Stories, Law & Hard Reality

Paul Robinson
Would You Convict? Seventeen Cases That Challenged the Law
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Where would we be without legal stories? Without the never-ending stream of real-life conflicts from which our system fashions law, our legal world would be seriously impoverished, a barren place of codes and constitutions. It must count as one of the great strengths of U.S. legal culture that analysis generally begins with the facts of life, with a story of a particular dispute, so that legal principles grow out of and respond to the complexity of individual lives. Legal stories give the law emotional immediacy and make its conflicts central to our culture. But they also bring a complexity, even messiness, to our legal heritage that challenges those of us who seek organizing principles in the law.

Realizing the richness and universal appeal of legal stories, a number of academics in recent years have used them to build book-length arguments on criminal responsibility aimed at the general public.[1] These authors use stories of human harm-doing to entice lay readers into a realm of principles and rules that are normally the exclusive domain of lawyers, judges and academics. Taking this process a step further is Paul Robinson, who with Would You Convict? presents what may be called a popular case book.

Robinson's book has two principal aims: to provoke the general public to serious scrutiny of a variety of criminal law issues and to advocate the author's own proposals for legal reform. In its first and most important aim, the book succeeds admirably and, in places, brilliantly. The author provides a series of

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1 For example, Andrew E. Taslitz, Rape and the Culture of the Courtroom (1999); Samuel H. Pillsbury, Judging Evil: Rethinking the Passions of Murder and Manslaughter (1998); Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (1998); Alan M. Dershowitz, The Abuse Excuse and Other Cop Outs, Sob Stories and Evasions of Responsibility (1994); Leo Katz, Bad Acts and Evil Minds (1987).

sharply executed, well-researched accounts of people and principles in conflict to illustrate doctrines as diverse as the legality principle and psychological defenses. He gives a clear account of current doctrine and its many shortcomings, stimulating the reader to reconsider accepted principles of criminal law. The only caveat here is that Robinson's populist ambitions do not always mesh well with his analytic ones. On occasion his effort to make legal and philosophical principles accessible to lay readers works against the depth and nuance needed for full understanding of the issues involved.

Overall, Robinson fares less well in his second goal of arguing for particular reforms. Again, the blame lies partly with his popular conception of the book; a short work aimed at the general public, emphasizing storytelling and basic issue explication, simply cannot support the kind of detailed and complex arguments needed to persuade readers of the need for some often radical changes in basic law. But there is another, perhaps more interesting reason for the relative weakness of Robinson's reform arguments: they do not acknowledge the essential messiness of criminal law decisionmaking. While in his storytelling Robinson respects the complexity of human lives, his accounts of legal decisionmaking tend to the simplistic. He ignores or dismisses the complex forces of public emotions and institutions in the formation and application of legal principles. As a result, his most ambitious proposal for reform – to expand civil detention schemes to protect society from future criminality – appears strikingly, and dangerously, naive.

Would You Convict? introduces the reader to a series of criminal law issues through stories, questions and legal analysis. Robinson opens each segment by recounting the basic facts of a case in journalistic style. Some of these stories come from published appellate case reports, others from popular accounts and his own research. Following the facts of alleged wrongdoing, Robinson asks the reader a series of questions about liability and punishment – hence the book's title. Robinson then returns to his story, describing the legal and human resolution of the case. The author concludes each segment with an analysis of the strengths and weaknesses of applicable doctrines, often by comparing the law's differing approaches to seemingly similar issues.

Would You Convict? promises to bring many who have never attended law school the excitement of a great class in criminal law. It provides all the drama of criminal cases along with the intellectual and emotional challenge of converting intuitions about responsibility into coherent, consistent rules of law. Each of Robinson's stories has its own colorful characters and places, which the author skillfully uses to pull the reader into a wide array of situations. The stories move from late twentieth century Los Angeles to nineteenth century rural Vermont, from brainwashing in the Korean war to theft in the shadow of terrorism in modern day Israel. Robinson recounts a wide range of harm-doing, from callous murders and horrific sex offenses, to the taking and cashing in of a lost lottery ticket. Robinson illustrates his accounts with photographs of the locations and people involved. While of very mixed quality, the photos make the stories powerfully real; they challenge the reader to take the issues seriously and deny the easy escape of dismissing the case as unusual and therefore unimportant. Looking at the snapshots of those involved we are reminded that justice is not statistical; each case makes its own moral demands.

