Punishment, Poverty and Responsibility: The Case for a Hardship Defence

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Introduction

I very much appreciate Neil Hutton's attention to my argument for 'principled parsimony' (Hudson, 1995). I have suggested that sentencing ought to be able to accommodate differences in economic situation of offenders, and argued further that such accommodation should be through the development and application of principled criteria for economic hardship, rather than being on the basis of individual representations for particularly sympathetic cases. In this article, I clarify and develop my position on the possibility of a hardship defence.[1]

I comment on three points of disagreement between Hutton's article and my own position: two points concern what I think are misrepresentations of my position, and the third concerns an empirical disagreement about the role of the sentencer. The two points of misrepresentation or misunderstanding involve ideas of *responsibility* and of the *social*; the empirical point is the balance of *formal* and *substantive* justice concerns in sentencing.

Responsibility and culpability

I find some confusion in Hutton's article in the way in which he uses the terms 'culpability', 'responsibility' and 'blameworthiness'. Despite having a sub-heading 'Responsibility and Culpability', in many places he seems to treat the two words as synonymous. For example:

> From a desert perspective, offence seriousness is comprised of harm and culpability, that is the extent of harm or damage caused to victims added to the extent of the offenders' responsibility for the harm. (pp. 572–3)

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Here, Hutton appears to use the terms 'culpability' and 'responsibility' as equivalent. He quotes me accurately as saying that indigent offenders may be less *blameworthy* than those whose choices are less constrained by economic circumstances, but appears not to allow that I do not use 'blameworthy' as a simple equivalent of 'responsibility'. For me, blameworthiness has two elements, one of which is whether or not someone actually did something (actively and knowingly), and the other is whether the act was something that the actor made a positive choice to do. Legal theorists generally recognize that there is an element to culpability beyond having carried out an act; otherwise, the sentence:

> And we do not want it [the criminal law] to convict people who are not culpable for doing the *actus reus*. (Simester and Smith, 1996: 6)

would be nonsense.

Although it recognizes that there is more to culpability than merely doing the act in question, legal theory has difficulty in moving consideration of culpability beyond a fairly narrow discussion of responsibility, with current debate mainly centred on categories such as recklessness, negligence and omission, rather than on choice. Nonetheless, acceptance of situations such as self-defence and various forms of physical coercion, shows that for law culpability involves an act not only having been done, but having been done from choice. Whereas legal theory has paid much attention to responsibility, however, it has paid scant attention to choice.

Law's failure to elaborate theories of choice leaves it with an absolutist, either/or notion of choice, such that action is seen as (freely) chosen if it is not carried out under conditions of physical coercion or mental incapacity. David Garland has also commented on this absolutist notion of choice in law, arguing that it conflates the ideas of *agency* and *freedom*:

> The idea of agency refers to the capacity of an agent for action, its possession of the 'power to act', which is the capacity to originate such actions on the basis of calculations and decisions. Agency is a universal attribute of (socialized) human beings . . .
>
> Freedom, on the other hand, generally refers to a capacity to choose one's actions without external constraint. Freedom (unlike agency) is necessarily a matter of degree – it is the configured range of unconstrained choice in which agency can operate. (Garland, 1997: 196–7)

My argument rests on this separation of agency and freedom, even though the dichotomy might not be quite so precise as Garland's formulation indicates. The term 'power to act' conveys to me a certain degree of freedom as well as a Kantian capacity of reason and will. Law's conception of responsibility seems to fit this formula of reason, will and at least a minimum freedom from external constraint very well. What is lacking, though, is acknowledgement of the fact that though agents may possess – in general and in the abstract – the power to act and therefore be responsible for any crimes they

may commit, in actual concrete crime situations they are operating in a society where possibilities of socially meaningful choices are unequally distributed. Since freedom of choice in an unequal society is necessarily a matter of degree and is unequal between agents, the extent to which they are to be blamed – and therefore punished – should reflect these differences and inequalities.

THE SOCIAL AND THE GROUP

At this point I want to refer to the second of Hutton's misrepresentations of my work, and this concerns the meaning, in this context, of the word 'social'. As Hutton says, I advocate a 'social' theory of culpability. This is *not* the same, however, as advocating a 'group' theory, either of culpability or responsibility. Hutton claims that I want to 'allocate responsibility at the level of the group rather than the individual' (p. 577); in this sentence he makes the double error of shifting from culpability to responsibility and from social to group.

