

## Does Criminal Law Deter? A Social Science Investigation

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### ***Study Description***

Does criminal law in America deter potential offenders from committing crimes? As public policy is formulated, many U.S. legislators, media commentators, and policy analysts argue that having a criminal justice system that imposes liability and serious punishment for violations deters: that the threat of “hard time” in prison—or worse—will give certain individuals pause before they break the law.

But in a new paper, “Does Criminal Law Deter? A Social Science Investigation,” (forthcoming in the *Oxford Journal of Legal Studies*) by Paul H. Robinson, professor of law at the University of Pennsylvania Law School, and John M. Darley, professor of psychology and public affairs at Princeton University’s Woodrow Wilson School of Public and International Affairs, the authors argue that given available behavioral science data, in most cases criminal law does not foster deterrence.

Robinson and Darley acknowledge that the wider allocation of police resources or the use of enforcement methods that dramatically increase the capture rate of offenders can, in fact, deter crimes. But the authors find that attempts to increase the deterrent effect by increasing the penalties assigned by criminal law – the substantive rules governing the distribution of criminal liability and punishment—does not succeed, contrary to what law- and policy-makers have assumed for decades.

In the paper, Robinson and Darley note that it is not that the formulation of criminal law can never influence behavior, but rather that the conditions under which it can do so are not typical. By contrast, the authors further note, lawmakers and the courts formulate and apply criminal law rules—such as increasingly harsh prison sentences or “three strikes” legislation forcing mandatory sentencing—on the assumption that they nearly always influence conduct. From a social science perspective, Robinson and Darley see this working assump-

tion as seriously flawed, a conclusion with wide policy implications.

### ***Study Findings***

Robinson and Darley frame their study by highlighting the prerequisites for deterrence, noting that for criminal law to have an effect on a potential offender’s conduct choices, the following three questions must all be answered in the affirmative:

First, does the potential offender know, directly or indirectly, and understand the implications for him, of the law that is meant to influence him? That is, does the potential offender know which actions are criminalized by criminal codes, which actions are required, and which conditions will excuse actions which are otherwise criminal?

Next, if the potential offender is aware of the above, will he bring such understanding to bear on his conduct choices at the moment of making his choices? And finally, if the potential offender does know the rule and is able to be influenced in his choices, is his perception of his choices such that he is likely to choose compliance with the law rather than commission of the criminal offense? That is, do the perceived costs of noncompliance outweigh the perceived benefits of the criminal action so as to bring about a choice to forgo the criminal action?

The authors find that people rarely know the criminal law rules, even when those rules are formulated under the express assumption that they will influence conduct. Further, people seem not to have a good knowledge of the magnitude of the penalties that the criminal justice system assigns to various crimes. Darley’s and Robinson’s results indicate that people commonly assume the law to be as they think it should be, so they assume the existence of criminal law rules that correspond to their own intuitions of justice.

Robinson and Darley argue that the standard practice of formulating criminal law liability and punishment rules—in other words, increasing the punishment severity for breaking old criminal laws, and creating new criminal laws—to optimize deterrent effect is indefensible given the rarity with which such rule formulation is likely to have the intended effect on crime decisions. The authors find that potential offenders commonly do not know the legal rules, that is to say, specific law or laws, either directly or indirectly, even those rules that have been explicitly formulated to produce a behavioral effect. Even if potential offenders know the legal rules, the authors note, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or even chemical influences.

And even if they know the rules and are able to bring that information to bear on how they decide to conduct themselves (i.e. break the law versus not break the law), the cost-benefit analysis potential offenders perceive commonly leads to a conclusion suggesting violation of a law rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted, or for a variety of other or a combination of reasons. For example, the authors point out that data regarding sentences for first offenders, and particularly young offenders, suggests that the problem may be a real one. Forty-five percent of all felony offenders without a prior conviction are not given an incarcerative sentence. Sixty-six percent of all felony offenders under the age of 20 receive a probation sentence.

Moreover, even if the punishment prescribed by a specific law to be imposed had real bite, it nonetheless would have that bite heavily discounted by a potential offender because it would occur so far in the future. In criminal cases, the delay that intervenes between the completion of the offense and the beginning of the punishment is often quite long. Available data regarding state courts suggest that the average time from arrest to sentencing for felony cases ranges from 7.2 months for a guilty plea to 12.6 months for a jury trial.

Finally, even if the long-delayed bite were still seen as painful, it would have no deterrent effect if the chance of suffering it is perceived as minuscule. (The authors note the classic anecdote of pickpockets working the crowd at a fellow pickpocket's hanging to illustrate their point).

In the absence of any one of these prerequisites to deterrence—knowing the legal rule, being willing and able to bring such information to bear on one's conduct decision, and perceiving the threat of punishment to exceed the benefit of the offense—can be fatal to a

deterrent effect. A well known rule carrying a credible threat of punishment that exceeds the benefit of the offense nonetheless will be ineffective in deterring a person caught up in rage or the social pressures of the group or drug effects. A rational person capable of calculating their behavior, who fears any form of punishment even if the likelihood of it is slight, nonetheless will not be deterred by a rule of which he does not know. And a rule known by such a "rational calculator" perceived to carry a meaningful penalty nonetheless will not deter if the chance of getting caught is seen as trivial. Even if no one of these three hurdles is fatal to law's behavioral influence, their cumulative effect commonly is.

### ***Policy Implications***

Given the rarity of the situations in which the prerequisites of deterrence are present and of significant effect, the standard use of deterrence analysis to formulate criminal law doctrine seems wildly misguided. At the very least, deterrence analysis ought to be considered in criminal law debate only after a showing that the deterrence-prerequisite conditions might actually exist.

Some of the implications of this may cause us to reexamine current sentencing practices. Current practices, as Robinson and Darley demonstrate, often involve what the authors suggest are futile attempts to increase the deterrent effect of criminal law by increasing the duration of prison sentences. In the past few decades, the standard duration of sentence for a crime has more than doubled, and the number of prisoners has increased from a few hundred thousand to over two million. Many more prisoners are serving much longer prison sentences, and the cost to states has soared, taking funds away from other discretionary elements in their budgets, including education. Redirecting some of these funds to implement more successful crime control practices may serve America better and free funds for other worthy public purposes.

A copy of the policy brief can be found at:

[http://www.wws.princeton.edu/policybriefs/darley\\_deterrence.pdf](http://www.wws.princeton.edu/policybriefs/darley_deterrence.pdf)

The website for the Woodrow Wilson School of Public and International Affairs:

<http://www.wws.princeton.edu>

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