and to the role of neighborhood gossip, Braithwaite favors gossip with which the convicted offender is never confronted (but which he knows is occurring) combined with openly expressed regret, acceptance and support for the defendant in the future. "Secret indirect gossip is combined with open direct gestures of reintegration."

Braithwaite may wish and exhort the community to forgive and embrace the ex-offender, but shaming is hard to channel and control. U.S. politicians and law enforcement personnel are more likely to emphasize the deterrent, rather than restorative, impact of shaming. Certainly, the john websites are intended to embarrass, humiliate and deter customers of prostitutes. If shaming sanctions are wrong or undesirable does that mean that the community should be morally neutral with respect to convicted offenders? If so, wouldn't that conflict with Professor Hart's view?

⁴ Jeff Mosier & Holly Yan, *New Tools in Prostitution Crackdown Arlington: Police Posting Arrestees' Photos on City Web Site, Postcards*, DALLAS MORNING NEWS, June 7, 2007, at 15B.

⁵ <http://www.fortworthpd.com/johntvarrests.htm>

⁶ stopduiaz.com

⁷ <http://www.cityoforlando.net/police/Rx/Rx.htm>

⁸ <http://www.mcso.org/index.php?a=GetModule&mn=Mugshot>

⁹ http://www.mcso.org/index.php?a=GetModule&mn=Deadbeat_Parents

¹⁰ JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 8 (1989).

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¹² Dan Kahan calls "stigmatizing publicity" the most straightforward type of shaming in which the penalty "attempt[s] to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience." Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-632 (1996). Kahan identifies three other types of shaming sanctions: literal stigmatization, self-debasement, and contrition.

Should Criminal Convictions be Public or Confidential?

Should public policy seek to disseminate to the public information about individuals' criminal histories or to keep this information as confidential as possible? One of the most distinctive U.S. constitutional choices with respect to criminal procedure is the commitment to courts that are open to the public. Not only is the defendant guaranteed a public trial, but the public and the media have an independent right to attend trials and examine court records. This means that a law violator cannot count on anonymity and that a rational actor contemplating the costs and benefits of a future crime should factor in the costs of community condemnation and loss of reputation. Is this an unintended feature of the administration of criminal justice or is it intended as an essential component?

In recent years, powered by the IT revolution, the trend has been toward making criminal records increasingly more accessible to the public. Approximately half the states make criminal record information available to any member of the public, usually for a small fee. Several states post on websites the names and background information of state prisoners. For example, the Kansas Bureau of Investigation launched Kansas' on-line criminal records database in 2004.¹³ This database, is available to the general public, and allows a searcher to retrieve any individual's criminal history record simply by entering the name and birth date of the search subject.¹⁴ These criminal histories include convictions for offenses classified under Kansas state law as felonies or as class A, class B, or certain types of class C misdemeanors.¹⁵ The criminal histories also include records of arrests that occurred less than a year before, which are missing disposition information.¹⁶ There were 3000 public searches of this database in the first month of the website's availability.¹⁷

In addition, a whole industry of information providers now stands ready, for a modest fee, to conduct a criminal background search of any person in whom a client has an interest. Many private information services companies prominently advertise on the worldwide web. An internet search for "criminal records" yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. Some companies have constructed their own databases by purchasing criminal history records in bulk from courts and state record repositories. For example, National Background Data (NBD), claimed as of spring 2003 to provide real-time access to more than 126 million records covering thirty-eight states. Another vendor, ChoicePoint, claims to have in excess of seventeen billion public records, including more than ninety million criminal records. ChoicePoint reported conducting approximately 3.3 million background investigations in 2002; the overwhelming majority of which included a criminal records search.

A recent report by the National Task Force on the Criminal Backgrounding of America points out that criminal background checks are proliferating in a variety of

13. *Kansas Criminal History Records Now Available Online at www.accesskansas.org*, BUS. WIRE, May 12, 2004, available at http://findarticles.com/p/articles/mi_mOEIN/is_2004_May_12/ai_n6023367. See also Kansas Bureau of Investigation, *supra* note **Error! Bookmark not defined.**

14. *Kansas Criminal History Records Now Available Online, supra* note 13. [A \\$17.50 fee is required to obtain an individual's criminal record. *Id.*](#)

15. Kansas Bureau of Investigation, Requesting Someone Else's Criminal History Record, http://www.accesskansas.org/kbi/criminalhistory/request_public.shtml (last visited Dec. 27, 2007).

16. *Id.*

17. *Kansas Criminal History Records Now Available Online, supra* note 13.

contexts, especially employment and residential rentals.¹⁸ We may be moving inexorably to a society where everybody's criminal record is readily and cheaply (if not freely) available. Is this to be regarded as inconsistent with the aims of the criminal law and opposed? I think not.

The openness/publicness of criminal courts is a vital part of our criminal justice system and, arguably, of American democracy. It allows "the community" (via media, scholars, interest groups) to monitor who is being arrested, prosecuted, sentenced and for what offenses. In the absence of such information, the criminal justice system's legitimacy would be undermined by all sorts of surmises, accusations, rumors and conspiracy theories. A criminal justice system with fragile legitimacy would weaken the overall legitimacy of the state.

It is another question entirely whether a system of public and easily accessible criminal records is consistent with professor Hart's view of the aims of the criminal law. On the one hand, he might see it as consistent in that it will contribute to a citizenry that is better informed about patterns of crime and crime control and about individual criminal cases. On the other hand, he might see it as inconsistent with the aims of the criminal law in that it facilitates, perhaps encourages, members of the community to express to their personal condemnation to defendants and to otherwise shun and discriminate against convicted offenders. Such actions could undermine the goals of rehabilitation and reintegration that Professor Hart also recognizes as important. It is unfortunate that we do not have him here to opine on this dilemma.

¹⁸ See SEARCH, NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS., NAT'L TASK FORCE ON THE CRIMINAL BACKGROUNDING OF AMERICA 1(2005), *available at* <http://www.search.org/files/pdf/ReportofNTFCBA.pdf> .