My intended meaning of the word 'social' is that of taking into account the social circumstances in which offenders live their lives. This seems the same sense as that conveyed by Simester and Smith:

> The law exists in society, not in the abstract. Correspondingly, the law's labelling of a defendant as 'criminal' should be done with an eye to the social meaning of that term. (Simester and Smith, 1996: 6)

'Social' refers to an environment of economic, political, spatial and personal factors and relationships; 'group' designates a particular cluster of persons who form a specific and distinctive sub-segment of a society or community.

There are writers who suggest group exemptions from liability to state punishment, and while I sympathize with their arguments, I think they pose considerable difficulties. US judge David Bazelon (1976) and theorist Martha Klein (1990) conclude that the impoverished offender has 'paid in advance' because s/he has already in effect foregone the social rights and privileges supposedly derived from membership in society. The deprivations and burdens of poverty, it is argued, are similar to those of punishment, and so society does not have the right to punish further. Although there is much moral force to these arguments, they pose questions concerning whether they exempt in advance *all* the impoverished from *all* categories of offences, and how the norm-affirming, expressive functions of criminal law are to be served in cases involving impoverished offenders.

I am not, therefore, suggesting group, in-advance exemptions; what I am suggesting is that law should be cognizant of the social circumstances in which crimes occur, as well as physical, mental dimensions of actual crime situations.

FAIR OPPORTUNITY TO RESIST

My proposals for 'principled parsimony' take as their starting point the concept of 'fair opportunity to resist' mentioned by Hart (1968: 190–91). Hart allows that responsibility might be less for people whose circumstances are such that conformity with the law would be more difficult than for most people. This concept of fair opportunity to resist is unproblematic in the case of physical duress or mental incapacity, but although Hart raises the possibility of its extension to economic incapacity, most desert theorists have rejected the idea. For example, Von Hirsch acknowledges that the impoverished defendant:

> poses a dilemma for our [retributive] theory. In principle a case could be made that he is less culpable because his deprived status has left him with fewer opportunities for an adequate livelihood within the law. (Von Hirsch, 1976: 178)

Most desert theorists, including Von Hirsch, decide against a hardship defence, however. Their reasoning is partly the difficulty of operating a hardship defence consistently, and partly that allowing for reductions in culpability might lower penalties below those which would be properly reflective of the harm done by the offence. They are also mindful of the experience of rehabilitative sentencing systems where 'needs' have resulted in more punishment for the disadvantaged, on the ground that they need more penal input than the more fortunate in order to resist the pressures to commit future crimes. Returning to the question of poverty and punishment in subsequent works (1992, 1993), Von Hirsch, however, confirms that the key difficulty is the ideas of choice and voluntarism. He says that proportionality cannot be based on the idea of fair opportunity to resist because it concerns:

> the quantum of punishment levied on persons who, in choosing to violate the law, have voluntarily exposed themselves to the consequences of criminal liability. (Von Hirsch, 1992: 62)

The features of desert theory which are attractive to penal progressives[2] hinge to a large extent on desert's insistence that the offender is like the non-offender in remaining a member of the moral community and remains owed a duty of justice, rather than being the vehicle for unlimited crime-control objectives as in some utilitarian approaches. The corollary of this equality of rights to justice, is that offenders must accept responsibility for their actions as rational, autonomous moral agents. Quite apart from the general arguments about the ascription of responsibility in law made by Hutton, there is undoubtedly a profound specific difficulty in reconciling desert theory's insistence on the offender as autonomous moral agent, with the 'soft determinism' implied in the idea of a hardship defence.

This difficulty of reconciling desert with any notion of lack of voluntarism is alluded to by Sandel when he discusses the 'puzzle' of why Rawls admits desert as a basis for retributive justice where he does not admit it for distributive justice (Sandel, 1998: 90). Sandel asks, if it can be held that possession

of qualities and attributes which may affect their possessors' chances of material success are 'owned' by the community in general, and therefore do not attach to their possessors in any way that ascribes virtue, why should attributes and qualities that are linked with the propensity to commit crime be thought to reflect on the moral worth of their possessors? The lack of individual ownership, and ascribed virtue, of qualities such as intelligence, energy and fortunate family circumstances are essential to Rawls' defence of his 'difference' principle in his theory of justice as fairness (Rawls, 1972); similar logic with regard to criminogenic characteristics and social situation would, suggests Sandel, lead to a social response to crime based on pooling of risks through insurance and compensation rather than individual liability to punishment. It is thus fundamental to the institution of punishment that crimes are perceived as the outcome of bad moral choices rather than as the outcome of arbitrarily distributed attributes and circumstances. A hardship defence is therefore bound to be problematic for desert theorists.

