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THE DISUTILITY OF INJUSTICE

PAUL H. ROBINSON,* GEOFFREY P. GOODWIN** &
MICHAEL D. REISIG***

For more than half a century, the retributivists and the crime-control instrumentalists have seen themselves as being in an irresolvable conflict. Social science increasingly suggests, however, that this need not be so. Doing justice may be the most effective means of controlling crime. Perhaps partially in recognition of these developments, the American Law Institute's recent amendment to the Model Penal Code's "purposes" provision—the only amendment to the Model Code in the forty-eight years since its promulgation—adopts desert as the primary distributive principle for criminal liability and punishment.

That shift to desert has prompted concerns by two groups that, ironically, have been traditionally opposed to each other. The first group—those concerned with what they see as the over-punitiveness of current criminal law—worries that setting desert as the dominant distributive principle means continuing the punitive doctrines they find so objectionable, and perhaps making things worse. The second group—those concerned with ensuring effective crime control—worries that a shift to desert will create many missed crime-control opportunities and will increase avoidable crime.

The first group's concern about over-punitiveness rests upon an assumption that the current punitive crime-control doctrines of which it disapproves are a reflection of the community's naturally punitive intuitions of justice. However, as Study 1 makes clear, today's popular crime-control doctrines in fact seriously conflict with people's intuitions of justice by exaggerating the punishment deserved.

The second group's concern that a desert principle will increase avoidable crime exemplifies the common wisdom of the past half-century that ignoring justice in pursuit of crime control through deterrence, incapacitation of the dangerous, and other such coercive crime-control programs is cost-free. However, Studies 2 and 3 suggest that doing injustice has real crime-control costs. Deviating from the community's shared principles of justice undermines the system's moral credibility and thereby undermines its ability to gain cooperation and compliance and to harness the powerful forces of social influence and internalized norms.

The studies reported here provide assurance to both groups. A shift to desert is not likely either to undermine the criminal justice system's crime-control effectiveness, and indeed may enhance it, nor is it likely to increase the system's punitiveness, and indeed may reduce it.

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INTRODUCTION

The past half-century has seen a continuing debate between “retributivists,” who view deserved punishment as a value in itself that does not require further justification, and “utilitarians” (or “instrumentalists”), who see punishment as justified only if it brings about a greater good—typically the avoidance of future crime. Utilitarian avoidance of crime has traditionally been sought through the mechanisms of general and special deterrence, incapacitation of the dangerous, and rehabilitation. Some academics and researchers have recently suggested that, in addition to these traditional coercive crime-control mechanisms, punishment can work to avoid future crime by engaging the powers of social and normative influence.¹ Such normative crime control is possible, however, only if the criminal law has earned a reputation as a moral authority. It is difficult for criminal law to do so if it distributes criminal liability and punishment in ways that conflict with the community’s shared intuitions of justice, which are based on moral blameworthiness, not utilitarian factors such as dangerousness or deterrence.²

That instrumentalist crime control benefits may be gained by tracking individuals’ intuitions of justice suggests that instrumentalist

¹ See Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29, 29–31 (Paul H. Robinson et al. eds., 2009) [hereinafter Robinson, *Empirical Desert*] (suggesting that aligning distribution of punishment with empirical desert strengthens law’s moral credibility); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 18–31 (2007) [hereinafter Robinson & Darley, *Intuitions of Justice*] (arguing that concurrence of empirical desert and criminal law is optimal).

² See Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 18–31.

and retributivist distributions of punishment may not be as incompatible as has been traditionally assumed. Empirical research shows that laypersons look primarily to moral blameworthiness as a guide to the imposition of criminal liability and punishment,³ just as the retributivists do. However, the crime-control benefits of the law's moral credibility flow not from following the moral philosopher's view of desert—what one might call “deontological desert”—but rather from following the community's shared intuitive views of justice—what one might call “empirical desert.”⁴ These two conceptions of desert may differ in important ways.⁵ Nonetheless, recent appreciation for the practical value of doing justice suggests some concurrence of interest between the previously warring retributivist and instrumentalist camps.

A. *The Recent Shift to Desert*

The long-running debate between retributivists and instrumentalists came to the forefront of criminal law policy recently, when the American Law Institute amended the Model Penal Code for the first time in the forty-eight years since its enactment. Since 1962, the Code has been the model for the codification of criminal law in three-quarters of the states and, for the most part, has represented the epitome of instrumentalist thinking. The Code's original Section 1.02 made clear its preventive focus. While the Code was not entirely indifferent to the offender's moral blameworthiness, it did not explicitly tie liability and punishment to desert:

³ See Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, in 40 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 193, 233–34 (Mark Zanna ed., 2008) (presenting empirical study showing that people primarily react to crime descriptions emotionally and favor proportional just deserts, and noting that “[c]ontempt will develop when the sentencing practices of the society are importantly out of synchrony with the citizens' rank orderings of the blameworthiness of crimes”); Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 284, 295 (2002) (presenting empirical study demonstrating that people assess punishment based upon desert criterion, rather than upon factors relevant to deterrence); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 *L. & HUM. BEHAV.* 659, 676 (2000) (presenting empirical studies finding that people assess punishment based upon desert criterion, rather than upon factors relevant to dangerousness).

⁴ See Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 152–53 (2008) (contrasting conceptions of desert and their effectiveness in crime control).

⁵ For a discussion of the practical differences between deontological and empirical desert, see PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 138–40 (2008) [hereinafter ROBINSON, *DISTRIBUTIVE PRINCIPLES*].

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to *forbid and prevent conduct* that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(b) to *subject to public control* persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal; . . .

(e) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to *prevent the commission* of offenses;

(b) to promote the *correction and rehabilitation* of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment; . . .⁶

This “purposes” provision is not only of intellectual interest, revealing the principles that guided the Code’s drafters, but it is also of practical importance because it offers direction to judges in how to interpret and apply the Code’s provisions, as well as in how to exercise their discretion in sentencing.

The new Model Penal Code “purposes” section is significantly different. It now sets the primary distributive principle for criminal liability and punishment to desert—that is, the blameworthiness of the offender. Alternative distributive principles such as deterrence, incapacitation, or rehabilitation may be pursued only to the extent that they remain within the bounds of desert:

(2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

(a) in decisions affecting the sentencing of individual offenders:

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and *the blameworthiness of offenders*;

(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community *provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i)*; and

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (ii); . . .⁷

⁶ MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962) (emphasis added).

⁷ MODEL PENAL CODE § 1.02 (Tentative Draft No. 1, 2007) (emphasis added).

This rather dramatic turnabout is in part the result of a growing recognition of the weaknesses and limitations of the traditional mechanisms of coercive crime control. Deterrence may work under the right conditions, but those conditions may be the exception rather than the rule.⁸ Rehabilitation is effective only occasionally and, even then, commonly generates only modest crime-control effects when used as a distributive principle.⁹ Incapacitation of the dangerous clearly does work but generally can be achieved more effectively and with fewer detrimental side effects when done through mechanisms outside of the criminal justice system, such as through civil commitment.¹⁰ However, the Model Penal Code's turn to desert also may reflect a growing appreciation that doing justice is an attractive distributive principle for both retributivist *and* instrumentalist reasons.

The common wisdom of the past half-century has been that deviations from desert are essentially cost-free. It was felt that a legislature could adopt whatever coercive crime control principle it thought effective, without regard to whether the punishment that was generated conflicted with the offender's deontological or empirical blameworthiness. For example, the drafters of the Model Sentencing Act, under which the defendant's potential threat in the future determines punishment, boast that the sentence will have "a minimum of variation according to the offense"¹¹—an approach guaranteed to create

⁸ See ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 5, at 48–49 (arguing that deterrence is effective only if following conditions are satisfied: potential offender is aware of legal rule, foresees meaningful chance of punishment, evaluates costs of violating law as outweighing benefits of doing so, and is able to bring information about relevant net costs to bear on her behavior); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173 (2004) (arguing that deterrent effect of criminal law is not typical); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (arguing conditions necessary for deterrence to work are not typical in modern societies).

⁹ See ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 5, at 99–108 (evaluating effectiveness of rehabilitation as both deterrent and distributive principle).

¹⁰ See *id.* at 130–33 (arguing that civil commitment of dangerous offenders would be both more efficient and effective for community protection and fairer to offenders than would using criminal justice system for such preventive detention, as now occurs); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1454–56 (2001) [hereinafter Robinson, *Punishing Dangerousness*] (same).

¹¹ Council of Judges of the Nat'l Council on Crime and Delinquency, *Model Sentencing Act: Second Edition*, 18 CRIME & DELINQ. 335, 341 (1972).

The . . . Act diminishes [differences in] sentencing according to the particular offense. Under [the Act] the dangerous offender may be committed to a lengthy term; the nondangerous defendant may not. It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.

regular and serious conflict with desert. As one can imagine, the Model Penal Code amendments represent a dramatic shift from almost ignoring desert, as the common wisdom of the past half-century would do, to holding desert inviolate.

B. Two Opposing Concerns About the Shift to Desert, and a Preview of a Response to Each

Not everyone has applauded the Model Penal Code's shift giving dominance to desert. Two sorts of concerns drive opposition by two quite different groups. The first group—those concerned with what they see as the over-punitiveness of current criminal law—worryes that setting desert as the dominant distributive principle means continuing the punitive doctrines that they find so objectionable, and perhaps even making things worse. They reason that current crime control doctrines are a product of the community's views of justice and decry "populist punitiveness."¹² Giving formal deference to that sense of justice, they worry, will only exacerbate the situation. The second group—those concerned with ensuring effective crime control—worryes that a desert distributive principle will create many missed crime-control opportunities and will increase avoidable

Id. The commentary to the Model Sentencing Act is openly hostile to desert. *See id.* at 344–45 (“[S]entencing on the basis of the offense does not satisfactorily provide public protection Vengeance or punishment is not a proper motive for a sentence.”). The Council even argues that exceeding the minimum sentence required for public safety (which may be, and often is, in serious conflict with desert) “is a disservice to the entire penal system.” *Id.* at 363. Additional discussion of the Model Sentencing Act can be found in Robinson, *Punishing Dangerousness*, *supra* note 10, at 1440–41.