The chapter organization of the book follows Robinson's iconoclastic grouping of legal issues, something that may prove initially disorienting to those used to the standard law

school categorization of doctrines. Thus the first chapter spans the definition of the act requirement in attempt and the constitutional prohibition on cruel and unusual punishment. More problematic is that in the early going, stories and issues rapidly pile one on top of another without clear conceptual links. The patient reader will find that the larger themes soon emerge, however, and give the book considerable narrative force.

One of Robinson's central innovations is to combine substantive discussion of responsibility and criminal law doctrine with opinion polls on the cases. The author has surveyed entering law students, asking them to decide on conviction and possible punishment, choosing between options ranging from acquittal to life in prison.[2] The results provide the reader with a fascinating opportunity to compare notes with others' reactions. They represent a kind of social test of one's own convictions.

Robinson uses the surveys as empirical data to further his central argument that the criminal law needs popular support to thrive. He argues that criminal law requires moral authority for maximum effectiveness, and that the law loses that authority when its principles stray too far from popular consensus. Early in the book he gives examples of such divergence, most notably in the doctrine of mistake of law, generally not recognized under current law, and cruel and unusual punishment, which under current Supreme Court interpretation permits outrageously long sentences for nonviolent offenders.

In its broadest outlines Robinson's argument for the congruence of criminal law and public opinion is both important and irrefutable. He effectively documents how courts and lawyers, taking a narrowly legal perspective, sometimes ignore broader principles of moral responsibility. Robinson's argument is incomplete, however, as he fails to take into account powerful political and institutional dynamics which largely explain divergences between public opinion and the law. It's not that political and institutional dynamics necessarily do, or should, trump our moral intuitions, but that we cannot understand present law or effectively advocate its reform without taking political and institutional forces seriously.

For example, consider Robinson's treatment of the oft-stated criminal law principle that all persons are deemed to know the criminal law. Robinson does an excellent job of presenting the often bizarre features of this doctrine and presents a sound argument for reform based on retributive justice. He points out that without a mistake of law defense, in some cases the legally guilty will be morally innocent. Robinson fails to fully acknowledge the forces opposing mistake of law arguments, however. While he notes the slippery slope concerns of courts – the worry that defense claims of legal ignorance will swamp the system and prove impossible to resolve efficiently or accurately – he does not acknowledge the institutional force of these concerns.

The first law of any institution is self-protection, and a broad mistake of law defense threatens the very institution asked to allow it: the judiciary. Permitting the defense would require judges to give up their formal monop-

2 The author describes the polls this way in his Acknowledgements: "Also to be thanked are the several hundred people whose 'sentences' for these seventeen cases are reported in this book, including students from the entering class of Northwestern University School of Law in 1997 and students from the entering class of the University of Michigan Law School in 1998." Robinson, Would You Convict? at xiii. As an indicator of public opinion generally, this population obviously presents some problems because of age, class, educational, and regional biases, among others, in the sample.

oly on legal interpretation.[3] It would require courts to make a fundamental concession of professional turf, and without any significant institutional benefit. Such a defense would also bring to the surface an uncomfortable fact about modern criminal law: that its complexity makes it virtually impossible for any individual to know all of its prohibitions. Life is simply too short and the criminal law too vast for any of us to truly "know" it.

More generally, Robinson's argument that the rules of criminal law must have public support requires more detail and nuance than he provides for it to be a useful legal principle. In fact, public sentiment and legal judgment have a complicated and often uneasy relationship.

While the criminal law must in the long run persuade the public of its moral rigor, in the short run the law requires insulation from public sentiment to retain its moral authority. The lynch mob stands as our most vivid image of injustice even though the mob may accurately express current public sentiment. Nor can we rely entirely on public opinion in the long run to decide moral issues. The moral legitimacy of slavery or abortion or the death penalty or gay marriage cannot be determined by a simple public opinion poll any more than television ratings determine the aesthetic quality of the shows rated. This means that those who shape the criminal law in a democracty must seek to reconcile popular opinion, as reflected in legislation, with the decision-maker's own understanding of moral principle. In reality, courts and other institutional elites engage in a complex give and take with respect to popular opinion and moral principle. In our democratic system the public has the last word on what the law will be, but in the meantime, both the shape of the law and public opinion itself may be influenced by judicial decisions.

Finally, as Robinson notes with respect to the most difficult responsibility questions encountered at the end of the book, the public is deeply divided on some important issues. Courts and legislatures must decide such issues definitively even when the public is – collectively – quite divided. Thus it is not surprising that the surveys play a steadily diminishing role in Robinson's substantive argument as the issues of criminal responsibility become more challenging.

