

1-1-2003

Strict Criminal Liability Limiting the State's Power to Condemn

Andrew Verstein

Yale Law School, andrew.verstein@yale.edu

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylas>

 Part of the [Courts Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Verstein, Andrew, "Strict Criminal Liability Limiting the State's Power to Condemn" (2003). *Lecturer and Other Affiliate Scholarship Series*. Paper 10.

<http://digitalcommons.law.yale.edu/ylas/10>

This Article is brought to you for free and open access by the Yale Law School Other Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Lecturer and Other Affiliate Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Strict Criminal Liability: Limiting the State's Power to Condemn

By Andrew Verstein '05

H. L. A. Hart argues that strict criminal liability often undermines the moral condemnation associated with punishment and therefore its capacity for deterrence. Hart explains that insofar as legal punishment expresses the "odium, if not the hostility"¹ of a community towards those who break its laws, strict liability forces us to either condemn those who are not deserving of condemnation or to negate the moral condemnation of the law in general. One choice is immoral and the other reduces the effectiveness of a significant deterrent and is therefore counterproductive. Either way, the consequences of strict liability are undesirable. In this paper, I will defend Hart's thesis against its objectors. I will also propose and defend an original reason to believe Hart's thesis. I will build my case around the crime of statutory rape, although discussion of principles and objections will involve other crimes.

The state's ability to condemn through punishment is essential to deterrence and is undermined by strict liability. When rational individuals consider whether to commit a crime such as statutory rape, they consider a number of factors. By far, the most important is the immorality of the action. Long before fear of punishment enters the picture, personal morality usually ends the consideration. Part of this personal morality is reinforced by the implications of punishment. If the state reserves the word "rapist" for only those who commit heinous crimes with full knowledge and intent, then agents will feel compunction towards anything that might earn them the that title. We do not want to be morally equivalent to an agent who has sought out a young person and used his age and authority to take advantage of her. A

¹ H. L. A. Hart, "Changing Conceptions of Responsibility." *The Philosophy of Law. Classic and Contemporary Readings with Commentary*. Edited by Frederick Schauer and Walter Sinnott-Armstrong, (Harcourt Brace: United States, 1996), page 363.

could not have reasonably foreseen. If an agent did not know that his partner was underage, if he had taken reasonable steps to make sure she was not underage, if she took steps to convince him that she was not underage, many would find the agent morally blameless. However, in this case, strict liability rape laws would still hold him accountable for punishment. Thus the word "rapist" is now broadened to mean more than "vilest of human beings," or some equivalent value judgment. If we would punish this agent, we must change the term to mean "vilest of human beings or individual who carelessly or confusedly had intercourse with a minor." This new title is weaker and less deterrent. Individuals are less afraid to risk getting this label because they know that it carries less social stigma than the original definition of 'rapist'. Individuals will scorn rapists less because plenty of rapists, by this definition, are not awful human beings. Further affecting condemnation, the vileness of the crime is weakened by apparently conflating purposeful action with accidental. By treating both intentional and non-intentional action the same, the law seems to say that plotting to take advantage of a young girl is no worse than having sex with a girl who one had no reason to believe was under age.

Perhaps the employment of strict liability punishment in cases of statutory rape would not actually increase the amount of people who committed statutory rape. Even if this is so, the effect of strict liability cannot be written off. Strict liability damages the deterrent power of moral condemnation beyond the scope of the crime that it is actually punishing. First, is it likely that accepting strict liability for one crime will create precedent for its application other crimes, exasperating whatever problems are already associated with strict liability. More significantly, weakening the government's capacity to make moral condemnations in one area necessarily weakens its ability to do so in related areas. If I read in the paper that a court found a man guilty of statutory rape without having considered his intent, I will assume that

mine is the sort of government for which moral innocence is irrelevant. When the next article talks about man imprisoned for smuggling (a crime without strict liability), I will wonder whether his moral guilt was really considered in the trial. In any case, I will have far greater sympathy towards criminals in general since I cannot operate with the pretense that all those in prison are morally guilty. Once a system admits of guilty charges against morally innocent people, citizens cannot look at any branch of that system without an ever-present doubt.

Hart's opponents will object that the state's ability to condemn is not limited by citizens learning that morally innocent people are punished. After all, morally innocent people go to jail all the time and we still have respect for the law's moral condemnation. Not only that, but *legally* innocent people go to jail. Hart's opponents will remind us that no legal system is perfect, that mistakes are made, and that somehow we manage to cope with these problems without becoming disenchanted with our justice system. It might be sad that the full brunt of the law is brought against innocents every day, but citizens will accept it when to demand more rigorous standards would cripple the justice system. Yet this objection ignores a crucial distinction between those unfairly punished by more conservative liability standards and those punished by strict liability. First, while in the former case individuals mistakenly have their moral character called into question, the latter case makes no pretense of examining their intentions. That is to say, when we read about a rapist sentenced without strict liability (suppose, by reckless liability), we may fear that the state has made a mistake and that it was some horrible coincidence that brought this agent into his fate, but we believe that the state has done everything reasonable to make sure that his intentions were not good; we can doubt whether the state competently applied its condemnation, but we have no doubt whether or not it was thoughtful in its application. Conversely, to when the state condemns someone under strict liability, there is no pretense that new evidence of character or motive (a journal, a letter) could be uncovered to discredit the sentence—the state condemns without consideration. This is a relevant