Perhaps the best evidence of the common wisdom that there is no crime-control cost in deviating from the community's conception of desert is shown in Table 4 and Figure 1 in Part II, *infra*, which demonstrate how the most popular modern crime-control doctrines described in Part I, *infra*, seriously conflict with those community conceptions.

¹² Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, in *THE POLITICS OF SENTENCING REFORM* 17, 39–41 (Christopher M.V. Clarkson & Rodney Morgan eds., 1995) (defining “populist punitiveness” as overtly political phenomenon). Similarly, David Garland decries this attention to community views and holds it accountable for the draconian sentences and policies of current law:

A few decades ago public opinion functioned as an occasional brake on policy initiatives: now it operates as a privileged source. The importance of research and criminological knowledge is downgraded and in its place is a new deference to the voice of “experience,” of “common sense,” of “what everyone knows.” . . . [T]he ruling assumption now is that “prison works”—not as a mechanism of reform or rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution.

DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 13–14 (2001) (footnote omitted).

crime.¹³ In other words, this is a continuation of the classic retributivist-instrumentalist dispute along traditional lines.

The first group's concern about the Model Penal Code amendment's shift to desert—that it risks making modern crime-control doctrines even more punitive—rests upon two assumptions: one probably true, the other clearly false. First, they assume that the distributive principle of desert to which the Model Code refers is that of empirical desert rather than deontological desert—that the Code looks to community views of justice rather than to philosophers' views. As a practical matter, the group's analysis is probably correct, although it is not beyond debate. Deontological desert is difficult to operationalize, if for no other reason than that moral philosophers disagree with one another about many (if not most) things, and there is no authoritative method by which one can easily determine the superiority of one deontological position to another.¹⁴ In contrast, empirical desert has a clear standard and an easy means of determination. One need only test the intuitions of the members of the community that is to be governed by the code. Perhaps more importantly, the Model Code's notion of desert may be empirical rather than deontological because many modern moral philosophers give strong deference to people's shared intuitions of justice in determining what constitutes deontological desert. In other words, many modern philosophers see little meaningful difference between the two.¹⁵

The first group's concern about punitiveness also rests upon a second assumption: that the current punitive crime control doctrines of which they disapprove are a product and manifestation of the community's intuitions of justice. This assumption, however, is wrong. As Study 1 (reported in Part II) shows, current crime control doctrines seriously conflict with individuals' intuitions of justice by exaggerating the punishment deserved. Thus, a distribution of liability and punishment that tracks lay intuitions of justice would significantly reduce the injustice now present. As Part III explains, the modern crime control

¹³ See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1009 (2000) (arguing that assessment of law enforcement policies should depend exclusively on their effects on individuals' welfare and accord no independent weight to conceptions of fairness in order to maximize crime control); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 225–27 (describing argument that using empirical desert as distributive principle may result in increase of crime that might not be measurable ex ante).

¹⁴ For a discussion of these issues, see Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Philosophical and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1838–43 (2007).

¹⁵ See *id.* at 1839–40 (describing and criticizing philosophical attempts to harmonize popular intuitions into “reflective equilibrium”).

doctrines are not a product of the community's sense of justice but rather a product of the distortions inherent in American crime politics.

There also is a persuasive response to the concern of the second group that a desert distributive principle will increase avoidable crime. The common wisdom of the past half-century has been that the system is free to ignore doing justice in pursuit of crime control through deterrence, incapacitation of the dangerous, and other such coercive crime control programs—that there is no crime control cost incurred in deviating from desert. This common wisdom is dangerously wrong. There is disutility in injustice, and the crime control costs of deviating from desert must be taken into account when designing an effective crime-control program. Indeed, in the long run, doing justice may be the most effective means of fighting crime.¹⁶

To telegraph our findings, Studies 2 and 3 (reported in Parts IV and V, respectively) support the arguments we have made elsewhere that doing justice, at least as the community perceives it, increases the law's moral credibility and thereby harnesses the crime-control powers of social and normative influence. Deviating from desert undermines the criminal justice system's moral credibility and thereby undermines its crime-control effectiveness. Specifically, it undermines its power of stigmatization, increases the chances of vigilantism, promotes resistance and subversion rather than the cooperation and acquiescence required by the criminal justice system, undermines compliance in borderline cases where the condemnatory nature of the offense may be ambiguous, and reduces the criminal justice system's influence in the public conversation by which societal norms are shaped. Studies 2a and 2b suggest that changes in the system's moral credibility can have these kinds of effects. Study 3 suggests that the dynamics shown in these laboratory experiments also can be seen in the datasets of existing national surveys.

We believe the studies reported here will assure both groups concerned about a change to desert as the distributive principle for criminal liability and punishment. The shift to a desert distribution—specifically, empirical desert—will not seriously undermine the criminal justice system's crime-control effectiveness, and indeed may enhance it, and is not likely to increase the system's punitiveness, and

¹⁶ See ROBINSON, *DISTRIBUTIVE PRINCIPLES*, *supra* note 5, at 210–12 (“[A] charge to prevent crime is, as a practical matter, a charge primarily to do justice—to consider just desert—for that will reduce crime more than distributive criteria that ignore desert.”); Robinson, *Empirical Desert*, *supra* note 1, at 29–31 (arguing that use of empirical desert as distributive principle strengthens law's moral credibility); Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 18–31 (same).

indeed is more likely to reduce it. This shift better tracks the community's shared intuitions of justice.

I

THE MOST POPULAR MODERN CRIME-CONTROL RULES

Do the community's shared intuitions of justice lead to draconian punishments? Described below are seven of the most common and politically popular criminal justice doctrines expressly based upon instrumentalist coercive crime-control strategies—usually those of deterrence and incapacitation. These are not necessarily the statistically most common applications of these doctrines, but neither are they aberrant applications by a rogue judge. Each instance is an expected and intended application by the terms of the doctrine, and many, if not most, have been reviewed and approved on appeal—some by the United States Supreme Court. These are the legal doctrines against which individuals' intuitions of justice are tested in Study 1, as reported in Part II.

A. *Three Strikes and Other Habitual Offender Statutes*

The case of William James Rummel is not unusual.¹⁷ In 1964, the twenty-one-year-old Texan uses his employer's credit card to pay \$80 for four new tires without permission. He later pleads guilty to felony fraud. In 1969, Rummel forges a check for \$28.36 to pay rent at a hotel, another felony. Over a course of years, Rummel is convicted of similar frauds four more times. On a hot August day in 1972, Rummel enters a bar in San Antonio and notices that the air conditioner is broken. He tells the bar's owner that the unit needs a new compressor, and offers to fix it for free if the owner will pay for the necessary part. The owner gives him \$120.75 for the compressor, but Rummel never returns to the bar. After the owner decides to press charges, Rummel is arrested.¹⁸ Rummel is found guilty of felony theft,¹⁹ which typically would receive a sentence of two to ten years.²⁰ However, because this is Rummel's third felony conviction, he is charged under a Texas recidivism statute and receives a sentence of

¹⁷ See *Rummel v. Estelle*, 445 U.S. 263, 285 (1980). For more details on the *Rummel* case, see PAUL H. ROBINSON, *WOULD YOU CONVICT? SEVENTEEN CASES THAT CHALLENGED THE LAW* 28–32 (1999) [hereinafter ROBINSON, *WOULD YOU CONVICT*].

¹⁸ PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 28 (4th ed. 2010).

¹⁹ ROBINSON, *WOULD YOU CONVICT*, *supra* note 17, at 32.

²⁰ *Id.* at 29.

life imprisonment.²¹ His sentence is affirmed by the Fifth Circuit Court of Appeals and by the United States Supreme Court.²²

In another case, fifty-nine year old Charles Almond becomes frustrated by the constant arguing of his two adult sons (who still live at home) over which television program to watch. He picks up a .22 caliber revolver that his oldest son had left on the table, and shoots out the television's screen. Thirty years earlier, Almond had been convicted of burglarizing an unoccupied building, and twenty-five years earlier, he was convicted both of throwing "a missile" (a rock) at an automobile driven by his father-in-law and of breaking and entering an office. Because of Almond's decades-old felony convictions, a sentence of fifteen years is imposed in the television-shooting case for "possession of a firearm as a felon" combined with a "career offender" statute.²³

Such "three strikes" and other habitual-offender legislation commonly impose long prison terms on offenders who have committed previous crimes. The underlying rationale for these statutes is typically incapacitative.²⁴ Advocates of such statutes reason that the offender's past recidivism shows that he cannot be deterred from future crime and that incapacitation may be the most effective means of preventing future offenses.²⁵

Similar habitual-offender statutes, which became common in the 1990s,²⁶ typically set high mandatory sentences for felonies committed after the offender has been convicted of two prior felonies.²⁷ The most common form of such statutes requires the two previous felonies to be

²¹ *Id.* at 32. According to Texas penal law and practice at the time, Rummel may have been eligible for parole after serving twelve years of his sentence with good behavior. *Rummel*, 445 U.S. at 280; *see also* Brief for the Respondent, *Rummel v. Estelle*, 445 U.S. 263 (1980) (No. 78-6386), 1979 WL 199781, at *16-17 (explaining Texas's parole system and suggesting that Rummel would be eligible to serve twelve years with good conduct or even ten if he earned "trusty status").

²² *Rummel*, 445 U.S. at 285; *Rummel v. Estelle*, 587 F.2d 651, 654 (5th Cir. 1978) (en banc), *vacating* 568 F.2d 1193 (5th Cir. 1978).