Robinson's use of journalistic techniques produces both the strongest and weakest features of the book. Like most skilled journalists (and case book editors, for that matter), Robinson displays a great feel for human stories. He does a superb job of case selection, finding a wide variety of often little-known tales to illustrate responsibility issues. He presents them well, bringing the virtues of journalism to the legal realm. Robinson writes clearly and has done his journalistic homework, going beyond published appellate court records to find compelling human details about the individuals involved. Particularly strong are his presentation of the *Rummel v. Estelle* case in the first chapter, and his accounts at the close of the book of three cases in which the defendants' wrongdoing may be traced to serious mistreatment they received from others. The power of the human tales deepens the reader's involvement in the legal issues.

Unfortunately, with journalism's virtues come some of journalism's vices. Beginning with matters of style, Robinson's use of the universal present tense, that staple of contemporary television journalism, may grate on

3 There is a distinction to be made here between formal and practical roles. Jurors necessarily determine the practical meaning of law through their verdicts. Formally, however, the court instructs the jurors on what the law is, and jurors take an oath to follow these instructions. In recognizing a reasonable mistake of law defense, courts would be explicitly and formally granting jurors authority to interpret criminal statutes. Jurors would be told to judge how the law reasonably may be read.

some readers' ears. In order to enhance the sense of suspense, all of the cases are related in the present. Thus: "It is 1874. Joseph B. Wood's daughter, Alma, … marries Lumen Smith, a farmer. …"[4] Used repeatedly the tense becomes tiresome, compressing a wealth of time and expression into an artificial present. At least that is its effect on this reviewer. Other readers may not mind.

Also in the quibbling category is the lack of source references. Without knowing who supplied what information about the cases, the reader is handicapped in evaluating the potential bias of the source, an important matter in judging any dispute. The author's Acknowledgements at the front of the book give some indication of origins, but these entries represent a cumbersome and limited means for matching up teller and tale.

Arguably more serious, given that the stories serve primarily as vehicles for presenting legal issues, is the lack of a bibliography or suggested reading list. A book by a legal academic, designed to inspire the general public to serious thought about criminal responsibility, should provide some introduction to the rich academic literature on the issues covered. Robinson, after all, is hardly the only one to have written on these matters. The book does have an ample appendix, packed with statutes related to the cases recounted in the text, but while useful for "in the comfort of your own home" legal analysis, these materials do not substitute for a suggested reading section or bibliography.

The author's journalistic approach serves him worst when he undertakes philosophic analysis of legal issues. The same prose that in storytelling mode reads easily here appears vague and superficial. Now it is true that because he seeks a general readership, Robinson must give up some depth and precision in his presentation. Certainly he cannot resort to the standard technique of philosophers of deploying thick preliminary paragraphs to set out careful definitions of all terms to be used and questions to be answered – and not answered. Still, simple writing can be persuasive on complex issues, if drafted with sufficient care. Too often that level of care is missing here.

At times Robinson substitutes personal characterizations for reasoned argument. With respect to battered spouse syndrome, Robinson acknowledges its downside this way: "Sometimes the syndrome is used as a general anti-male vehicle to promote a political agenda. For example, the syndrome is often a centerpiece of a radical feminist legal program of pressing the pardon or release of women in prison for killing their male mates."[5] Perhaps Robinson can substantiate this claim, but without any specifics – and he gives none – this "argument" is mere name calling. He tosses out a trio of pejoratives – "anti-male," "political agenda" and "radical feminist" – to clear the field for his own advance.[6]

In similar fashion, at one point Robinson

4 Robinson at 20.

5 *Id*. at 149.

6 Robinson is similarly casual in addressing concerns raised about so-called "abuse excuses." He observes: "The misuses of the 'abuse excuse' are now well documented." *Id*. at 198. But without citations or other support, this statement raises a host of questions. Although a common phrase in legal commentary, criminal law recognizes no defense specifically based on prior abuse. Certainly some have argued that claims of psychological disability due to various forms of past mistreatment represent a dangerous trend in legal responsibility. See James Q. Wilson, Moral Judgment: Does the Abuse Excuse Threaten Our Legal System? (1997) and Dershowitz, The Abuse Excuse, *supra* note 1. But the term "abuse excuse" needs basic definition along with its "well documented" ills in order to support Robinson's assertion. The real problem in current legal judgments about

attempts to bolster his advocacy for a liberal, that is, pro-defendant legal reform, by noting that he is a former federal prosecutor and a "crime conservative."[7] This sort of argument draws on the worst kind of are-you-tough-on-crime rhetoric that has soured our political debate on crime for decades. What does it mean to be a "crime conservative"? Robinson does not tell us. Nor is it clear why his status as a crime conservative should make this particular reform a sensible one.[8]

We come finally to the book's central paradox: that despite the author's evident interest in popular opinion and the practical working of law in human lives, Robinson's reform arguments do not match up with the human reality of criminal justice. The arguments assume a legal world that does not exist, never has and likely never will.

