

ECNS 316

Economic Rationale for Criminal Law

To-do list

- **Required** reading for the week (posted on class webpage)
Ehrlich, Isaac. 1996. “Crime, Punishment, and the Market for Offenses.”
Journal of Economic Perspectives, Vol. 10, No. 1, Pgs. 43-67.
- **Optional** reading for the week (posted on class webpage)
Becker, Gary. 1968. “Crime and Punishment: An Economic Approach.”
Journal of Political Economy, Vol. 76, No. 2, Pgs. 169-217.
- First quiz: Next Tuesday
 - Will cover lecture material from this week
 - Required reading (i.e., Ehrlich (1996)) also fair game
 - Pay particular attention to the section on “Estimates of the Effects of Positive and Negative Incentives” (pgs. 55-63)
 - Online quiz (via WebEx polling function) will consist of 2 to 3 questions
 - 15-20 minutes
 - Multiple-choice questions (but be prepared with pencil and scratch paper, because some questions could require problem solving, graphs, etc. in order to figure out the answer)

Why is there a need for a criminal justice system?

- Agents who suffer harm can take actions under civil law to recover from those at fault.
 - Does this mean that criminal law is just the government piling on?
 - If civil litigation operates efficiently and plaintiffs and defendants can obtain justice at low cost, is there a need for a criminal justice system?
 - Why do societies have both civil law and criminal law?
- In economics, we generally separate the study of “law and economics” (focusing civil law) and the “economics of crime” (focusing on criminal law)

Consider the following example

- Suppose Connor's car collides with Donald while they are driving
 - Connor was negligent, but not driving recklessly
 - The collision may slow traffic and cause some delays, but the majority of the costs are born by Donald
 - Civil law is designed to allow Donald to collect damages for the harm done
 - Donald must establish that Connor was at "fault" and driving "negligently"
 - "Fault" is based on the preponderance of evidence and generally requires a majority, rather than unanimity
 - The potential for civil judgement against Connor will ensure that he experiences the full cost of his decision to drive negligently.
 - We can model this graphically from a benefit/cost perspective
[insert benefit/cost analysis of negligent driving]

Extending example further

- So, are we done? Is civil law all we require in this situation for the economically efficient outcome to arise?
 - Suppose Connor was driving very recklessly. Who else, besides Donald, incurs costs?
 - There are external effects on drivers who are frightened and forced to take evasive action
 - Substantial costs may be associated with these external effects
 - Criminal law prohibits reckless operation of a vehicle
 - We need to modify our original diagram
- [insert modification of original cost-benefit analysis]
- Some may wish that Connor never drove recklessly. But, welfare economics requires that the preferences of Connor be counted. The marginal benefit curve implies personal benefit from driving recklessly.

Summarizing the economic approach to criminalization

- Economic approach to crime is based on welfare economics
 - Agents make decisions based on the full marginal benefits and costs of their choices for all of society.
 - When benefits and costs are purely private, the decisions made by individuals will generally be efficient.
 - In other cases, where an individual's actions influences others, remedies are available under contracts of civil law.
 - If civil law does not force individuals to internalize the full costs of their actions, there is justification for government intervention and the criminalizing of behavior.

Using an economic approach to criminalizing: 3 examples

- It is useful to consider, informally, how the decision to criminalize proceeds under a welfare economics criterion as opposed to other rationales for criminalizing (e.g., laws prompted by religious beliefs or cultural norms)
- The following examples will provide a way to distinguish economic thinking from other possible motives for criminalizing behavior

Case 1: Nudity



- Common treatment of nudity under criminal law
 - In sufficiently private locations, nudity is legal.
 - In public places, it is generally criminalized.
 - More common to be criminalized when genders are mixing or children present
 - In some societies, public nudity may be restricted to particular locations (e.g., beaches, theatrical performances, etc.)
- Let's consider an economic approach to criminalizing nudity
 - Private nudity has no significant externalities

- As nudity becomes increasingly public, the potential for external costs not subject to action under civil law increases.



- There is a continuum of external costs that increases as nudity becomes more public
- Economic theory suggests that somewhere along this continuum these costs may become large enough that criminalizing nudity is efficient.
- Actual treatment of nudity under current criminal law appears roughly consistent with economic efficiency.
 - Sure, the offensiveness of public nudity may be influenced by religion, norms, etc.
 - But, individual preferences are a function of these factors.
 - Economically relevant costs are, of course, based on individual preferences

Case 2: Financial Misrepresentation

- Can range from exaggerating income or assets on a loan application to selling bonds to the public based on false financial statements
- Financial misrepresentation, commonly overstating the value of securities being sold, is subject to action under the civil law.
 - Plaintiffs can recover damages in civil cases
 - Civil fraud is designed to remedy private wrongs
- Misrepresentations that are circulated to the public are likely to be addressed under criminal law

- Civil and criminal law treatment of financial misrepresentation is quite consistent with welfare economics
 - Cases of single contracts may result in large costs to individual plaintiffs, but these can be recovered as damages under civil law.
 - Publicly circulated misrepresentations may cause substantial harm aggregated across many people, even if it results in small losses to any particular individual investor
 - Externalities can be substantial and, thus, economic efficiency suggests that these cases be subject to action under criminal law.

Case 3: Prostitution

- Treatment in the criminal law varies substantially across and even within countries. There is no consensus.
 - Some places legalized, often taxed, and, of course, subject to litigation under civil law as any other service
 - In other places it may be legalized but licensed, regulated, and strictly limited to selected locations and criminalized otherwise
 - Finally, it may be completely criminalized.
- Initially, may seem like efficiency is generally achieved if civil law can operate normally.
 - But, are there externalities associated with prostitution?
 - Public health problems due to spread of disease
 - Theoretically, could go in either direction. For instance, if lower risk sex workers enter market upon legalization, then STI rates may fall (Cunningham and Shah, forthcoming)
 - Effects on spouses or family members
 - As with nudity, some may wish to avoid exposure to the industry entirely

- Public health issue can be addressed through regulation
- Exposure problem can be addressed through spatial segregation of prostitution to well-identified areas
- Costs arise when criminalization of prostitution disables protections offered under civil law.
 - This is unique to our previous two examples. In this case, criminalization of prostitution raises the costs of making and enforcing contracts.
- In sum, criminalizing prostitution is only consistent with increasing economic welfare under certain conditions.
 - Externalities experienced by those not involved in producing or consuming the service must be large, even after implementing provisions to address them through regulation and segregation from other activity