²³ *Almond v. United States*, 854 F. Supp. 439, 445 (W.D. Va. 1994); PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 132-33 (2005) [hereinafter ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*].

²⁴ See authorities and examples collected in Robinson, *Punishing Dangerousness*, *supra* note 10, at 1429 n.2.

²⁵ See *id.* at 1429 n.7 (explaining incapacitation rationale for habitual offender statutes).

²⁶ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 16-17 & exhibit 1-9 (1998), available at <http://www.ncjrs.gov/pdffiles/169270.pdf> (noting in 1996 that twenty-four states had enacted two- or three-strikes laws and that "overwhelming majority" of such laws had been passed between 1993 and 1995).

²⁷ Note that the number of "strikes" in recidivist statutes is not always three. It is sometimes two (North Dakota, South Carolina), and sometimes four (Georgia, Maryland). N.D.

of a violent nature.²⁸ Some jurisdictions allow the inclusion of other felonies, such as drug-trafficking violations.²⁹ Other jurisdictions have habitual-offender statutes other than the famous “three strikes” laws.³⁰

B. Drug Offense Penalties

In another relatively typical case, Anthony Papa is asked by a bowling partner to deliver an envelope containing cocaine to a town in upstate New York in exchange for \$500. The courier who gives him the envelope is an undercover drug enforcement officer, and Papa is arrested when he delivers the envelope, which contains 4.5 ounces of cocaine. Under the controlling statute, the court imposes the required sentence of fifteen years to life.³¹

Similarly, in the case of *Harmelin v. Michigan*,³² Harmelin is driving through Detroit in the early morning when he makes an illegal U-turn through a red light. After Harmelin is pulled over, he is arrested for marijuana possession, and a police search uncovers 672 grams of cocaine in the car’s trunk—an amount approximately equal in size to one-and-a-half soda cans. Harmelin, who has no prior police record, is convicted under a Michigan drug statute and is sentenced to a mandatory term of life in prison without the possibility of parole—a sentence that the United States Supreme Court upholds as constitutional and not in violation of the Eighth Amendment prohibition against cruel and unusual punishments.³³

CENT. CODE § 12.1-32-09 (1997); S.C. CODE ANN. § 17-25-45 (2003); GA. CODE ANN. § 17-10-7 (2008); MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2002).

²⁸ E.g., 18 U.S.C. § 3559(c) (2006); N.M. STAT. ANN. § 31-18-23 (LexisNexis 2009); VA. CODE ANN. § 19.2-297.1 (2008).

²⁹ E.g., GA. CODE ANN. § 17-10-7 (2008) (requiring two strikes for violent felonies, four strikes for others); N.D. CENT. CODE § 12.1-32-09 (1997) (allowing for habitual offender sentence when offender has two prior convictions for felonies of Class C or above, which may include out-of-state felony convictions punishable by maximum prison terms of five years or more); S.C. CODE ANN. § 17-25-45 (2003) (requiring life imprisonment without possibility of parole for offenders with two or more convictions for “most serious offense[s],” including certain nonviolent crimes, or upon conviction of three or more “serious offenses,” including drug trafficking felonies).

³⁰ E.g., ALA. CODE § 13A-5-9 (2005) (imposing enhanced penalty for felonies where defendant was previously convicted of felony); ALASKA STAT. § 12.55.125 (2008) (specifying sentence ranges for certain felonies by first-time, second-time, and third-time offender status); S.D. CODIFIED LAWS § 22-7-7 (2006) (enhancing sentence for principal felony if defendant was previously convicted of one or two felonies).

³¹ See Rebecca Tuhus-Dubrow, *Talking with Anthony Papa*, THE NATION, Dec. 27, 2004, <http://www.thenation.com/doc/20041227/tuhusdubrow>. Papa serves twelve years of his sentence before being granted clemency. *Id.*

³² 501 U.S. 957 (1991).

³³ *Id.* at 995–96.

In *United States v. Prince*,³⁴ Leroy Prince rents a room from Sydney Griffith, the owner of a nearby furniture store. Prince frequently helps move furniture from the house to Griffith's business. In exchange, Griffith agrees to provide furniture when Prince moves into an apartment, as he is planning to do. On one occasion, at Griffith's request, Prince helps unload boxes at the house where Prince rents a room. He smells marijuana during the unloading and confirms its presence by partially opening a box. He continues to help with the unloading but insists that the marijuana boxes be stored in a place other than the house where he lives. He helps move the boxes to the basement of a nearby grocery store. Customs inspectors later seize forty-seven boxes, containing a total of 1169 kilograms of marijuana. After being given downward adjustments under the U.S. Sentencing Guidelines due to his minor role in the offense, his lack of knowledge of the drug's presence beforehand, and his guilty plea, Prince is sentenced to five years' imprisonment without the possibility of early release.³⁵

Though they are traditionally governed only by state law, drug-related crimes have increasingly come under federal jurisdiction in recent decades.³⁶ In an attempt to increase deterrent effects, federal sentencing for drug crimes has become quite harsh.³⁷ The average federal sentence for drug-related crimes in 2005 was 85.7 months. If marijuana-related crimes are ignored, that average rises to 98.9 months. As a point of comparison, the average federal sentence for all violent crimes is 95.2 months. Homicide has an average sentence of 118.3 months—less than 20% higher than the average sentence for non-marijuana drug offenses.³⁸ Harsher federal penalties mean that an ever-increasing number of cases that could be brought in state courts are being prosecuted in federal court.³⁹

³⁴ 110 F.3d 921 (2d Cir. 1997).

³⁵ The U.S. Sentencing Guidelines range after those adjustments is fifty-one to sixty-three months. *Id.* at 926.

³⁶ See, e.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 259–60 (2000) (stating that since 1970s, Congress has expanded federal jurisdiction over drug crimes, and noting that “virtually any drug crime can now be prosecuted federally”).

³⁷ The U.S. Sentencing Guidelines suggest 0 to 6 months for possession, and 0 months up to a maximum of 293 months for possession with intent to manufacture, import, export, or traffic. See U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c), 2D2.1(a) (2006).

³⁸ All sentencing statistics are taken from Bureau of Justice Statistics, U.S. Dep't of Justice, *Defendants Sentenced in U.S. District Courts: By Offense, and Type and Length of Sentence, Fiscal Year 2005*, in Sourcebook of Criminal Justice Statistics tbl.5.25.2005, <http://www.albany.edu/sourcebook/pdf/t5252005.pdf> (last visited Aug. 27, 2010).

³⁹ See Glaeser et al., *supra* note 36, at 260 (noting that expansion of federal jurisdiction and harsher federal penalties could implicate deterrence and equity considerations).

C. *Adult Prosecution of Juveniles*

It is no longer unusual for prosecutors to try juveniles as adults, even if this results in long prison terms.⁴⁰ Nathaniel Brazill, thirteen years old, is upset about being suspended from school for ten days just before summer vacation for throwing water balloons. He returns to the middle school to say good-bye to friends. When told by a seventh grade teacher (with whom he has a good relationship) that he has to leave, he pulls out a pistol and points it at the teacher. The gun discharges, hitting the teacher in the head and killing him. After being tried and convicted as an adult, he is sentenced to twenty-eight years in prison without the possibility of parole.⁴¹

In another case, Zachary Eggers, a sixteen-year-old, is given two natural-life terms for killing his parents.⁴² Witnesses testify that Eggers was upset at his parents because he considered them to be too strict.⁴³ His attorney suggests that Eggers was intoxicated at the time of the killings.⁴⁴

As of the end of the 1990s, all jurisdictions in the United States allow, in at least some cases, juveniles to be transferred to criminal court and tried as adults.⁴⁵ Transfers can be by discretionary, presumptive, or mandatory waiver of juvenile court jurisdiction, as well as by specific statutory criteria, and can be limited to specific offenses. The lowest age for which transfer is allowed differs by jurisdiction. Some jurisdictions do not list any minimum age for transfer.⁴⁶ Others allow transfer as early as age ten⁴⁷ or age fourteen.⁴⁸ Some jurisdic-

⁴⁰ See *infra* notes 45–49; cf. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (holding it unconstitutional to impose capital punishment for crimes committed by defendant under age eighteen).

⁴¹ See Kate Randall, *Another Florida Teenager Receives Harsh Adult Prison Sentence*, WORLD SOCIALIST WEB SITE (Aug. 3, 2001), <http://www.wsws.org/articles/2001/aug2001/flor-a03.shtml>.

⁴² Kim Smith, *Teen Gets Life for Killings of His Parents*, ARIZ. DAILY STAR, Sept. 23, 2005, at B4.

⁴³ Mitch Tobin, *Teen Guilty in 2 Killings*, ARIZ. DAILY STAR, Aug. 25, 2005, at B1.

⁴⁴ *Id.* When detectives searched his house, they found marijuana in Eggers's room. Appellee's Answering Brief at 3, *State v. Eggers*, No. 2 CA-CR 05-0320 (Ariz. Ct. App. 2005).

⁴⁵ See PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 1 (1998).

⁴⁶ *E.g.*, ME. REV. STAT. ANN. tit. 15, § 3101 (West Supp. 2009).

⁴⁷ *E.g.*, IND. CODE ANN. § 31-30-3-4 (LexisNexis 2007) (only for murder); VT. STAT. ANN. tit. 33, § 5506 (2001).

