

Justice for the Elephant

The Role of Moral Sentiments in Reducing Criminality

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1. Introduction

People are like the rider on the elephant. If you want to get someone to change their mind, talk to the elephant first. (Haidt)^{i: 50}

In this briefing we highlight and critique, the effect of the general public adoption of the socio-political paradigm of neo-liberalism on approaches to crime and criminal justice. We concentrate here on the import of neo-liberal ideology on the rehabilitation of offenders as a topical example of a wider and more general critique.

Neo-liberalism, in its vulgar understanding, is supposedly based on the economic modelling of human actions and interactions arising from instrumental rationality utilised in a self-serving manner in pursuit of extrinsic gains. Individual agents exercise their rational choices in a market with full foresight and perfect information.

The implications of the neo-liberal paradigm on political discourse inform current criminal justice policy: *Transforming Rehabilitation* (TR)ⁱⁱ. Under TR the majority of community-based offender services will be subject to supposed market forces with the private and voluntary sectors tendering to supply commodities of criminal justice provision. It has been suggested this greater reliance on the market, suitably defined, will provide higher quality, and/or lower cost services.

At the other end of the criminal justice spectrum, the influence of neo-liberalism may be seen in the modelling of offender motivation. The current debate in criminology about desistance and its implications for offender management indicates a resurgence of interest in the concept of 'agency'ⁱⁱⁱ. Many interested in desistance argue that offenders have the potential to exercise agency, but have distinguished their approaches from the concept of agency embedded within Rational Choice theoryⁱⁱⁱ. By contrast, the underpinning model of human behaviour in the Risk, Needs, Responsivity (RNR) model – the dominant approach to offender management in England and Wales – and in cognitive behavioural interventions that are often integral to the RNR approach seem much closer to the model of individual behaviour assumed by rational choice theory^{iv}.

Talk of instrumentally rational individual actors and the presentation of markets presents the neo-liberal criminal justice system with a paradox:

Although a typical person may do better in the society of others than on their own, often they may further improve their situation by undermining the very society which supports them. Thus, crime and criminality exist in a social, rather than an individual context. Robinson Crusoe, alone on his island, lacks the opportunity for both criminality and company.

In the post-2008 era, economists are re-thinking their models and questioning their underpinning theories. In the following, we consider what implications this will have on the criminal justice system. In sum, we suggest a fuller and more encompassing economic paradigm of crime and criminal justice is possible; one in which the agent is modelled as a moral, but flawed, actor in a social context.

2. The neo-liberal theory of criminal justice

In the mid twentieth-century, liberal western democracies struggled to theorise responses to depression and global warfare. It was clear policies based on free trade and free markets, so called *laissez faire*, had failed to prevent the great depression. However, collective and totalitarian solutions (Fascism and Communism) imposed intolerable costs on human freedom and human rights. The economist Milton Friedman, amongst others, argued a new political-economic paradigm, neo-liberalism, was required to provide a balance between collectivism and *laissez faire*^v:

The citizens would be protected against the state by the existence of a private market; and against one another by the preservation of competition

(Friedman)^{vi:5}.

The emphasis on private markets and competition finds its theoretical justification in the observations of the classical economist Adam Smith that individuals, following the dictates of self-interest, 'are led by an invisible hand to ... advance the interest of the society...'^{vii}. Friedman recognised unconstrained self-interest would tend to undermine this result, therefore he argued:

It is the responsibility of the rest of us to establish a framework of law such that an individual in pursuing his own interest is, to quote Adam Smith again, 'led by an invisible hand ...' (Friedman)^{viii:112}

It will be noted Friedman's consideration implicitly rules out individuals' moral consideration or self-control. Rather, it is the responsibility of the state to ensure that (apparent) compliance with the law is in individuals' interests. Apparent compliance is incentivised through manipulation of the probability of detection and level of punishment of offenders. If the state carries out this role adequately, it will (in theory) restrict criminality to an optimum level^{ix}.

3. Moral sentiments

However, Friedman's is a misreading of Adam Smith. According to Smith, an holistic consideration of the human condition must include consideration of virtue, the intrinsic constraint on self-interest. Smith argued:

The man who acts according to the rules of perfect prudence, of strict justice, and of proper benevolence, may be said to be perfectly virtuous (Smith)^{vii: VI:III:1}

The first of these virtues, prudence, refers to ‘The care of the health, of the fortune, of the rank and reputation of the individual’^{vii: VI:I:14}. According to Smith, self-interest (which should be distinguished from greed) is a virtue, although ‘it never is considered as one, either of the most endearing, or of the most ennobling of the virtues’ (*ibid.*). The other two virtues, justice and beneficence constrain the pursuit of self-interest.

Smith suggests humanity should act justly, even when this limits pursuit of self-interest, as ‘we feel ourselves to be ... obliged to the observation of justice’^{vii: II:II:I:5}. Smith notes compliance with the dictates of ‘justice’ can be facilitated through threats of force. Conversely, ‘Beneficence is always free, it cannot be extorted by force’^{vii: II:II:I:3} yet it is ‘productive of the greatest good’^{vii: II:II:I:9}.

In sum, those acts which benefit society and the individual will be carried out through prudence; those acts which are of value to the individual, but which reduce societal well-being are proscribed by justice; and those acts which cost the individual but which benefit society may be carried out if the individual has sufficient beneficence (kindness).

