

MORE ON OVERCRIMINALIZATION: A REPLY TO PROFESSOR JUNKER

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I am grateful to the editors of the Law Review for inviting me to comment on Mr. Junker's article. It gives me a chance to clarify some of the points I have elsewhere tried to make which, judging from Mr. Junker's article, appear to need it.

Mr. Junker apparently agrees with the conclusion of those he criticizes, myself and several others, that the criminal law has made excessive use of the criminal sanction in the respects we describe. What he quarrels with is the arguments we make to support that conclusion. Fair enough. I am not inclined to regard it as treason in an ally to attack the good hearted for being weak minded, least of all among those who presume to scholarship. Indeed, as T. S. Eliot has Thomas Becket reflect, "The last temptation is the greatest treason; To do the right deed for the wrong reason." So if there's treason around it is we who are charged with it.

Then what is Mr. Junker's argument? Let me deal first with what he offers as his "general conclusion." It is that "the proffered arguments are parasites in search of a host"; that we have failed to develop principles to support the proposition that private behavior should not be prohibited by the criminal law; that such principles are essential to the argument, for without them it can always be retorted that despite the great practical costs of enforcing such laws, which we argue at length, the price should be paid anyway.

Now I am not one to make little of the search for the high ground of principle. The moral and philosophical questions on what is and what is not the law's business—debated elegantly by Mill and Stephen in the last century and as well by Hart and Devlin more recently—are of great significance on many counts. But is it really necessary to get the answers to those questions to make a *case* for decriminalizing abortion, homosexuality, prostitution, marijuana use, and the rest? Surely not. Speaking for myself at least (I have no charter to speak for my brethren under attack), the argument that Mr. Junker attacks was quite straightforward in structure. It was as follows: You apparently want to keep certain conduct criminal just

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because it's immoral (homosexuality, abortion, prostitution), or because it enables police and prosecutors to provide some service or other (check laws, family support laws), or because it gives police authority over suspected criminals they otherwise would not have (vagrancy, disorderly conduct). But have you considered how the inevitable process of actual enforcement of such laws (a) so poorly serves the objectives you have in mind, and (b) in any event produces a variety of substantial costs, including adverse consequences for the effective enforcement of the criminal law generally? These practical considerations are so great that they should persuade you to decriminalize the law in these areas.¹

It eludes me why this line of argument is fatally flawed by failing to demonstrate a general principle in terms of which conduct should not be made criminal. Of course, the argument rests on a major premise. But that premise is not at all a covert conclusion as to the limits of the legitimate use of the criminal sanction. It is simply that if something costs too much for what you get, you'd be foolish to buy it. Concededly, I don't generalize a principle for determining how much of which costs are too much for which benefits. Frankly, I wouldn't know how to go about it. The argument asserts the conclusion that the specified costs are too much for the specified gains and invites agreement in the hope that presenting a bill of particulars of the nature and magnitude of the costs may help to achieve it.

Consider an example. At the end of my discussion of sex offenses, I observed: "Only the judgment that the use of the criminal law for verbal vindication of our morals is more important than its use to protect life and property can support the preservation of these laws as they are."² Mr. Junker criticizes this statement because it fails to demonstrate a set of principles in terms of which it is improper to use the criminal law for verbal vindication of our morals, arguing that in the absence of such principles I haven't made a case for repeal. Of course not—not, that is, if one wants to insist that verbal vindication *is* more important than more effective enforcement of laws protecting life and property. That's exactly what the statement asserts. The argument was plainly not that one is not *entitled* to use the criminal law for verbal and symbolic purposes, only that it was *foolish* to do so if you give protection of life and property a higher priority.

This same misconstrual of the argument leads Mr. Junker to another of his critical themes—*i.e.*, if we meant what we said we'd be

¹ See Kadish, *The Crisis of Overcriminalization*, 372 ANNALS 157 (1967).