Robinson's single most ambitious reform proposal is to eliminate considerations of deterrence from criminal sentencing and essentially transfer them to a system of preventive detention under civil law. Robinson wants determinations of criminal guilt and sentence to depend entirely on what the defendant deserves according to the nature of his wrongdoing. In other words, criminal law should be only retributive, never deterrent. In order to protect society from the criminally dangerous, Robinson argues that we should use a separate, civil law system explicitly devoted to preventive detention. Presumably civil commitment schemes, currently used to lock up dangerous mentally ill persons and sexual predators in "treatment" facilities, would be extended to cover all persons who demonstrate they present a continuing danger to others.

Robinson asserts that exclusive reliance on a civil system of preventive detention to protect against future dangerousness would foster greater honesty in criminal decision making, to the benefit of both wrongdoers and the public. Robinson maintains that compared to the alternative of harsh criminal punishments, civil preventive detention is superior for all concerned. It is, he says, "more cost-efficient; we pay only for the incarceration needed. At the same time, it is more fair to its subjects, for it requires the minimum restriction of liberty consistent with public safety."[9] Robinson says he is quite mystified at the objections of civil libertarians to this reform.

At this point the reader with a basic grasp of legal reality must stop to catch his or her breath. It's hard to know where to begin to address such extraordinary trust in legal systems to carry out designed functions without distortion or abuse according to the exigencies of public pressures or institutional needs.

To begin with the most obvious concern, Robinson does not deal with how dangerousness might be defined or proven. What besides past convictions can be considered to

criminal responsibility may be a highly selective, and normatively unjustified use of psychological incapacity as either a full excuse or mitigation of punishment. See Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 Stan. L.R. 1435 (1998). If true, Robinson's own argument for a psychological incapacity excuse, discussed later in text, may suffer from a similar malady.

7 Robinson at 215.

8 Perhaps this is akin to Nixon going to China, a move against the political grain that has inherent credibility because of the personal history of the individual. But this is not politics, where leadership may depend on personal trust; this is law, where reasoned argument is required.

9 Robinson at 203. Along these same lines, Robinson says that sex offenders should prefer a civil detention system to criminal punishment. He writes: "Even from an offender's point of view, opposing such civil commitment schemes seems a bit mad." *Id*. at 42-43.

predict future dangerousness? What real alternative would there be to reliance on experts, whose most accurate predictions are likely to overestimate dangerousness?[10] Nor does Robinson mention the particular abuse to which U.S. legal systems are prone – that of strongly associating dangerousness (and wrongdoing) with class and race.

Even the initially appealing idea of separating deterrent and retributive justifications into separate fields of law becomes suspect on closer examination. It assumes a level of emotional self-understanding and control that few can attain. It assumes that most people can distinguish between two of our most powerful and powerfully interrelated emotions, fear and anger. It assumes that criminal judges and juries will not consider dangerousness and that civil decisionmakers will not be influenced by their own intuitions about blameworthiness. In this regard Robinson displays a characteristic weakness of law teachers. As masters of the hypothetical designed to tease out different theoretical justifications, we want to keep the law theoretically pure; we hate the kind of messy reasoning with overlapping justifications that first year students and lay people are wont to use. But such messy reasoning is far more characteristic of the making of real life legal judgments than the neatly categorized arguments of a law review article, or even a good answer to a criminal law exam. It is part of the messy business of having nonacademic decision makers.

Robinson's other major substantive proposal is on behalf of a defense of psychological disability. He believes that a defendant should be excused from punishment based on a determination that he reasonably was incapable of doing otherwise.

The moral intuition behind this defense is widely shared. Many believe that deserved punishment requires free choice, a phrase which implies freedom from certain kinds of coercive influences on character. Thus persons whose inhibitions have been lowered by involuntary intoxication or young people whose crimes flow directly out of their own victimization by adults might argue for a fundamental lack of free choice. We feel for those who never had a decent chance to become a law abiding person, a feeling of sympathy that seems directly opposed to the emotions associated with deserved punishment.

In recent years a number of academics have made sophisticated and highly nuanced arguments along these lines, supporting the view that certain persons, psychopaths in particular, lack the necessary choosing capacity to deserve criminal punishment.[11] By contrast Robinson's presentation is sketchy. He deals only in passing with the conceptual problems raised by such a defense and proposes a rule that depends entirely on the moral intuitions of the decision maker.