⁴⁸ *E.g.*, ALA. CODE § 12-15-34.1 (2005); MINN. STAT. ANN. § 260B.125 (West 2007); N.J. STAT. ANN. § 2A:4A-26 (West Supp. 2010).

tions retain a somewhat higher age for transfer, such as fifteen or sixteen, and several retain this higher age with very limited exceptions.⁴⁹

D. *Abolition or Narrowing of the Insanity Defense*

Eric Clark was a typical teenager until mental illness took over his life. He is diagnosed with paranoid schizophrenia, a subtype of schizophrenia characterized by delusions and hallucinations. He will not drink tap water because he is fearful of lead poisoning. He believes that alien life forms from another planet are after him. Clark sets up a fishing line with beads and wind chimes throughout his home as an alarm system for alien invasions. He also starts to keep a bird in his car to warn him of any airborne poison. He sometimes circles the neighborhood, blaring loud music in an attempt to keep the aliens away. Clark thinks that the aliens are commonly disguised as government agents.

After neighbors call the police to report the excessive noise he is making, Clark is pulled over by a police officer. Believing the policeman to be an alien, and not wanting to be abducted or killed, Clark shoots and kills the officer. Clearly, Clark is dangerous in his current state and needs to be civilly committed for as long as he remains so. Yet it seems difficult to assess his blameworthiness without taking account of his serious mental illness. The Arizona statutes, however, have so narrowed the availability of defenses and mitigations related to mental illness that his disease is essentially legally irrelevant to Clark's criminal case.⁵⁰ He is convicted of first degree murder and sentenced to life imprisonment.⁵¹ The Supreme Court upholds as constitutional the Arizona Supreme Court's *Mott* rule, which precludes the use of evidence of diminished capacity caused by mental illness to negate the mens rea elements of a crime.⁵²

Consider, similarly, the case of Andrea Yates.⁵³ She, her husband, and their four young boys live in a renovated bus. They are deeply

⁴⁹ *E.g.*, D.C. CODE § 16-2307 (LexisNexis 2008) (at least fifteen, with one exception of no minimum age for illegal possession of firearm within 1000 feet of school or day care center); OR. REV. STAT. §§ 419C.349, .352 (2010) (fifteen, with no minimum-age exceptions for certain cases of murder, rape, sodomy and unlawful sexual penetration); TENN. CODE ANN. § 37-1-134 (2005) (sixteen, no exceptions); WASH. REV. CODE ANN. § 13.40.110 (West Supp. 2009) (sixteen, no exceptions).

⁵⁰ Arizona law does not allow evidence of mental illness to be introduced to negate specific intent elements for any crime. *State v. Mott*, 931 P.2d 1046, 1051 (Ariz. 1997). The State does allow a general insanity defense, but only one that is narrow in scope and that puts the burden on the defendant to prove "by clear and convincing evidence" that he was insane. ARIZ. REV. STAT. § 13-502(A)-(C) (LexisNexis 2008).

⁵¹ *Clark v. Arizona*, 548 U.S. 735, 746 (2006).

⁵² *Id.* at 779.

⁵³ *Yates v. State*, 171 S.W.3d 215 (Tex. Crim. App. 2005).

religious, often praying together, and want as large a family as possible. Unfortunately, Andrea increasingly manifests signs of mental illness. On one occasion, she attempts to commit suicide by swallowing pills. Though given prescriptions for multiple medications, including anti-psychotics, Andrea does not often take them. She often shakes, fails to feed her children, mutilates herself, and claims that there are cameras in the ceilings. Her husband Rusty stops a second, nearly successful, suicide attempt, but does not report the incident to her physicians. The Yates are warned against having more children because of Andrea's precarious mental state, but they soon have a fifth child, a baby girl. The family moves from the bus into a house. Andrea's condition initially improves, but the improvement is short-lived. Andrea is soon cutting herself again and refusing to feed her children. She worries that her mental illness renders her a bad mother and that, as their minister preaches, her children will then be doomed to eternal torment in hell. One morning, after Rusty leaves for work, Andrea fills the bathtub with water, then drowns each of her children. Her son Noah tries to run, but Andrea grabs him and holds him under the water as he struggles to escape. She believes that by killing her children she is saving them from a horrifying existence of eternal torment.

Again, one would think that her serious mental illness would significantly reduce or eliminate her blameworthiness. Yet she is convicted of capital murder and sentenced to life imprisonment (though the conviction is later overturned because of questionable testimony by a state witness).⁵⁴ Yates did not qualify for an insanity defense in Texas because the state limits it to individuals who, owing to mental illness, do not know that their conduct is criminal.⁵⁵ Presumably, Yates did know that her conduct was in violation of the state's rules, even though she thought she was doing the right thing in order to save her children.

Today, two jurisdictions do not allow an insanity defense, although they do allow evidence of mental illness to be used more narrowly to negate the culpability requirements of an offense.⁵⁶ Another thirty allow an insanity defense based only upon a cognitive

⁵⁴ *Id.* at 216–22.

⁵⁵ The Texas Penal Code provides: "It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." TEX. PENAL CODE ANN. § 8.01(a) (West 2003). "Wrong" in this sense is interpreted under Texas law to mean "illegal." *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008).

⁵⁶ Montana, MONT. CODE ANN. § 46-14-214 (2007); Utah, UTAH CODE ANN. § 76-2-305 (LexisNexis 2008).

dysfunction; no defense is allowed for a control dysfunction no matter how severe the impairment.⁵⁷ The remaining nineteen allow an insanity defense for either a cognitive or a control impairment.⁵⁸

E. Strict Liability

It is now common for even serious offenses, like statutory rape, to be treated as strict liability offenses. Under such a regime, a culpable state of mind need not be proven with respect to a sexual partner's age. Consider the case of Raymond Garnett,⁵⁹ a twenty-year-old mentally retarded man with an IQ of fifty-two. He is introduced to Erica, who says that she is sixteen—a fact confirmed by her friends. Garnett and Erica talk on the phone on and off—he enjoys talking to someone who does not make fun of him. One night, at around 9:00 p.m., he is stranded without a ride home, but notices Erica's house nearby. As he

⁵⁷ United States, 18 U.S.C. § 17 (2006); Alabama, ALA. CODE § 15-16-2 (LexisNexis 2008); Alaska, ALASKA STAT. § 12.47.010 (2008); Arizona, ARIZ. REV. STAT. ANN. §§ 13-502(A)–(B) (2008); Arkansas, ARK. CODE ANN. § 5-2-312 (2008); California, *People v. Drew*, 583 P.2d 1318 (Cal. 1978); Colorado, COLO. REV. STAT. §§ 16-8-101(1), -104, -105(2) (2007); Delaware, DEL. CODE ANN. tit. 11, §§ 304a, 401 (2007); Florida, FLA. R. CRIM. P. § 3.217; Illinois, 720 ILL. COMP. STAT. ANN. 5/6-2 (LexisNexis 2008); Indiana, IND. CODE ANN. §§ 35-41-3-6, -4-1(b) (West 2004); Kansas, *State v. Roadenbaugh*, 673 P.2d 1166 (Kan. 1982) and *State v. Grauerholz*, 654 P.2d 395 (Kan. 1982); Louisiana, LA. REV. STAT. ANN. § 14:14 (2007); Maine, ME. REV. STAT. ANN. tit. 17-A, § 39 (2006); Minnesota, MINN. STAT. ANN. § 611.026 (West 2009); Mississippi, *Herron v. State*, 287 So. 2d 759 (Miss. 1974); Missouri, MO. ANN. STAT. § 552.030 (West 2009); Nebraska, NEB. REV. STAT. § 29-2203 (2009); Nevada, *Poole v. State*, 625 P.2d 1163 (Nev. 1981); New Hampshire, *State v. Plummer*, 374 A.2d 431 (N.H. 1977); New Jersey, N.J. STAT. ANN. § 2C:4-2 (West 2005); New York, N.Y. PENAL LAW § 40.15 (Consol. 2008); North Carolina, *State v. Vickers*, 291 S.E.2d 599 (N.C. 1982); Oklahoma, *Munn v. State*, 658 P.2d 482 (Okla. 1983); Pennsylvania, 18 PA. CONS. STAT. ANN. § 315 (West 1998); South Carolina, S.C. CODE ANN. § 17-24-10 (2007); South Dakota, *State v. Kost*, 290 N.W.2d 482 (S.D. 1980); Tennessee, *State v. Clayton*, 656 S.W.2d 344 (Tenn. 1983); Texas, TEX. PENAL CODE ANN. §§ 2.04, 8.01 (West 2003); Washington, WASH. REV. CODE ANN. § 10.77.030(2) (West 2002).

⁵⁸ Connecticut, CONN. GEN. STAT. § 53a-13(a) (2007); District of Columbia, *Bethea v. United States*, 365 A.2d 64 (D.C. 1976); Georgia, GA. CODE ANN. § 16-3-3 (2007); Hawaii, HAW. REV. STAT. § 704-400 (2009); Idaho, *State v. White*, 456 P.2d 797 (Idaho 1969); Iowa, IOWA CODE ANN. § 701.4 (West 2003); Kentucky, KY. REV. STAT. ANN. § 504.020 (West 2008); Maryland, MD. CODE ANN., CRIM. PROC. § 3-109 (LexisNexis 2008); Massachusetts, *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); Michigan, MICH. COMP. LAWS ANN. § 768.21(a) (West 2008); New Mexico, N.M. STAT. ANN. § 31-9-3 (LexisNexis 2009); Ohio, *State v. Anders*, 277 N.E.2d 554 (Ohio 1972); Oregon, OR. REV. STAT. § 161.295 (2009); Rhode Island, *State v. Johnson*, 399 A.2d 469 (R.I. 1979); Vermont, VT. STAT. ANN. tit. 13, § 4801 (2009); Virginia, *Godley v. Commonwealth*, 343 S.E.2d 368 (Va. Ct. App. 1986); West Virginia, *State v. Lockhart*, 490 S.E.2d 298 (W. Va. 1997); Wisconsin, WIS. STAT. ANN. § 971.15 (West 2007); Wyoming, WYO. STAT. ANN. § 7-11-304 (2009).