² *Id.*

advocating repeal of a lot more of the criminal law than we do. Illegal police practices occur as often in connection with weapons offenses as with narcotics offenses. How, then, can Morris and Hawkins urge repeal of the latter and extension of the former? If absence of complainants produces underenforcement which invites discriminatory enforcement, then why not repeal bribery and weapons offenses as well as sex and drug offenses? If the costs we describe inhere in enforcing drug laws against adults, they inhere in juvenile enforcement as well—but we don't urge repeal of the latter. Hence we don't mean what we say. And our real reasons for urging repeal of those laws we don't discuss or defend.

This is a further manifestation of Mr. Junker's winning but misplaced figure of the parasite in search of a host. Again he has the argument wrong. The argument is not that any of these adverse consequences affords a sufficient reason for abandoning every criminal law whose use produces it. It is simply that in any use of the criminal law a particular adverse consequence may be so severe and so combined with other kinds of adverse consequences (*e.g.*, not only discriminatory enforcement, but police corruption, police illegality, loss of respect for law) that, considering the relative importance of the purposes of that law and the extent to which they are achieved, a prudential judgment would be to abandon it.

Now this kind of case can be made more strongly for certain kinds of laws than for others. "Morals offenses" tend to come off particularly badly with this sort of cost accounting. But that doesn't mean that any law whose criminal enforcement produces any of these adverse consequences, to be consistent, must also fall. Take gun control, for example. Its enforcement may well exact some costs of the kind we called attention to in urging repeal of private moral offenses: a significant minority of law abiding citizens are firmly attached to their right to buy and possess guns free of control; the mere illegal possession of guns produces no complaining victim; enforcement requires searches of the person which can lead to abuse; discriminatory enforcement is likely against groups the police fear or dislike. These plausible apprehensions are enough to justify some second thoughts about gun control laws. But they don't themselves make the case against these laws. What has to be weighed is the objective of gun control laws (the saving of human lives) and the chances that gun control laws would operate to achieve that goal. So long as a strong case can be made in light of these kinds of considerations (and I believe it can and has been made³), Mr. Junker's decriminal-

³ See, *e.g.*, Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 771 (1968).

izers should be able to favor such laws without being accused of playing an intellectual shell game.

Now there is a big problem in this cost-benefit approach to deciding what to make criminal. The problem is that it is easier to state what the costs and benefits may be than to measure their quantity with any degree of accuracy or to assess them with reliability and objectivity. My colleague, Phillip Johnson, called attention to this when he observed: "In the end the comparison of costs and benefits is just a useful way of thinking about the problem. When it begins to seem to lead to definite answers, one begins to suspect that the proponent's personal moral philosophy is quantifying the uncertainties."⁴ I agree with that. It's Mr. Junker's best point. I think he threw it away going after bigger fish which weren't there.⁵

⁴ Johnson, Book Review, 7 *TRANS-ACTION* 57, 59 (1969).

⁵ There are some other criticisms Mr. Junker makes of more interest to me as the target than to a bystander. Some are well taken. For example, he challenges my airy assertion that abortion laws probably kill more mothers than they save fetuses. Fair enough. I have no proof. I should have said "possibly." Some are less well taken. For example, he apparently thinks police illegality should be met through the "straight-forward response . . . of effective procedural controls" (like what?) rather than by repealing laws which invite such conduct. Why not both? At another point he chides me for criticizing the insufficient fund bad check laws on the ground that they constitute a diversion of enforcement resources in order to help businessmen reduce the cost of the voluntarily assumed risk of taking checks. That argument, he says, proves too much for it could be invoked to justify decriminalization wherever a victim can protect himself by changing his ways—keeping merchandise behind the counter, for example, or even building a fortress to protect against burglary. The distinction, however, is in the kind of risk that is assumed, as I tried to point out. In the insufficient fund cases it is the risk of debt collection, a risk which, as a rule, we conscientiously leave to the civil law. The appeal here is to priorities. Is it worth taking police and prosecutor time and resources from fraud and burglary, etc. to help a creditor collect a debt just because a check was used to establish the debt?