Robinson suggests the following language for a defense of psychological disability: "A person is blameless for a violation only if the effect of the disability is so strong that we can *no longer reasonably expect the person to remain*

10 While some social scientists report that dangerousness assessment for the mentally ill has improved in recent years, Kirk Heilbrun & Gretchen Witte, *The MacArthur Risk Assessment Study: Implications For Practice*, 82 Marq. L. Rev. 733 (1999), serious doubts about the accuracy of dangerousness assessment continue to be voiced by many, including the American Psychiatric Association. See Katherine Corry Eastman, Comment, *Sexual Abuse Treatment in Kansas's Prisons: Compelling Inmates to Admit Guilt*, 38 Washburn L.J. 949, 955 n. 45 (citing the APA's brief to the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

11 E.g., R.A. Duff, Crimes and Punishments 262-66 (1986); Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability*, 39 UCLA L. Rev. 1511 (1992). For a contrary view, see Pillsbury, Judging Evil, *supra* note 1 at 32-46.

law-abiding, that is, if the reasonable person suffering the same predisposition similarly would have been unable to resist committing the offense."[12] As Robinson recognizes, reasonableness is the key to this defense, but he gives us very little in the way of guidelines for determining it. This trust in reasonableness as the key criterion is a little surprising, as it comes not long after the author's sharp critique of one of current law's most venerable reasonableness formulations – on grounds of vagueness.[13]

When Robinson gives more details about his proposed excuse, more problems emerge. He suggests there exists an incapacity continuum, with disabilities supporting an excuse at one end and those that do not at the other. Robinson takes a definitive stand only on the no-defense end of the continuum. He states that incapacity based on bad temper must be rejected. Robinson explains: "Admittedly, bad-temperedness ought not to be taken into account, but there are many other personal characteristics that are beyond a person's control, that clearly ought to be taken into account if justice is to be done."[14]

But if unchosen psychological incapacity is the basis for excuse, why should temperament be treated differently than any other trait that makes a person apparently unable to resist criminal wrongdoing? If a person cannot control his bad temper, if he became bad-tempered because of his own unchosen victimization, why should acts stemming from that bad temper be treated differently than those stemming from other unchosen character traits beyond one's control, such as pedophilia?

And then there are the proof problems. Exactly what is psychological incapacity and how can we distinguish it from weakness of will? In making judgments do we have any more to rely on here than the individual's past history? Assuming that we can, in theory at least, distinguish between an irresistible impulse (i.e., defense based on psychological incapacity) and an impulse not resisted (i.e., no defense), how can a decision maker operating with imperfect and incomplete information reliably differentiate between them?

Again we see a disconnect between theory and reality. Again Robinson fails to recognize the abuses to which such a defense may be subject – the extent to which pure intuitive (read reasonableness) judgments may reflect decisionmaker sympathies based on class, race, attractiveness or other morally irrelevant factors rather than a legitimate though inchoate principle of responsibility.

More fundamentally, Robinson builds his theory on a congenial and widely-shared, but nevertheless problematic theory of personal responsibility. In this land of the free we all like to believe that we have chosen our own characters. Thus we tend to view as exceptional the dramatic stories of those law breakers whose character seems to have been shaped by their own, quite unchosen, victimization. Yet are our own situations really so different? Perhaps we all have an equal lack of choice in creating our moral selves; some are just luckier in the unchosen influences which shape them. Some have been raised with the love and moral values that build strong consciences; others have grown up with opposite, though equally powerful influences. Of course

12 Robinson at 160 (emphasis in original).

13 Criticizing current legal formulas for dealing with reasonableness in self-defense, Robinson writes: "Astonishingly, this most fundamental question – how is the law to judge the reasonableness of a violator's conduct – is one for which the law has no clear answer. The law has not yet been able to define what characteristics and conditions of a defendant ought to be taken into account and which ought not." *Id*. at 155.

14 *Id*. at 139.

this view requires us to acknowledge the tragic and unfair dimensions of moral responsibility, something we are most reluctant to do.

For an enjoyable, provocative and worthwhile work on criminal responsibility – and WOULD YOU CONVICT? is all of these – Robinson's book has come in for a rather hard time here. Obviously I disagree with Robinson's substantive proposals and quarrel with his manner of argument. Yet the heart of the book, and its main value, lies not in Robinson's vision of the future of criminal law, but in the stories he tells and the way he deploys them to frame important issues of criminal responsibility.

From start to finish, Robinson engages his readers in criminal jurisprudence. He makes readers take considered stands on a host of important and challenging legal issues, in the process enriching their understanding of the law and themselves. The author of a work of legal argument may strive for more than this, but in truth, few achieve this much.