

CHAPTER 8

Contributions from Law and Economics: 'Reason and Rationality'

OVERVIEW

This chapter discusses the role of human reason both in the decisions of criminals and of those who administer the legal order. It is thus about the Classical school, which sees crime as a violation of the social contract that is undertaken in the rational pursuit of self-interest. In that patterns of crime are seen as relating to patterns of punishment provided by the criminal law, Barak argues that this material has much in common with environmental or structural theories of crime.

The postmodern critique of law challenges the notions of objectivity and rationality by pointing out the social, cultural and political factors that play into law. A review of postclassical choice-opportunity theories (such as routine activities) highlights the constraints on rationality and choice. This reading helps open the door to integrating structural variables (race, class, gender) and erodes the exaggerated distinction between classical and positive criminology.

OUTLINE

I Introduction

- A. Interest in law, liberty and reason; return to classical perspectives that emphasize rational calculation of free people
 - 1. Crime determined and 'sub-rational' to a degree, but see crime as a response to the predictability of punishment
 - 2. Also use legal and economic contributions to critique/deconstruct criminal law and social justice
- B. Classical school
 - 1. Punishment to fit the crime (not offender)

* The Instructor's Manual for *Integrating Criminologies* is available as a downloadable Adobe .pdf file by chapter or in complete form through <http://paulsjusticepage.com/IntegratingCrim/index.htm>. The author's website is <http://greggbarak.com>. The website for [Amazon.com](#) has additional information about the book, and the [publisher's website](#) accepts requests for academic desk copies.

2. Law should only punish behavior that harms others
3. Importance of due process and equal protection
- C. Discussion placed here because classical school has much in common with environmental or structural explanations of crime
- D. Range of theories, but share interest in cost-benefit analysis of crime as defined by law
 1. Also share consensus view of society expressed in the concept of the social contract

II From Torts to Felonies

A. Laws

1. Provide for maintenance of order, social cohesion and solidarity
2. Social control
 - a. Law establishes rules of conduct
 - b. Law allocates power throughout stratified society
3. Laws become vehicles of authority and ideology, provide rationales for the way things are done
4. Critique: law can be arbitrary compromises and legal norms may reflect the needs of powerful interests
5. Distinctions
 1. Public law: constitutional, administrative and criminal (state injured)
 2. Private law: property, contracts and torts (between individuals)

B. History

1. Originally, all crimes were torts (private matters)
2. State/King gets involved as society becomes more complex
3. Consensus theory posits law coming from norms
4. Conflict theory posits law reflecting interests of the powerful
5. Criminal law emerged during 14th to 16th centuries to protect propertied classes as capitalism developed
 - a. Chambliss on vagrancy

III Postmodernism and the Critique of Rational Law

A. Critique

1. Criminology has not developed a theory of state or law
2. No understanding of political power and thus general support of 'law and order' position; does not address 'whose law and what order?'

B. Critique of case law

1. Individualistic case approach ignores social forces, surroundings and cultural dimensions
2. It ignores framing, associative paradigms and cognitive domains
3. Portrays decision makes as objective and neutral

C. Deconstructionism

1. 'Questions the ontology of being and the philosophic means by which reality is constituted'
 2. Denies binary dualities can be correlated with variables to predict patterns of outcome
 3. Rejects logocentrism (speaking subject is determinant of meaning)
 4. Final understanding is not possible
 5. Legal decision making is fraught with contradictions and interests of class, race and gender
 6. Problematizes the reason-emotionality dichotomy from Enlightenment
- D. 'Relational' theory of the state
1. State constructed as fluid and dynamic intersections of political economy, people, culture, ideologies and apparatuses of legislation and administration
 2. Useful for integration because of multiple levels of analysis

IV Economic Models and Rational Choice Theories of Crime

- A. People criminal not because of pathology but choice based on cost-benefit preferences within given restraints
1. Crime varies directly with benefits and inversely with legitimate opportunities
- B. Classical: increase costs; no need to reform system
- C. Neo-classical: focuses attention on arbitrariness of decision-making process and discretion
- D. Postclassical: choice-opportunities approaches
1. Routine activities: change crime through change in environmental situations as they relate to motivated offenders, suitable targets, and lack of protectors
 2. Situational choice: offender's skills interact with offense's risks and payoffs
 3. Routine conflict: routine activities emphasis on victim lifestyle + understanding of how structural position of individuals relates to learned repertoires for managing conflict and situated transactions
 4. Evolutionary ecological model: crime from limited behavioral choice to satisfy needs by taking from others
- E. Classical and Positive
1. Classical theory appreciates limits and constraints on choices; assumes no more or less rationality than positive theory (except some versions of biological and psychoanalytic theory)

V Conclusion

- A. Neo-classical position major model for understanding crime; it can apply to crimes in the streets and the suites

- B. Has failed to recognize divergence between assumption of formal equality and discriminatory reality
 - 1. Has thus blamed criminals and victims; 'solutions' involves target hardening, get tough and ideas that do not challenge status quo
- C. Fails to appreciate individual differences in pleasures, pains and ability to reason; need to include informal social control

LEARNING OBJECTIVES

- 1] Review history and assumptions of the classical school
- 2] Overview of the development and functions of the legal order; critique of the role of rationality, reason and objectivity
- 3] Discuss various choice-opportunity theories and how the limitations on them erode the distinction with positive theories

IDEAS FOR LECTURES & DISCUSSION

This chapter raises issues about the extent and scope of rationality in terms of criminal behavior and decisions of the legal system. In terms of criminal behavior, the Classical school is considered modernist, but shares with postmodern perspectives a view of people as active decision makers. The assumption has been that crime flows from a rational pursuit of pleasure, but deconstructing this assumption raises many questions. First, how rational is the pursuit of pleasure? Is the rationality short-term and centered on immediate gratification? (These notions can be integrated with impulse control and sensation seeking theories.) Is the rationality based on middle class values and assumptions about the person's stake in the future? (The deterrence argument about capital punishment seems to have this premise.) How do drug and alcohol use change the calculation about pleasure? What are the structural constraints that shape the available options from which people make decisions (and which might make people's decisions seem irrational)? Once such qualifications are included, then the distinction between Classical and Positive theories does seem exaggerated. Also, the policy implications are much broader than simply another turn of the 'get tough' ratchet.

The second aspect of rationality is its application to the legal order and decision making. While there is a process of legal reasoning, critical legal studies attempts to show that law is made and not found. The correct result is not simply discovered by an impartial, objective decision maker. Rather, everyone has a social location, and the whiteness, richness, maleness and heterosexuality of the judges affects what they consider to be a 'rational' decision. We may share many of these

assumptions and biases, but that does not make the position 'objective'. These points can also be brought up in terms of the social contract, which is a staple of Classical Theory. Early theorists were quite blunt that the social contract was there to protect the accumulation of private property – their property. Once again, class (and race and sex) are important ingredients in the concept but are eventually erased; an upper class, white male 'rationality' thus becomes universalized and naturalized as 'objective'. The postmodern and critical projects thus attempt to ask the 'whose law and what order?' types of questions.

See also: Gregg Barak, Jeanne Flavin & Paul Leighton. *Class, Race, Gender & Crime: Social Realities of Justice in America*. Roxbury, 2001. More info available, <http://paulsjusticepage.com/reality-of-justice.htm>.