THE SENTENCING FRAMEWORK

Some of the misunderstandings between myself and Hutton stem, I think, from a difference in empirical understandings of sentencing. Hutton argues that the sort of consideration of social circumstances, degrees of freedom of choice and therefore of culpability, with which I am concerned are dealt with by substantive aspects of law. Since, according to Hutton, the substantive part of criminal justice proceedings – sentencing – operates exactly as I would wish, taking account of nuanced notions of culpability and treating freedom of choice as a matter of degree, he naturally presumes that I must be aiming at the fundamentals of the formal aspects of law: equality of agency and individual responsibility.

Hutton's description of sentencing, however, no longer fits present-day England and Wales, the USA, and many other western jurisdictions. The 1980s and 1990s have seen considerable reductions in sentencers' discretion. Although England and Wales has not introduced the sort of sentencing guidelines and rigid sentencing laws seen elsewhere, concern with sentence disparities and the promotion of consistency in sentencing were the main themes of criminal justice developments from the 1982 Criminal Justice Act onwards. As well as legislation, during the 1980s a series of guideline judgments, the establishment and activities of the Judicial Studies Board, Home Office and Lord Chancellor's Department circulars and booklets directed both judges and magistrates firmly towards selecting the 'going rate' for the offence category concerned rather than choosing the sentence appropriate to the circumstances of the offender as a socially situated individual. The Probation Service also moved from welfare-oriented 'social inquiry' reports to 'justice model' pre-sentence reports, making recommendations to sentencers on the basis of gravity-of-offence scores rather than personal circumstance concerns.

This clear linking of sentence to offence seriousness, with consistency

valued over individual appropriateness, was codified in the 1991 Criminal Justice Act. Even non-custodial sentences were offence- rather than offender-oriented. The Act provided for non-custodial penalties to be graduated along a continuum of restriction of liberty, with the amount of restriction in each community sentence reflective of the seriousness of the offence. In the 1990s this trend has continued. The unit fine, which was the sentence most clearly designed to reflect the economic circumstances of the offender, was quickly abandoned; the 1997 Crime (Sentences) Act brought in new mandatory and presumptive minimum sentences. Although mandatory sentencing is nowhere near as advanced as in the USA, and in Scotland not so much as in England and Wales, the principle of sentencing as the part of the process which dispenses substantive justice to the individual, has been breached.

Even for the group of people for whom individualized justice was formerly commonplace – female offenders – sentencing in the 1980s and 1990s has become less reflective of personal circumstances, with consequent rising imprisonment rates (Daly, 1994; Hudson, 1998a). There is no doubt that the last 15 or so years have seen a marked and general shift to downgrade substantive justice concerns in criminal justice processes.

In these circumstances of reduced scope for the individualized, person-centred substantive elements in criminal proceedings, attention needs to be given to how these important requirements of justice may be met. While I fully sympathize with those who call for a wholesale change of criminal justice towards a more discursive mode,[3] in my work on punishment and poverty I engage in a less utopian project of making the present juridical mode more sensitive to inequalities between defendants. I am concerned to find ways of building consideration of social factors into legal proceedings which can meet the requirements of formal law, and which could provide some guidance for the principled exercise of judicial discretion should the balance shift again towards giving more scope for substantive elements of justice.

As well as reductions in judicial discretion and the sphere of substantive justice, the other important context of my argument is reduction of the welfare safety-net. Contemporary desert theory has been developed in the context of Rawlsian welfare liberalism, which carries the assumption that the basic needs of food, healthcare and shelter will be guaranteed by the state. In such a situation, the assumption that all offenders who are free from physical coercion or mental incapacity are acting out of at least some degree of positive choice is reasonable. The shrinking of the welfare safety-net in England and Wales and the USA in two decades of free-market neo-liberalism has, however, produced categories of people who do not have access to any legitimate income, and it is this fact that prompts reconsideration of a defence of economic duress. If an offender does not have the opportunity to afford the means of survival by legitimate means, s/he cannot be said to have *chosen* illegitimate means. It is in this case that I would suggest a defence of economic coercion might be admitted which would be analogous to the defence of physical coercion, and depending on circumstances would – rarely – negate or more often diminish responsibility.

For greater numbers of people, widening social inequalities, with poverty-level wages and progressive reductions in levels of benefits have increased pressures towards crime (Currie, 1997). For such people, economic circumstances might not undermine responsibility, but should significantly mitigate culpability.