⁵⁹ *Garnett v. State*, 632 A.2d 797 (Md. 1993). For further facts, see PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 114 (2d ed. 2008) [hereinafter ROBINSON, CRIMINAL LAW: CASE STUDIES] and ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 23, at 63–65.

approaches the house, Erica opens her upstairs bedroom window and invites him in, directing him to use a nearby ladder. They talk for a long time, have consensual intercourse, and Garnett leaves at about 4:30 a.m. When Erica gives birth eight-and-a-half months later, her parents contact the police, who arrest Garnett for statutory rape. Erica was thirteen years old at the time of their intercourse. Garnett is charged with second-degree rape. Because the offense is one of strict liability, he is not allowed to introduce evidence at trial showing that his mistake as to her age was a reasonable one for him to make.⁶⁰

In another case, nineteen-year-old Ras Haas lets two runaway girls stay at his apartment. They tell him they are eighteen years old, and at different times have consensual intercourse with him. He is later arrested and charged with two counts of sexual assault of a child because the girls, in fact, are fourteen and fifteen years old. At trial he is not allowed to present evidence that he reasonably believed the girls were over the age of sixteen, which is the age of consent required by state law. Because the offense is one of strict liability, such reasonableness is irrelevant. He is sentenced to twenty to thirty years imprisonment for each count, with the terms to be served consecutively.⁶¹

Roswold Adkins has consensual intercourse with a fourteen-year-old girl who intentionally misrepresents her age. During deliberations, the jury, apparently concerned about the issue, asks the judge about taking the intentional misrepresentation into account in assessing liability and is told that it is irrelevant to liability because even a reasonable mistake is no defense. Adkins is convicted of two counts of criminal sexual conduct and sentenced to two concurrent terms of six-and-a-half to twenty-two years.⁶²

Most jurisdictions reject even a reasonable mistake as to age as a defense to statutory rape.⁶³ While other serious offenses, such as

⁶⁰ Garnett's prison sentence is suspended, and he is put on probation. *Garnett*, 632 A.2d 799, 803–04.

⁶¹ *State v. Haas*, No. A-05-804, 2006 WL 996535, at *5 (Neb. Ct. App. Apr. 18, 2006).

⁶² *People v. Adkins*, No. 257845, 2006 WL 142120, at *1 (Mich. Ct. App. Jan. 19, 2006).

⁶³ See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385–91 (2003) (categorizing each state's approach as among true crime, strict liability, and hybrid, with majority employing strict liability). For states that employ a strict liability approach, see, for example, FLA. STAT. ANN. § 794.021 (West 2007), N.J. STAT. ANN. § 2C:14-5(c) (West 2005), and WIS. STAT. ANN. § 939.43(2) (West 2005). For states that allow for a mistake defense, see, for example, IND. CODE ANN. § 35-42-4-3(c) (LexisNexis 2009), MO. REV. STAT. § 566.020 (2000), and W. VA. CODE ANN. § 61-8B-12 (LexisNexis 2005). The federal approach is a hybrid, with strict liability only for sexual contact with children under the age of twelve. 18 U.S.C. § 2441(d) (2006).

driving under the influence, can be ones of strict liability,⁶⁴ the bulk of strict liability offenses are more minor, such as “public welfare offenses,”⁶⁵ speeding and other vehicular offenses, and liquor, narcotics, and food regulation infractions.⁶⁶ A few state courts have invalidated the use of strict liability for offenses that impose significant prison sentences or create an unreasonable expectation of knowledge in the offender.⁶⁷ The Model Penal Code attempts to restrict the use of strict liability to “violations” rather than crimes,⁶⁸ although it too imposes strict liability for the serious felony of aggravated statutory rape.⁶⁹

F. Felony Murder

The felony-murder doctrine punishes as murder all deaths caused in the course of a felony, no matter how accidental the killing, and applies such murder liability not just to the person causing the death but to all accomplices in the underlying felony.⁷⁰ The case of Jerry Moore is not unusual. Moore agrees to help Montejo (an acquaintance) burglarize a house while the house’s owner is away. Neither man is armed. When the resident returns unexpectedly, Moore is surprised to see Montejo shoot and kill the owner with a gun he apparently found in a nightstand. Moore is convicted of murder for Montejo’s shooting of the homeowner and is sentenced to life imprisonment at hard labor without the possibility of parole.⁷¹

In the case of Forrest Heacock, the defendant supplies cocaine to people at a “drug party” that he attends. He and three other people inject the cocaine; one of them overdoses and dies. Heacock is convicted of felony murder and is sentenced to forty years imprisonment.⁷²

⁶⁴ See *Leocal v. Ashcroft*, 543 U.S. 1, 8 n.5 (2004) (listing states where driving under the influence is treated as strict liability offense).

⁶⁵ See, e.g., *Morissette v. United States*, 342 U.S. 246, 255 (1952) (comparing nature of “public welfare offenses,” which involve neglect or inaction with regard to duty of care, to accepted classifications of common law offenses, which involve “positive aggressions or invasions”); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84–88 (1933) (listing state cases involving public welfare offenses with no mens rea requirement).

⁶⁶ WAYNE R. LAFAVE, *CRIMINAL LAW* 272 n.1 (4th ed. 2003).

⁶⁷ *Id.* at 279.

⁶⁸ MODEL PENAL CODE § 2.05(1)(a) (Proposed Official Draft 1962).

⁶⁹ *Id.* § 213.6(1).

⁷⁰ See LAFAVE, *supra* note 66, at 744–65 (providing general overview of felony murder rule).

⁷¹ *State v. Moore*, No. 2006-KA-1979, 2007 WL 914637, at *1 (La. Ct. App. Mar. 28, 2007).

⁷² *Heacock v. Commonwealth*, 323 S.E.2d 90, 93 (Va. 1984). Heacock’s sentence is actually eighty years imprisonment, but forty years of the sentence are suspended.

The most popular version of the rule, used by forty jurisdictions, allows only inherently dangerous felonies (such as arson or drug trafficking) to trigger the rule's use.⁷³ Ten jurisdictions allow the commission of any felony to be used.⁷⁴ Two jurisdictions have abolished the felony murder rule.⁷⁵

G. Criminalization of Regulatory Violations

Robert Blandford and two other seafood importers are arrested, tried, and convicted in federal court for violating the Lacey Act, which criminalizes the importation of wildlife in violation of a U.S. or foreign law.⁷⁶ In this instance, the importation was in violation of a Honduran law requiring the use of cardboard box-shaped containers

⁷³ United States, 18 U.S.C. § 1111(a) (2006); Alabama, ALA. CODE § 13A-6-2(a)(3) (2009); Alaska, ALASKA STAT. § 11.41.110(a)(3) (2008); Arizona, ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (2010); California, CAL. PENAL CODE § 1-8-1-189 (West 2008); Colorado, COLO. REV. STAT. ANN. § 18-3-102(1)(b) (West 2009); Connecticut, CONN. GEN. STAT. ANN. § 53(a)-54(c) (West 2007); District of Columbia, D.C. CODE § 22-2101 (LexisNexis 2010); Florida, FLA. STAT. ANN. § 782.04 (West 2007); Idaho, IDAHO CODE ANN. § 18-4003(d) (2004); Illinois, 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 2002); Indiana, IND. CODE ANN. § 35-42-1-2, -3 (West 2004); Iowa, IOWA CODE § 707.2.2-.3 (2007); Kansas, KAN. STAT. ANN. § 21-3401(b) (2007); Louisiana, LA. REV. STAT. ANN. § 14:30(A)(1) (2007); Maine, ME. REV. STAT. ANN. tit. 17-A, § 202(1) (2006); Maryland, MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2002); Massachusetts, MASS. ANN. LAWS ch. 265, § 1 (LexisNexis 2008); Michigan, MICH. COMP. LAWS ANN. § 750.316(1)(b) (West 2004); Minnesota, MINN. STAT. ANN. § 609.185(a)(2)-(3) (West 2009); Mississippi, MISS. CODE ANN. § 97-3-19(1)(c) (2005); Montana, MONT. CODE ANN. § 45-5-102(1)(b) (2009); Nebraska, NEB. REV. STAT. § 28-303(2) (2009); Nevada, NEV. REV. STAT. § 200.030(1)(b) (2009); New Jersey, N.J. STAT. ANN. § 2C:11-3.a(3) (West 2005); New York, N.Y. PENAL LAW § 125.25(3) (Consol. 1998); North Carolina, N.C. GEN. STAT. ANN. § 14-17 (West 2000); North Dakota, N.D. CENT. CODE § 12.1-16-01(1)(c) (1997); Ohio, OHIO REV. CODE ANN. § 2903.01(B) (West 2006); Oregon, OR. REV. STAT. § 163.115(1)(b) (2009); Rhode Island, R.I. GEN. LAWS § 11-23-1 (2002); South Carolina, S.C. CODE ANN. § 16-3-20(c)(a)(1) (2003); South Dakota, S.D. CODIFIED LAWS § 22-16-4(1) (2006); Tennessee, TENN. CODE ANN. § 39-13-202(a)(2)-(3) (2006); Utah, UTAH CODE ANN. § 76-5-203(2)(d) (LexisNexis 2008); Vermont, VT. STAT. ANN. tit. 13, § 2301 (2009); Virginia, VA. CODE ANN. § 18.2-32 (2009); West Virginia, W. VA. CODE ANN. § 61-2-1 (2005); Wisconsin, WIS. STAT. ANN. § 940.03 (West 2005); Wyoming, WYO. STAT. ANN. § 6-2-101(a) (2009).

