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Comment on the Tort/Crime Distinction: A Generation Later

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COMMENT ON *THE TORT/CRIME DISTINCTION: A GENERATION LATER*

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Perhaps unsurprisingly, Professor Epstein has used the occasion of this Symposium to again voice his disapproval of the modern regulatory state.[1] Those of you who know me will not be surprised to hear that I disagree with the bald assertions and assumptions he makes concerning that issue. In my view, compelling reasons justify the kinds of environmental and, at least in the absence of pervasive independent employee collective representation at the work place, worker safety laws attacked by Professor Epstein.[2] However, I will refrain from compounding the diversion by engaging Professor Epstein on these normative issues.

Instead, I will begin by noting my agreement with the abstract primary thesis Professor Epstein posits in *The Tort/Crime Distinction: A Generation Later*—that it is possible to justify meaningful distinctions between modern tort and criminal law, including the distinctions he drew in his excellent paper from what he calls the last generation,[3] by purely consequentialist analysis.[4] I would not claim, and I do not read Professor Epstein as claiming, that our law has totally consequentialist derivations. However, I would claim, perhaps in agreement with Epstein, that we can utilize consequentialist principles not only to distinguish between tort and criminal law, but to frame an ideal tort/civil enforcement/criminal law system as well.

I first depart from Professor Epstein's approach in *A Generation Later* when he attempts to frame these consequentialist justifications entirely in terms of the "incentives . . . create[d] for individual conduct, be they for good or ill."[5] Epstein's analysis assumes, as does much—though not all—economic analysis, that humans are mere rational calculators of and responders to that which brings them satisfaction or dissatisfaction, happiness or unhappiness, pain or pleasure, or whatever type of "util" that works best for the calculus. Although I might be persuaded that this kind

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1 Richard A. Epstein, *The Crime/Tort Distinction: A Generation Later*, 76 B.U. L. REV. 1 (1996) [hereinafter *A Generation Later*].

2 *Id.* at 5-7.

3 Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231 (Randy E. Barnett & John Hagel III eds., 1977).

4 *A Generation Later*, *supra* note 1, at 3-4.

5 *Id.* at 4.

of analysis, if applied with sophistication and a willingness to make collective judgments about how preferences can be developed that are more desirable for the aggregate of the present and future members of our species, should be central to the justification of either our present or an ideal *tort* system, I am convinced that one must take a much broader view to understand *criminal* law.

A comprehensive framework for understanding the criminal law must incorporate the insights of sociologists and psychologists as well as economists. In the last few pages of *A Generation Later*, Professor Epstein dismisses the "expressive" or "educative" function sometimes attributed to the criminal law.[6] This position derives from his skepticism that public morals and attitudes are influenced in any significant way by the reasoning, or I take it, by the result of even major decisions like *Roe v. Wade*[7] and *Bowers v. Hardwick*,[8] or by the language of actual or model penal codes. This dismissal is not responsive to the stronger claims made about the expressive and moral function of the law in general and of criminal law in particular.[9]

First, new legal rules that resonate with the deeper morals of at least a dominant portion of society can influence behavior by forcing its members to live within a new institutional system resting on such rules. Strong psychological and sociological processes can induce those who originally rejected the values expressed in the new rules, but who also wish to succeed in the new institutional system, to adapt to and ultimately to adopt these values. We can expect rebellion and, as in the case of *Roe v. Wade*, such rebellion may prove intractable. But where the new rules accord with deeply held values of a dominant portion of society and the rules are strongly enforced, rebellion will not necessarily be successful. *Brown v. Board of Education*[10] and the ensuing civil rights revolution is of course the great twentieth century illustration. Concededly, neither the reasoning nor the result in *Brown* ultimately persuaded Southern elites. Still, I would claim that the new institutional structures that followed in *Brown*'s wake ultimately did lead to a change in Southern values.

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[6] *Id.* at 18-20.

[7] 410 U.S. 113 (1973).

[8] 478 U.S. 186 (1986).

[9] *See, e.g.*, FRANKLIN E. ZIMRING, PERSPECTIVES ON DETERRENCE 4-5 (1971) (noting that punishment can serve as "a teacher of right and wrong"); Robert J. Lipkin, *The Moral Good Theory of Punishment*, 40 U. FLA. L. REV. 17, 28 (1988) (noting that the "communicative function [of punishment] suggests an educative dimension to the political practice of punishment"); Ronald J. Rychlack, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 332 (1990) (noting that condemnation educates and promotes social cohesion, but that its most effective role lies in its capacity to "reassure the majority of society that the system does work").

[10] 347 U.S. 483 (1954).

The more significant and commonly perceived educative and moral force of most law, and certainly of most criminal law, however, operates not to *change* morals or values, but rather to *confirm* them in such a way as to insure that they become more deeply internalized or inculcated in the public psyche. A central function of the criminal law is to iterate the community's condemnation of certain behavior and associated mental states in a way that helps insure that the tendencies in all of us toward these behaviors and emotions can be internally controlled by a stern superego if not by a more integrated ego. Effective criminal law in our society is not imposed by what Professor Epstein might call out-of-touch bureaucrats or judges, but rather by popularly elected officials, including prosecutors and juries of peers. These people most often formulate and implement criminal law not to change morals, but to express and confirm them. If the environmental, workplace safety, or other corporate criminal laws that trouble Professor Epstein fail to resonate with public morality, he can be assured that they will not last. Given the present state of our political market place, where the campaign contribution rules, I think he can rest assured that the monied elites who are against such laws can lead an effective rebellion.