I am not suggesting that criminal justice proceedings should be engaging in redistributive politics; what I am saying is that criminal justice must take account of changing contexts of action and narrowing ranges of choice. The argument is in some ways analogous to that for widening behavioural criteria for provocation as a defence or plea in mitigation for female victims of domestic abuse. Such women are in the sense of agency free to leave, but they can only do so if they have somewhere else to go, and their self-esteem may be so damaged that they cannot imagine improving their situation. The point is that law does not exist in a vacuum, and must reflect the realities of the society in which it operates.

STRUCTURING PARSIMONY

My 1995 article raises concerns about Tonry's suggestion of leniency for someone who, faced with adverse social circumstances, has struggled to 'overcome the odds' (Tonry, 1994). This selective leniency has, in the past, been disproportionately granted to women, and has been the focus of much of the feminist critique of pre-proportionality sentencing (see e.g. Eaton, 1986; Edwards, 1984). Such leniency, critics point out, comes at a high price, and this sort of leniency does indeed involve its recipients being seen as less than fully rational, responsible agents. As Daly (1994) demonstrates, individualized parsimony is only available to women who can be represented as victims as much as offenders – victims of poverty, of addictions, of emotions, and most of all, of men. Such parsimony is both demeaning and discriminatory. This is because what is being accepted as restricted is women's capacity to make choices; what I am proposing, on the other hand, is that indigent offenders be seen as acting rationally within a restricted range of choices.[4]

The question then is to specify criteria for hardship as defence or mitigation. Groves and Frank (1986) propose that freedom of choice be seen as a continuum with four main divisions: compulsion, coercion, causation, and freedom. The category 'freedom' would apply to offences where things that the offender wants can be obtained just as easily legally as illegally, so that there is a positive choice to use criminal means. Economic compulsion would be a defence where the only alternative is imminent starvation of oneself or one's dependents. This would, presumably, be relatively rare, but it is a comment on the present state of our society that it is not inconceivable. Lack of means amounting to coercion is more common. Young people, the homeless and others who do not fit the requirements of the job-seekers' allowance, people on poverty wages, women whose menfolk withhold money, people leaving penal, psychiatric or residential care institutions who receive benefit

in arrears but need to pay for food and accommodation immediately, are candidates for a mitigation of economic coercion.[5] Causation (I prefer the less determinist term 'motivation') would be the standard rational choice case where economic gain provides a motive but not an excuse or justification. These categories recognize the difference between stealing because one wants the latest fashion in footwear or the newest model video and cannot afford it legitimately, and stealing or failing to declare meagre earnings because one cannot otherwise feed oneself or one's children.

It is for politics rather than law to remedy social inequalities, but in the meantime law should reflect the structuring of opportunities which influences patterns of crime. Where crime results from economic compulsion or coercion, justice demands that society acknowledge responsibility by assisting the offender, and reflecting the harm done to the victim by adequate compensation.

NOTES

The ideas with which this article is concerned are discussed more fully in Hudson (1998a) and Hudson (forthcoming).

1. Development of my thinking on the problems and possibilities of a hardship defence has been assisted by discussions with Neil Hutton himself, with Andrew von Hirsch, by Andrew Ashworth in his comments on my 1998a chapter, and by John Kleinig, Bill Haffernan and other participants in the *Conference on Indigence and Criminal Justice*, John Jay College, City University of New York, May 1998.
2. I use the term 'progressive' in the same sense here as Hutton, that is, those who hope for reductions in the overall severity of punishment, not the sense that punishment should be more severe for each successive conviction. Unfortunately, this second sense of 'penal progression' is more influential in current penal policy in England, the USA and many other western countries.
3. This is common to proponents of restorative justice and some versions of feminist jurisprudence. See, for example, W. de Haan (1990); D. W. Van Ness (1993); C. Smart (1995); G. Masters and D. Smith (1998); B. Hudson (1998b).
4. These personal circumstances which have, as deserts theorists rightly pointed out, been associated with more intense punishment of the most disadvantaged have not, in any case, disappeared from criminal justice. They are being reintroduced not as 'needs', but as 'risk factors', and while they may not influence sentencing in the same was as in the rehabilitative era, they are influencing decisions about discretionary release, early termination of community supervision, and levels of intensity of community supervision.
5. Asylum seekers may soon be candidates for either economic compulsion or coercion defence or mitigation, depending on the levels and ease of access of 'benefits in kind' to which they are soon to become entitled instead of cash.

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