⁷⁴ Arkansas, ARK. CODE ANN. § 5-10-102(a)(1) (2006); Delaware, DEL. CODE ANN. tit. 11, § 636(a)(2) (2007); Georgia, GA. CODE ANN. § 16-5-1 (2007); Missouri, MO. REV. STAT. § 565.021.1(2) (1999); New Hampshire, N.H. REV. STAT. ANN. § 630:1-b (2007); New Mexico, N.M. STAT. ANN. § 30-2-1-A(2) (2004); Oklahoma, OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2002); Pennsylvania, 18 PA. CONS. STAT. § 2502(b) (1998); Texas, TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2003); Washington, WASH. REV. CODE ANN. § 9A.32.030(1)(c), -.050(1)(b) (2009).

⁷⁵ Hawaii, HAW. REV. STAT. § 707-701 (1996); Kentucky, KY. REV. STAT. ANN. § 507.020 (LexisNexis 2008).

⁷⁶ 16 U.S.C. § 1372 (2006).

for seafood exports. The plastic bags used by Blandford did not violate U.S. law. The men are sentenced to eight years in prison.⁷⁷

In another case, Tom Lindsey, twenty-six, takes his brother and six friends on a rafting and camping trip in the popular Hell's Canyon National Recreation Area, a park created and regulated by federal law.⁷⁸ Lindsey acquires the necessary permits to both raft and camp in the area but does not strictly follow the relevant regulations. In order to fish in the mornings, Lindsey and his friends launch their raft at 7:00 a.m., instead of waiting until 9:00 a.m., as the regulations require. Additionally, they camp below the high-water mark of the river, which is technically state and not federal land, in order to evade a federal regulation forbidding campfires during the summer. Forest Service agents arrest Lindsey and his brother. They later send Lindsey a letter informing him that his permits have been revoked. Lindsey and his brother are indicted on felony charges of camping without a permit and building a campfire without a permit.⁷⁹

The federal criminal code in particular has seen “unprecedented expansion” in recent years.⁸⁰ Between 1980 and 2004, there was a thirty percent increase in federal offenses that are subject to criminal penalties.⁸¹ Many of these new laws criminalize behavior typically handled through civil regulatory actions, including the expansion of

⁷⁷ United States v. McNab, 324 F.3d 1266 (11th Cir. 2003); Tony Mauro, *Lawyers See Red Over Lobster Case*, LEGAL TIMES, Feb. 18, 2004, available at <http://www.law.com/jsp/article.jsp?id=1122023117263&hbx>. The Honduran courts subsequently invalidated one of the regulations serving as the basis for the violation of Honduran law—the requirement that tails be no shorter than 5.5 inches. However, even though the laws were declared void retroactively, the Eleventh Circuit Court of Appeals upheld the defendants' convictions, stating that the District Court was able to determine on its own whether the law was valid at the time the offense was committed. Thus, even though the defendants could not be found liable for a violation under Honduran law, they were held liable for violation of the Lacey Act. *Id.*

⁷⁸ See ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 23, at 187 (discussing facts).

⁷⁹ United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979); ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 23, at 187–89. Before being indicted, Lindsey shows the agents a stipulation in the legislation creating the Hells Canyon Recreation Area that states that permits are not required to camp below the high-water mark. A district court judge dismisses the case for lack of jurisdiction. *Lindsey*, 595 F.2d at 6. However, the Ninth Circuit Court of Appeals rules that the federal government has the power to regulate conduct on state land when necessary to protect adjacent federal land. *Id.* The case is remanded to the District Court, but the prosecutor does not pursue it further. ROBINSON & CAHILL, LAW WITHOUT JUSTICE, *supra* note 23, at 192.

⁸⁰ Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005).

⁸¹ *Id.* at 754.

criminal liability for copyright infringement,⁸² environmental offenses,⁸³ and fiduciary irresponsibility.⁸⁴

The phenomenon is not limited to federal law, although the continuing expansion of state criminal codes has taken place in a much longer time frame than has the federal code expansion. The Illinois Criminal Code is a particularly striking example. In 1856, the Code contained 131 crime definitions; by 1951 this number had ballooned to 460.⁸⁵ Perhaps more telling is the expansion of Illinois's modern code: Though seventy-two pages long in 1961, the Code had expanded to 1200 pages by the year 2000.⁸⁶ Such rapid expansion is not unique to Illinois, and in most cases it is the result of a number of factors, including the continuous adoption of "designer offenses" covering actions already made illegal by more general statutes, the passage of laws covering "crimes *du jour*" that garner heavy news coverage and public outrage, and other forms of ad hoc code amendments tending to expand the range of criminal statutes.⁸⁷

II

TESTING THE PERCEIVED JUSTICE OF MODERN CRIME-CONTROL RULES: STUDY 1

The goal of this study is to compare subjects' treatment of cases involving the crime-control doctrines described in Part I to the law's treatment of those cases. Subjects were asked to rank and then assign a specific punishment to the cases, and these rankings and assigned punishments were then compared to the rankings and punishments that the law gives the cases.

We also examined subjects' treatment of a set of "milestone" cases, which did not engage the various crime control doctrines of interest, and we compared subjects' responses to these cases with their responses to the crime-control cases. We predicted that for the crime-control cases, the subjects' sentences would be much less punitive than those of the law. In contrast, although we expected that there might

⁸² *E.g.*, 17 U.S.C. § 101 (2006); *id.* § 1204.

⁸³ *E.g.*, 33 U.S.C. § 1319(c) (2006).

⁸⁴ *E.g.*, 7 U.S.C. § 2009 (2006); *see also* United States v. Ntshona, 156 F.3d 318 (2d Cir. 1998); United States v. Goldstein, 883 F.2d 1362 (7th Cir. 1989).

⁸⁵ *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513 (2001) (discussing rise in number of offenses).

⁸⁶ In 2000, Governor George Ryan issued an Executive Order ordering the creation of a Criminal Code Rewrite and Reform Commission whose purpose was to study existing criminal law and create clearer and more coherent standards. *See* 24 Ill. Reg. 7755 (May 4, 2000).

⁸⁷ Michael T. Cahill & Paul H. Robinson, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170-73 (2003).

be some discrepancies between subjects' sentences and the law's for the milestone cases, we predicted that these would be much smaller and less systematic than the discrepancies for the crime-control cases.

A. "Milestone" Scenarios

While people tend to agree on the proper rank order of cases on the punishment continuum, at least for the kind of core harms at issue here, some people tend to be harsh in their "sentencing," while others are lenient. To be able to account for these personal differences in general sentencing severity, subjects were first asked to rank in order, and then to assign specific punishments to a collection of twelve cases that ranged along the punishment continuum. These twelve cases provided "milestones" for the subject's punishment continuum, against which the twelve "crime-control" cases embodying the crime-control doctrines could be compared.

The "milestone" scenarios were taken from a 2007 study by Paul H. Robinson and Robert Kurzban.⁸⁸ In that study, subjects rank-ordered twenty-four crime scenarios according to the amount of punishment deserved by the described offender. Most researchers would consider this a quite demanding task, perhaps asking for more concentration and effort than most subjects are willing or able to provide. The task was also quite complex, requiring subjects to compare the deserved punishment for each scenario to that for each of the other twenty-three scenarios. Yet the researchers found that the subjects had little difficulty performing the task and, indeed, displayed an astounding level of agreement in the ordinal ranking of the scenarios across demographics.⁸⁹

A statistical measure of concordance, which measures the degree of agreement between different subjects (in this instance, agreement on rank ordering), is produced by Kendall's *W* coefficient of concordance; a Kendall's *W* of 1.0 indicates perfect agreement, and 0.0 indicates no agreement. In the study just described, the Kendall's *W* was .95 (with $p < .001$). This is a strikingly high level of agreement. One might expect to get this high a Kendall's *W* if subjects were asked to judge the relative brightness of different groupings of spots, for example.⁹⁰ In the context of more subjective or complex comparisons,

⁸⁸ Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1867 (2007).

⁸⁹ *Id.*

⁹⁰ See Charles M.M. de Weert & Noud A.W.H. van Kruysbergen, *Assimilation: Central and Peripheral Effects*, 26 PERCEPTION 1217, 1219–21 (1997) (describing experiment in which subjects were asked to judge brightness of black and white patterns, yielding high Kendall's coefficient of concordance).

such as asking travel magazine readers to rank the attractiveness of eight different travel destinations, one gets a much lower Kendall's W of .52.⁹¹ When asking economists to rank the top twenty economics journals according to quality, one study found a Kendall's W of .095.⁹²

In the present study, we used only twelve of the original twenty-four scenarios. Table 1 shows the control cases that were used as "milestone markers." The text of each of these twelve "milestone" scenarios is reproduced in Appendix A. As is apparent, this collection of cases represents the full punishment continuum, from cases where subjects impose no liability (scenarios 1 and 2), to cases of common minor offenses, such as petty theft, to cases of common serious offenses, such as first-degree murder. As it happens, each of the scenarios represents a different legal offense from the others, named in the second column. The differences in seriousness perceived by the subjects in Robinson and Kurzban's earlier study generally match the differences in offense grade assigned by typical American criminal codes (based, as they often are, upon the Model Penal Code),⁹³ as is noted in the third column. The ranking of those subjects also corresponds, in a general way, to the average sentences given to state offenders, listed in the fourth column, and to the sentencing of federal offenders provided by the federal sentencing guidelines, listed in the last column.

⁹¹ See Baruch Fischhoff et al., *Travel Risks in a Time of Terror: Judgments and Choices*, 24 RISK ANALYSIS 1301, 1303 (2004) (illustrating results of study designed to elicit attitudes regarding travel risks).

⁹² Kostas Axaroglou & Vasilis Theoharakis, *Diversity in Economics: An Analysis of Journal Quality Perceptions*, 1 J. EUR. ECON. ASS'N 1402, 1422 (2003) (examining perceptions of journal quality among American Economic Association (AEA) members, and finding that these perceptions vary widely across AEA subgroups).