Far from suggesting society operates best if comprised of self-centred, amoral actors, Smith contends:

to feel much for others and little for ourselves, ... to restrain our selfish, and to indulge our benevolent affections, constitutes the perfection of human nature; and can alone produce among mankind that harmony of sentiments and passions in which consists their whole grace and propriety (Smith)^{vii: I:I:V:5}

Smith’s use of the term ‘affections’ is indicative of his view of morals: that they are ‘sentiments’; they operate on a different plane from conscious choice. However, Smith suggests there is an interaction between choice and sentiment; we may choose to encourage our moral affections and discourage our selfish affections.

4. The elephant

Although the neo-liberal political paradigm, and considerations of society and criminal justice based on Rational Choice theory, have tended to ignore Smith’s *Theory of Moral Sentiments*, recently behavioural economists have provided evidence Smith was – and is – correct. Humanity is not solely motivated by rationality and self-interest, but rather may be motivated by sentiment and moral intuition (see Albertson and Fox, 2014^x for a summary of this research).

A useful metaphor for the human decision making process (the mind) is put forward by Haidtⁱ. He labels the emotional, habitual and intuitive part of the mind the ‘elephant’ and the rational part of the mind, the ‘rider’. He suggests, when humans make decisions, intuitions come first and strategic reasoning second. In other words, it is the power of sentiment which ultimately determines the course of both elephant and rider in the short-term; in the longer-term the ‘rider’ can train the ‘elephant’ so decisions are made more rationally.

Echoing Adam Smith, Haidt contends moral intuitions arise automatically and quite spontaneously in the intuitive mind; it is in the ‘elephant’ the vast majority of our moral reasoning lies. It should, of course, be noted that

it is from the ‘elephant’ that our selfish emotions will also arise. Subsequently, the ‘rider’ may construct supposedly moral arguments to justify decisions already taken intuitively. It follows that an effective and efficient criminal justice policy must seek, not only to deter the rational ‘rider’ from crime, but also to bolster the moral intuitions of the ‘elephant’ (and undermine selfish intuitions).

Ironically, however, it has been shown an emphasis on a supposed ‘market’ based approach to political and social life, and its associated ‘greed is good’ justification of vice, will tend rather to undermine pro-social intuitions, erode conscience and promote self-serving behaviour^{xi}. As Haidt suggests, if society does not value morality, it will not foster institutions which strengthen it. By emphasising a neo-liberal, market based paradigm, we have inadvertently undermined the sustainability of our society. If we may extend Haidt’s metaphor – if the ‘elephant’ is our ally in reducing crime, it makes sense to feed and train, rather than ignore and starve, it.

5. Conclusion

A major drawback of the application of the neo-liberal paradigm to criminology is that, by neglecting to consider human sentiments and emotions in context, the consideration of morality is diminished or even neglected with implications for policy and practice. An holistic consideration of economics suggests this will have the effect of increasing both criminality *and* the cost of criminal justice.

However, there is a deal of evidence human

beings are not so instrumentally rational as neo-liberalism assumes. Considering texts ranging from the classic work of Adam Smith through more recent insights of behavioural economists, we suggest it is the moral instincts of humanity, rather than the threats of criminal justice sanctions, which must form the core of motivation in social interactions. It follows an economically efficient legal system must move beyond the simplistic use of detection and extrinsic punishment and begin also to deal with moral sentiments.

In short, we suggest it’s time to talk about the elephant!

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- ⁱ Haidt, J. (2012) *The Righteous Mind: Why good people are divided by politics and religion*, Pantheon.
 - ⁱⁱ Ministry of Justice (2013a) *Transforming Rehabilitation: A Strategy for Reform*, London: Ministry of Justice and Ministry of Justice (2013b) *Transforming rehabilitation – a revolution in the way we manage offenders*, London: Ministry of Justice.
 - ⁱⁱⁱ See for instance Bottoms, A., Shapland, J., Costello, A., Holmes, D., & Muir, G. (2004) Towards desistance: Theoretical underpinnings for an empirical study, *The Howard Journal of Criminal Justice*, 43(4), 368-389 and Healy, D. (2013) Changing fate? Agency and the desistance process, *Theoretical Criminology*, 17(4), 557-574.
 - ^{iv} Hochstetler and Bouffard 2010, in Albertson, K. and Fox, C. (2014, forthcoming) *Justice, with Reason*.
 - ^v *laissez faire*, from the French, ‘let us be’, is a policy of unfettered free markets and a minimal role for the state.
 - ^{vi} Friedman (1951) quoted in Jones, D.S. (2012) *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*, Princeton University Press, Princeton.
 - ^{vii} Smith A. (1759) *The Theory of Moral Sentiments*, 6th ed. (1790), London: A. Millar. IV:I:7 Available at <http://www.econlib.org/library/Smith/smMSCover.html>
 - ^{viii} Friedman, M. (1962) *Capitalism and Freedom*, Chicago: University of Chicago Press.
 - ^{ix} Becker, G.S. (1968) Crime and Punishment: An Economic Approach, *Journal of Political Economy*, 76, 169-217.
 - ^x Albertson, K. and Fox, C. (2014, forthcoming) *Justice, with Reason*.
 - ^{xi} Stout, L. (2012) Killing Conscience: The Unintended Behavioral Consequences of “Pay For Performance”. Available from <http://www.law.leeds.ac.uk/assets/files/research/cblp/conf-jan13/killing-conscience.pdf>