distinction. Any claim that our population tolerates errors in the system without losing respect assumes falsely that strict liability punishment will be looked upon as mistakes *within* the system rather than thoughtlessness of the system itself. Secondly, the errors of traditional justice usually go unnoticed, but when they are seen they do cause a stir. If a population notices that the government repeatedly convicts innocent men and women, that population will begin to feel sympathy towards arrestees and suspicion regarding the government's condemnation. That United States citizens are not up in arms about our implementation of justice implies that mistakes are few or are quiet, not that they do not undermine respect for condemnation. The damage of bringing a slew of counterintuitive strict liability verdicts will not be dampened by any supposed tolerance built into the system.

Hart's objectors might then try to produce examples of strict liability laws that do not drag down the state's ability to condemn. Every year, thousands of Americans pay fines for late filing. If an agent turns in his forms late, he must pay a fine no matter his knowledge, intention or opportunity. Despite this, the state's condemnation is not dependant upon a lengthy trial process to consider the filer's state of mind. Why should we think that strict liability for rape would somehow deplete the state's ability to condemn in a way that this does not? However, objectors have assumed that all punishments and crimes carry moral condemnation when in fact laws vary in the level of moral condemnation they express. Indeed, some laws do not express moral judgment at all. Because Hart is dealing with the deterrent power of condemnation, it is individual perceptions of condemnation that must be considered. Most citizens feel that fines for late filing are not signs of moral turpitude or reasons to feel guilty. In fact, many citizens may feel as though tax law gives them the legitimate choice to file their taxes late as long as they are willing to pay the fine. They may be busy, forgetful, or just lazy, but we will be unlikely to fault them morally for incurring a fine. "Late-payer" is not a title to hide from in the same way as "rapist". For the latter to be applied widely without consideration of motives would weaken the power of label in a way that the former

would not. Strict liability may be called for because of practical concerns for the IRS, or parking fines, or any number of other cases, but objectors will not be able to produce a case where punishment is bound up with moral condemnation, and yet legal precedent and common intuitions will allow strict liability without a cost to moral deterrence as a whole.

Although Hart does not make them, there are other arguments in support of his thesis. If we are concerned about strict liability working against the law by reducing citizens' respect for the moral condemnation of punishment, we must be worried not only about the actual issues of justice, but also the widespread perceptions and intuitions about them. Take for example the apparent virtue of expedience that strict liability brings to courts. With no need to establish motive or knowledge, trials would simply be a matter of determining the factual events of the case. Often, these will be furnished by ready confessions of defendants who expect to be acquitted on grounds of ignorance and good intentions. Many of these confessions will come without any request for an attorney. Clearly, these sorts of trials will take less time. To outside observers, this creates an image of assembly line justice. It seems odd that a serious crime like rape could be tried more quickly than a less serious one like petty theft, yet the need to establish *mens rea* might very well make the latter more time-consuming. It implies that courts are too careless to devote the appropriate time to cases that warrant them. It also implies that the courts do not know the difference between serious crimes and less serious crimes. Objectors will counter that this argument applied to the justice system as a whole would encourage courts to deliberately increase the length of trials across the board. This objection draws too much from my comment. It is not true that maximizing trial time maximizes perception of justice and moral condemnation; there is a significant negative stigma associated with lengthy trials. Nevertheless it is true that citizens need a minimum standard of procedure to imply

that the state understands the gravity of its decisions. When a court convenes for a few hours before sentencing a man to ten years in jail for a crime he did not know he was committing, it sends the message that the state does not care about things that are very important to private citizens. Of course, this message is true; the damaging results of the state not caring about motive and knowledge are what is essential to strict liability. But the speed of the trial relative to how long it seems it should take, and how long other trials take, make this point especially clear and make its negative effect upon moral deterrence that much greater.

Hart argues that the power of moral condemnation is hindered by strict liability, and this claim holds up to critics. Attempts to show tolerance for misapplication of condemnation are not sustainable in light of relevant distinctions between their examples and the case of strict liability for statutory rape. Furthermore, additional perception issues, specifically citizens' expectation for how quickly (or, slowly) good justice ought to work, create even more reason to believe that citizens will not take the state's condemnation as seriously under strict liability codes. Clearly, for rape and other crimes, the strongest arguments for strict liability have gone unaddressed: whether the deterrent effect of strict liability is overriding and whether the practical concerns of certain crimes are such that citizens will understand the measures the state takes. These are questions which cannot be answered here. It is a policy maker's task to weigh the effect of punishing more morally guilty people, increased deterrence and incapacitation, against the effect of punishing more morally innocent people, loss of deterrence due to less effective moral condemnation. On these grounds, policy makers must decide for which crimes, if any, strict liability is justified. This paper has proven that, if she is to do so, she must do so with the knowledge that a justification is indeed required.