⁹³ One might note that an exception here is the case of burglary, which is graded more seriously by the criminal code than it is ranked by the subjects. This disparity is probably due in large part to the problem of "combination offenses" (burglary is simply a combination of one offense, such as theft, and the offense of criminal trespass). For general discussion of the problem of combination offenses, see ROBINSON, CRIMINAL LAW: CASE STUDIES, *supra* note 59, at 812–15, and Paul H. Robinson et al., *Codifying Shari'a: International Norms, Legality, and the Freedom To Invent New Forms*, 2 J. COMP. L. 1, 39 (2007).

TABLE 1
CONTROL SCENARIOS—"MILESTONE MARKERS"

<i>Scenario</i>	<i>Offense</i>	<i>Model Penal Code Grade</i> ⁹⁴	<i>Average State System Term</i> ⁹⁵	<i>USSC Guideline Sentence</i> ⁹⁶
12. Ambush shooting	First Degree Murder	Felony—death eligible (§§ 210.2(1)(a), 210.6(3)(h))	10.5 years*	Life (§ 2A1.1)
11. Stabbing	Second Degree Murder	Felony 1st degree (§2 10.2(1)(a))	10.5 years*	19.5–24.5 years (§ 2A1.2)
10. Accidental mauling by pit bulls	Manslaughter	Felony 2d degree (§ 210.3(1)(a))	4.7–8.4 years	2.25–2.75 years (§ 2A1.4(a)(2)(A))
9. Clubbing during robbery	Aggravated Robbery	Felony 2d degree (§ 222.1(1)(b))	4.3 years	6.5–8 years (§ 2B3.1(b)(2)(D), (3)(B))
8. Attempted robbery at gas station	Attempted Robbery	Felony 2d degree (§ 222.1(1)(b))	(<4.3 years*)	4.25–5.25 years (§ 2B3.1(b)(3)(B))
7. Stitches after soccer game	Aggravated Assault	Felony 2d degree (§ 211.1(2))	2.6 years	3.75–4.75 years (§ 2A2.2(b)(2)(B), (3)(B))
6. Slap and bruising at record store	Assault	Misdemeanor (§ 211.1(1)(a))	(<2.6 years*)	4–10 months (§ 2A2.3(b)(1)(A))
5. Microwave from house	Burglary	Felony 3d degree (§ 221.1(1))	2.4 years	2–2.5 years (§ 2B2.1(a)(1))
4. Clock radio from car	Theft	Misdemeanor (§ 223.1(2)(b))	1.5 years	0–6 months (§ 2B1.1(a)(2))
3. Whole pies from buffet	Petty Theft	Petty offense (§ 223.1(2)(b))	–	–
2. Wolf hallucination	Assault—insanity defense	No liability (§ 4.01(1))	–	–
1. Umbrella mistake	Theft—culpability defense	No liability (§2.02(1))	–	–

* National data are not available for this distinct category of offense.

Note that the data in each of the last three columns deviates slightly from the order of scenarios as they appear in the table, which is the order in which lay persons almost universally rank them.⁹⁷ This suggests that current state sentencing practice and the federal sen-

⁹⁴ MODEL PENAL CODE (Proposed Official Draft 1962).

⁹⁵ Bureau of Justice Statistics, U.S. Dep't of Justice, *First Releases from State Prison: Sentence Length, Time Served, and Percent of Sentence Served, By Offense*, in NATIONAL CORRECTIONS REPORTING PROGRAM (2003), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2045>.

⁹⁶ U.S. SENTENCING GUIDELINES MANUAL (2008).

⁹⁷ Robinson & Kurzban, *supra* note 88, at 1868.

tencing guidelines are not based strictly upon the community's shared intuitions of justice.⁹⁸ On the other hand, some of the inconsistency between the community's view and the rankings by average sentence and guideline sentence no doubt arises from the fact that the state sentencing average and the guideline sentence include a range of cases—sentences for burglary, for instance, vary depending on whether it was more or less aggravated. Thus, the last two columns only give a general sense of the range in which such cases would normally fall.

B. "Crime-Control" Scenarios

In the present study, after considering the twelve "milestone" scenarios, subjects were provided with twelve additional "crime-control" scenarios and asked to include them in their ranking exercise. Each of these "crime-control" scenarios summarizes the basic facts of one of the specific real-world cases used to illustrate the operation of the seven crime-control doctrines discussed in Part I. Table 2 shows the real-world case upon which each scenario is based, the crime-control doctrine that it illustrates, and the actual sentence imposed under that doctrine, in order of subjects' rankings.⁹⁹ The text of each of these "crime-control" scenarios is reproduced in Appendix B.

⁹⁸ Federal and state sentences typically are a product of the exercise of judicial discretion or crime-control policymaking. See Stephanos Bibas et al., *Policing Policies at Sentencing*, 103 Nw. U. L. REV. 1371, 1377 n.24 (2009) (collecting studies of how judges' different sentencing philosophies influence sentencing outcomes); Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 720 n.30 (2008) (finding in empirical studies that policy preferences of judges influence sentencing and that judges selectively use adjustments and departures to enhance or reduce sentences); see also Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 17,915, 18,121–22 (May 1, 1987) (arguing that federal sentencing guidelines as promulgated lacked coherent organizing principle).

⁹⁹ While offenders typically may be required to serve the entire sentence imposed, they also may be released from prison to parole supervision, subject to reimprisonment for a parole violation. These are the actual prison terms served by those offenders for whom information is available: Yates, whose life sentence was overturned on appeal due to questions regarding the proof of the underlying facts, has been held in a state mental hospital for three years with no release date currently set. *Woman Not Guilty in Retrial in the Deaths of Her 5 Children*, N.Y. TIMES, July 27, 2006, at A20. Brazill has a scheduled release date in 2028, which would mean a term served of almost twenty-seven years. FLA. DEP'T OF CORR., INMATE POPULATION INFORMATION DETAIL, <http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=2&From=list&SessionID=486501272> (last visited Oct. 27, 2010). Clark, who has served six years as of this writing, has no release date set. ARIZ. DEP'T OF CORR., http://www.azcorrections.gov/inmate_datasearch/results.aspx?InmateNumber=180165&LastName=CLARK&FNMI=E&SearchType=SearchInet (last visited Oct. 27, 2010). Rummel's conviction was overturned after eight years in prison, on a claim of incompetent representation, after which an agreement was struck for a sentence of time

TABLE 2
 "CRIME-CONTROL" SCENARIOS

<i>Scenario</i>	<i>Case Name</i>	<i>Offense</i>	<i>Crime-Control Doctrine</i>	<i>Actual Court Sentence</i>
L. Accidental teacher shooting	<i>Brazill</i>	Murder	Adult Prosecution of Juveniles	28 years without parole
K. Drowning children to save them from hell	<i>Yates</i>	Murder	Narrowing Insanity Defense	Life
J. Accomplice killing during burglary	<i>Moore</i>	Felony murder, burglary	Felony Murder	Life at hard labor without parole
I. Killing officer believed to be alien	<i>Clark</i>	Murder	Narrowing Insanity Defense	Life
H. Cocaine overdose	<i>Heacock</i>	Felony murder, unlawful distribution of controlled substance	Felony Murder	40 years
G. Cocaine in trunk	<i>Harmelin</i>	Complicity in unlawful distribution of controlled substance	Drug Offense Penalties	Life without parole
F. Air conditioner fraud	<i>Rummel</i>	Petty fraud	Three Strikes	Life
E. Sex with female reasonably believed overage	<i>Haas</i>	Statutory rape	Strict Liability	40 to 60 years
D. Underage sex by mentally retarded man	<i>Garnett</i>	Statutory rape	Strict Liability	5 years
C. Marijuana unloading	<i>Papa</i>	Unlawful possession of controlled substance	Drug Offense Penalties	8 years
B. Shooting of TV	<i>Almond</i>	Unlawfully discharging firearm	Three Strikes	15 years without parole
A. Incorrect lobster container	<i>Blandford</i>	Violation of importation regulations	Criminalizing Regulatory Violations	15 years to life

served. *S.A. Man Finally Free After 8-Year Ordeal*, SAN ANTONIO EXPRESS NEWS, Nov. 15, 1980, at 2-A C. Haas has a projected release date in 2035, which would mean a term served of just under thirty years. NEB. DEP'T OF CORR. SERVS., NEBRASKA INMATE DETAILS, <http://dcs-inmatesearch.ne.gov/Corrections/InmateDisplayServlet?DcsId=62184> (last visited Oct. 27, 2010). Blandford has a release date in 2011, which would mean a term served of eight years. FED. BUREAU OF PRISONS, INMATE LOCATOR, <http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch> (last visited Oct. 27, 2010). Almond was released from prison in 2006, after having served thirteen years. FED. BUREAU OF PRISONS, INMATE LOCATOR, <http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch> (last visited Oct. 27, 2010). Papa served twelve years. Tuhus-Dubrow, *supra* note 31.

We do not suggest that these cases are the statistically most common application of these crime-control doctrines. However, neither are they aberrant applications by a rogue judge. Each is an application of the doctrine as intended by its drafters and, in most cases, as specifically approved on appeal as a proper application in several instances by the United States Supreme Court. It only takes a few objectionable cases to undermine the system's moral credibility in peoples' minds. What we know about making and keeping reputations tells us that intention counts enormously: Accidental or unavoidable injustices or failures of justice may be forgiven if the system appears to be committed to trying to do justice.¹⁰⁰ When revealed, deviations from desert are intended by the system. When they are planned and predictable applications of the criminal law's rules, as with the modern crime-control doctrines examined here, then even a single telling case can have detrimental consequences.

C. Study 1 Design and Methodology

1. Study Design

The study was administered and funded by the National Science Foundation's Time Sharing Experiments in the Social Sciences (TESS). The 317 subjects were recruited broadly from across the United States and were demographically heterogeneous, representing a wide range of socioeconomic, racial, and religious backgrounds.¹⁰¹

¹⁰⁰ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 496 (1997) [hereinafter Robinson & Darley, *Utility of Desert*] ("An error can be forgiven if it is seen as 'out of character.' [People's] view of the system is likely to be governed by what they think the system is trying to do, by what they see as its motivation to do justice.").

