

Should Criminals Be Convicted of Unspecific Offences? On Efficiency, Condemnation, and Cognitive Psychology

Amit Pundik

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Abstract Assume that a person who is suspected of either murdering X or raping Y credibly and voluntarily confesses to have committed ‘a terrible crime’ but immediately after this utterance decides to remain silent. The remaining available evidence cannot prove beyond reasonable doubt the exact offence which he committed. Should such an accused be acquitted of both offences and evade the law or should a way be found to allow a conviction, although no specific offence can be proven beyond reasonable doubt? Harel and Porat suggest that such an accused should be convicted of an unspecific offence. This paper reaches entirely different conclusions, according to which the prevailing insistence of most Criminal justice systems on offence specificity is justified. It is argued that offence specificity stems from the cognitive psychological difficulties associated with simulating the event in question if the accused is convicted of an unspecific offence. The reason is that fact-finders are unable to simulate the details of an unspecific offence while retaining a confidence level sufficiently high to satisfy the standard of ‘beyond reasonable doubt’. The fact-finder faces a choice between a proven offence which is difficult to simulate and a group of unproven offences which are easy to simulate. These difficulties also give rise to a more solid expressivist justification for offence specificity than that conceded by Harel and Porat. Unspecific offences undermine the efficacy of condemnation because the message that corresponding convictions would broadcast to members of the public would be either blurred and ineffective or based on scenarios none of which was proven beyond reasonable doubt. This paper therefore offers two independent justifications for the prevailing insistence on offence specificity, both of which are based on the cognitive psychological difficulties of simulation, as found by the fact-finder and the public respectively.

Keywords Specific offences · Punishment · Harel and Porat · Simulation · Probability · Expressivism

A. Pundik (✉)

The Buchmann Faculty of Law, Tel Aviv University, 69978 Tel Aviv, Israel
e-mail: amitp@post.tau.ac.il