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The Limits of the Criminal Sanction, by Herbert L. Packer

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BOOK REVIEWS

THE LIMITS OF THE CRIMINAL SANCTION. BY HERBERT L. PACKER. STANFORD UNIVERSITY PRESS, 1968. Pages 375. \$8.95

The stated purpose of this book is to give the Common Reader an insight into the nature and rationale of the criminal sanction, an overview of the characteristic processes through which it operates, and some criteria for determining the limits of its applicability. The timeliness of the project, as its author points out, hardly needs emphasis.

Social groups of all sizes, from nations to families, are controlled not only by a complex system of penalties for the bad behavior of individual members, but to a significant extent by an equally complex set of rewards for good behavior. If a disproportionate number of people reject the rewards that society has traditionally offered, or have goals that do not seem to be attainable by adhering to the norms of good conduct, order tends to break down and there is a drastically increased reliance on punishment as a means of control. This is apparently what is happening in the United States. When the resulting dislocation reaches the point where "law and order" becomes a political slogan, an irrational response by an alarmed public is virtually assured unless there is somehow generated a common understanding of what the criminal sanction can and cannot be expected to do and what its alternatives are. Whether Professor Packer's book is designed to accomplish this objective raises an entirely different question.

Its thesis, developed in Part I, when extracted from a thicket of verbiage, is simple enough. The author elaborates a theory of criminal punishment based on the proposition that the familiar retributive and utilitarian goals of the criminal law are not antithetical, that each is a necessary, and that neither is a sufficient condition for using the criminal sanction. Thus punishment is justified if, but only if, it tends both to affirmation of ethical absolutes and also to prevention of antisocial behavior. Actually this justification is a restrictive definition of crime if crime in legal terms is nothing less than conduct which is punishable by the criminal law. But before considering whether there are other criteria for limiting the kinds of conduct that warrant the criminal sanction and may therefore be called crimes, Professor Packer examines the limits imposed on the rationale of punishment by the doctrinal content of the criminal law.

In two chapters, entitled *Culpability and Conduct* and *Culpability and Excuses*, the author's capacity as a teacher of law shows forth unmistakably in as nice a summary of the "general part" of the substantive criminal law

as I ever hope to see. These chapters test and fortify his theory of punishment. That they may also prove to be a bonanza for law students, especially in schools using Paulsen and Kadish, *Criminal Law and Its Processes*, since the summary closely follows pages 211 to 486 of that work, is merely another proof that serendipity endures.

Part I concludes with some general remarks to the effect that the State should be required in a criminal case to prove the absence of justification or excuse beyond a reasonable doubt. Since proof of a negative is seldom satisfactory, the author is undoubtedly correct in observing that this requirement would be a powerful curb on the use of the criminal sanction. He also notes the pyramidal effect of assigning the most severe punishment to the most serious and least frequent crimes, which limits the flexibility of the criminal sanction in dealing with more common and varied offenses.

Part II is devoted to a description of significant stages in the criminal process from arrest through trial and appeal. With respect to each, the author indicates how the pertinent legal issues are resolved, first, if crime control is the dominant value, second, if the complex of values subsumed by Due Process prevails. He then states what the present law and its trend seem to be. This is all rather remote from the theory of punishment previously developed at length. But since it has to do with some of the most dramatic issues of the day, including the right to counsel, use of confessions, electronic surveillance, and illegally obtained evidence, and is written with some clarity, this is the part of the book most likely to interest and instruct that Common Reader to whom it is addressed.

In Part III, Professor Packer returns to his theory of punishment and uses it to advance the contention that we have overrelied on the criminal sanction, that it can effectively control and should therefore be reserved for relatively few kinds of conduct. Other writers have discussed the ineffectiveness of punishment in controlling various crimes ranging from sex deviancy to drunkenness, the absurdity of including trivial infractions such as traffic offenses in the category of crime, and the general subject of overcriminalization. The contribution Professor Packer makes is to abstract and formulate criteria for determining what kinds of conduct will warrant criminal punishment. These include the following:

- (1) The conduct is viewed, without significant social dissent, as immoral.
- (2) Subjecting it to the criminal sanction is not inconsistent with the goals of punishment.
- (3) Suppressing it will not inhibit socially desirable conduct.
- (4) It can be dealt with even-handedly, without discrimination.
- (5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
- (6) There are no reasonable alternatives to the criminal sanction.

One of the problems here is that many of these criteria are meaningless without a fair amount of specialized background knowledge. The first, for example, is a prudential limitation the evaluation of which requires more than cursory knowledge of the Hart-Devlin controversy and Mill's famous "harm to others" formula.

This is characteristic of what I think is a fault that runs in varying degree throughout the book. The style and content presuppose the reader's acquaintance with legal principles and his understanding of legal jargon, which justifies an offhand reference to *M'Naghten*, *Durham*, or *Gideon* as a matter of course. At the same time, for anyone familiar with the literature on the subject of punishment, much of the material is repetitious. The author thus risks a fall between two stools. On one side is the Common Reader who will often find the book difficult if not unintelligible. On the other is the Academic who will find it boring. I would like to believe that there is a person in the middle, a lawyer or a judge, who is willing to make his way through the convolutions of Professor Packer's prose. He may find valuable insights. To take one example:

The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free. The limitations included in the concept of culpability are justified not by an appeal to the Kantian dogma of 'just deserts' but by their usefulness in keeping the state's powers of protection at a decent remove from the lives of its citizens.¹

He will discover Emersonian sentences here and there. For instance: "It is useless to try to define 'reasonable doubt.' What it suggests is not a quantifiable standard but an adjudicative mood."²

And finally this Uncommon Reader who makes the effort may very likely find his thinking stimulated and structured by the need to consider basic questions of the use of power in connection with any solution of the problems involved in setting limits to the criminal sanction.

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¹ H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 65-66 (1968).

² *Id.* at 137.

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