Further, Professor Epstein need not gainsay the moral and educative force of the criminal law in order to press his consequentialist thesis. This force can have a purely utilitarian justification. A simplified utilitarian view of human nature is not a prerequisite to basing an ultimate policy analysis on some kind of utilitarian calculus. Indeed, I would submit that Professor Epstein might significantly enhance his consequentialist defense of the tort/crime distinction by explicitly addressing the role of moral condemnation in the criminal law.[11]

We can observe the implications of Professor Epstein's lack of regard for the moral expressive function of law in his failure to separate clearly public civil enforcement of regulatory statutes from criminal enforcement. He makes his first cut between tort and crime as "between private and public enforcement."[12] Although he clearly recognizes later that there is at least some formal distinction between public civil and criminal enforcement,[13] Professor Epstein never attempts a meaningful formulation of what that distinction might be and seems concerned that any distinction could not restrain his aggrandizing bureaucrat.

I am not troubled by Professor Epstein's inclusion of regulatory statutes in his discussion of the divide explored in this Symposium. Given the importance of modern statutory regulation, I think this is an illumi-

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[11] *See* Rychlack, *supra* note 9, at 332 (noting that in light of its capacity to educate, reaffirm values, and promote social cohesion, "denunciation clearly has utilitarian aspects); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 8 (1987) (commenting that denunciation is a "hybrid" of retributivism and utilitarianism).

[12] *A Generation Later*, *supra* note 1, at 11.

[13] *Id.* at 16.

nating move and one that any theory advanced here this weekend should address. Moreover, I would suggest that the presumption be that civil enforcement rests comfortably on the tort side of the divide, given the similarity of available remedies and procedures.

Rather, my problem with Professor Epstein's analysis is his failure to adequately separate the reasons for choosing public civil enforcement over private enforcement from the reasons for criminalizing the regulatory command. There are a number of reasons for preferring public civil enforcement, some of which Professor Epstein notes,[14] and some of which he does not. These reasons include the possibility that the harm is diffused, creating either a collective action problem for the present generation, or an "impossible" action problem for a future generation; the possibility that private individuals will be too ignorant, intimidated, or impecunious to understand or risk litigation; and the desirability of having a more neutral public official screen litigation to avoid the costs of its inevitable disruptions and delays. However, none of these reasons, or others of which I can think, explain when criminalization might be appropriate.

In response I offer the special moral and educative function of the criminal law. Only the criminal law condemns certain behavior and associated mental states as evil. Our society is only ready to visit punishment on those who have demonstrated such evil. And our society will criminalize, or at least will continue to criminalize, only those actions which it deems—ultimately, I hope, for utilitarian reasons—sufficiently evil to require condemnation to maintain and insure the internalization of public morals. Such condemnation, and its associated possible sanctions, require special procedural safeguards such as those provided under our system.

This emphasis on the moral, condemnatory force of the criminal law is consistent with the line Professor Epstein drew between tort and criminal law eighteen years ago. Tort, he said, assigns liability on the basis of comparative responsibility.[15] The criminal law makes ultimate moral judgements and imposes absolute moral standards.[16]

Further, and contrary to Professor Epstein's present position, the expressive function of the criminal law suggests why we would have a criminal system even if the tort remedial system—along with public civil enforcement perhaps—could offer perfect compensation and perfectly balanced external incentives. If only external incentives interest us, I wonder why we do not send the insolvent to debtor's prison for not adequately compensating his creditors? We do not, I submit, because the electorate is unwilling to condemn those who cannot meet their civil lia-

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[14] *Id.* at 16-17.

[15] Epstein, *supra* note 3, at 243.

[16] *Id.* ("In criminal cases . . . it is possible to measure the conduct of each such individual against an ideal standard of judgement, rather than by constant comparison to the conduct of another party.").

bilities and is unwilling to imprison those whom it does not morally condemn. Contrary to Professor Epstein,[17] I would also claim that we create a privilege of self-defense, despite the risks of undue retaliation and concealed aggression, not because we are compensating for under-deterrence in the tort system, but rather simply because we are not ready to condemn those who inflict harm in self-defense. Similarly, we are willing to criminalize attempts because we condemn both the action constituting the attempt and also the associated mental state.[18] There may be no victim to compensate, but there is morality to confirm and internalize.

Finally, I should point out that a consequentialist like Professor Epstein need not lament the fuzzy line between "gross negligence" reachable only through tort liability, and reckless indifference, within the reach of criminal law.[19] The line is fully adequate as long as it serves to express distinctions between conduct that the community feels warrants special moral condemnation and that which it does not. To the extent that our various democratic institutions operate properly that should be the case. Although whether they do, I readily admit, is another topic.

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[17] *A Generation Later*, *supra* note 1, at 13-14.

[18] *Cf. id.* at 17-18 (suggesting that punishment of attempts arises as a compromise between optimal deterrence and the principle that punishments not be excessive).

[19] *Id.* at 15-16 (describing same as "about the best that can be done").