¹⁰¹ TESS relies on a company called Knowledge Networks, which recruits samples from a panel that is representative of the entire U.S. population. To create this panel, Knowledge Networks utilizes probability-based sampling methods, using both random-digit dialing and address-based sampling. Panel members do not need to be current web users, as Internet access and hardware are provided as needed. The random-digit dialing method incorporates both listed and unlisted telephone numbers as well as cell phone numbers. Panel members are all randomly selected, and unselected volunteers are not able to join. For a more complete description of this method, see KNOWLEDGE NETWORKS, KNOWLEDGEPANEL DESIGN SUMMARY (2010), available at [http://www.knowledgenetworks.com/knpanel/docs/KnowledgePanel\(R\)-Design-Summary-Description.pdf](http://www.knowledgenetworks.com/knpanel/docs/KnowledgePanel(R)-Design-Summary-Description.pdf).

Forty-three subjects were excluded from our data analysis for not completing the initial ranking task. The remaining 317 subjects had the following demographic characteristics: Age: 18-29, 24%; 30-44, 27%; 45-59, 28%; 60+, 20%. Gender: male, 51%; female, 49%. Marital status: married, 60%; divorced or separated, 12%; widowed, 2%; living with partner, 5%; never married, 21%. Race: white, 80%; black, non-Hispanic, 7%; Hispanic, 9%; other, 4%. Education: some college, 24%; two-year college degree, 10%; four-year college degree, 25%; Master's degree, 9%; professional or doctorate degree, 3%. Median household income: \$60,000-\$74,999. Employment status: currently employed, 61%; retired, 14%; not working (laid off, looking for work, disabled, other), 25%. Political views:

In the first part of the task, subjects were given the twelve “milestone” scenarios and were asked to rank order them in terms of their relative degree of seriousness—that is, in terms of the relative blameworthiness of the main character in each case. The cases were presented in a new random order for each subject. Following this, subjects were then given the twelve “crime-control” cases and were asked to perform the same task. However, the transition between the two blocks of cases was seamless for the subjects. They were not aware of any difference between the two sorts of cases, and instead had the experience of ranking twenty-four cases in turn. The twenty-four cases are reproduced in Appendices A and B.

In the second part of the task, subjects indicated what they thought was an appropriate level of punishment for each case. The instructions asked subjects to report their own judgments about the amount of punishment deserved in each case (if any), not what they thought the law or other persons would assign. They indicated the specific amount of punishment they would give to the offender in each of the twenty-four cases by using the punishment continuum response scale reproduced in Appendix B. In the third part of the task, subjects were asked to respond to ten questions which asked for their general impressions about the American criminal justice system.

2. Procedure

The task was computerized and run over the Internet using a sample of subjects that were recruited by TESS. In the first part of the task, subjects were presented with a vertical array on the left side of the screen, which was labeled “Most serious case (person most blameworthy)” at the top, and “Least serious case (person least blameworthy)” at the bottom. A description of each new case was presented on the right side of the screen. Each case had a brief title, followed by a short paragraph describing the circumstances of the case. Subjects read the description of each case and then dragged the case with a mouse cursor to a point on the vertical array corresponding to its relative rank order of blameworthiness. They were then presented with the next case. Once a case had been dragged over to the vertical array, only its title was visible. However, by dragging the mouse over the title, the full description of the case would be visible in a pop-up window. If they wanted to make adjustments to their ordering, subjects were able to subsequently move each case by dragging it to a new position with the mouse cursor. Once subjects had ranked all twenty-

extremely liberal, 2%; liberal, 16%; slightly liberal, 14%; moderate, 30%; slightly conservative, 15%; conservative, 20%; extremely conservative, 4%.

four cases, they were prompted to review and finalize the order they had constructed.

Subjects then assigned exact punishment amounts to the twenty-four cases they had previously rank ordered. Each case was displayed on the right side of the screen in the rank order that the subject had previously decided upon. Only the title of each case was visible to subjects without further action, but as in the first part of the procedure, subjects could reveal the full description of a case by dragging the mouse cursor over its title. On the left side of the screen was a sentence table which contained slots corresponding to different punishment amounts. The subjects' task was to drag each case to a punishment amount that they felt was appropriate given the blameworthiness of the offender. As shown in the Appendix, the sentence table contained slots corresponding to no punishment, including a "liability but no punishment" option, as well as a "no liability" option. Each punishment amount was capable of taking up to seven cases, so that several cases could be assigned the same sentence if the subjects so chose.

Subjects could assign punishments in any order they chose. However, the program was structured such that they were not able to violate their initial rank ordering in assigning punishment amounts. That is, punishment amounts had to follow a descending order from the case judged most blameworthy to the case judged least blameworthy, allowing ties for cases that were rated adjacent to one another in blameworthiness. This was done to ensure intra-subject consistency between the rankings of blameworthiness and the punishment amounts, as demanded by the deserved punishment assessment that subjects were instructed to impose.

Finally, in the third part of the study, subjects responded to ten questions on nine- and seven-point scales which assessed their general attitudes toward the American criminal justice system. These questions are not of primary relevance in interpreting the present results, so we do not discuss them further.

D. Study 1 Results and Discussion

Table 3 below sets out the subjects' mean ranking for each scenario. The "milestone" scenarios are in bold, and the crime-control cases are in italics. The rank order among the "milestone" scenarios matches that of the previous study from which they were taken.¹⁰² Together they present a continuum of blameworthiness along which the modern "crime-control" scenarios, in italics, can be placed. Con-

¹⁰² See Robinson & Kurzban, *supra* note 88.

sistent with previous research, subjects tended to agree very strongly on the rank ordering of the “milestone” cases (Kendall’s $W = .86, p < .001$). There was also moderate agreement on the rank ordering of the “crime-control” cases (Kendall’s $W = .52, p < .001$). Table 3 lists the scenarios in the order in which they were ranked by the subjects on average.

TABLE 3
SUBJECTS’ MEAN RANKINGS OF SCENARIOS

<i>Scenario</i>	<i>Legal Analysis</i>	<i>Mean Rank</i>
12. Ambush shooting	First Degree Murder	23.3
11. Stabbing	Second Degree Murder	22.0
10. Accidental mauling by pit bulls	Manslaughter	19.0
<i>L. Accidental teacher shooting</i>	<i>Murder - by juvenile</i>	18.8
<i>K. Drowning children to save them from hell</i>	<i>Murder - mental illness</i>	18.4
<i>J. Accomplice killing during burglary</i>	<i>Felony murder, burglary</i>	17.9
9. Clubbing during robbery	Aggravated Robbery	17.3
8. Attempted robbery at gas station	Attempted Robbery	16.0
<i>I. Killing officer believed to be alien</i>	<i>Murder - mental illness</i>	15.6
<i>H. Cocaine overdose</i>	<i>Felony murder, unlawful distribution of controlled substance</i>	14.7
7. Stitches after soccer game	Aggravated Assault	13.9
6. Slap and bruising at record store	Assault	11.8
<i>G. Cocaine in trunk</i>	<i>Complicity in unlawful distribution of controlled substance</i>	11.5
<i>F. Air conditioner fraud</i>	<i>Petty fraud - prior record</i>	10.6
5. Microwave from house	Burglary	10.1
<i>E. Sex with female reasonably believed overage</i>	<i>Statutory rape - lack of culpability</i>	9.0
4. Clock radio from car	Theft	8.7
<i>D. Underage sex by mentally retarded man</i>	<i>Statutory rape - lack of culpability</i>	7.8
<i>C. Marijuana unloading</i>	<i>Unlawful possession of controlled substance</i>	7.2
<i>B. Shooting of TV</i>	<i>Unlawfully discharging firearm - prior record</i>	6.4
3. Whole pies from buffet	Petty Theft	6.2
<i>A. Incorrect lobster container</i>	<i>Violation of importation regulations</i>	5.8
2. Wolf hallucination	Insanity Defense	5.6
1. Umbrella mistake	Culpability Defense	2.2

Perhaps the most striking feature of Table 3 is the locations of the modern “crime-control” scenarios. Recall from Table 2’s last column

that most of the cases were given very high sentences: The top eight (E–L) were given sentences comparable to that of murder—life imprisonment or its equivalent. If the subjects’ rankings had followed the law’s treatment of these cases, they would have been ranked at the top of the list, above or between the “milestone” murder scenarios of twelve and eleven. Instead, the top three “crime-control” cases were ranked as being less serious than the “milestone” manslaughter case involving an accidental killing by dogs. The next two “crime-control” cases are ranked as being even less serious—between the “stitches after soccer game” and “attempted robbery at a gas station” scenarios. The next two “crime-control” cases (both of which the law treats as comparable to murder), are ranked by subjects between the “stealing a microwave from a house” and the “slap and bruising at the record store” scenarios. The last case treated by the law as similar to murder is ranked somewhere between “stealing a radio from a car” and “stealing a microwave from a house.” The same dramatic disparity is also seen in the remaining four “crime-control” cases, for which the modern crime-control doctrines give sentences of five to fifteen years or more. The subjects, in contrast, treated the cases as almost trivial violations—more like “taking pies from an all-you-can-eat buffet,” but less serious than “taking a radio from a car.” It seems indisputable that the modern crime-control doctrines are treating cases in ways that dramatically conflict with laypersons’ intuitions of justice.

The same serious disparity is evident when comparing the sentences that the subjects gave the scenarios to the actual sentences that courts gave the “crime-control” cases, as set out in Table 4 below.¹⁰³ As before, the scenarios are listed in the order in which they were ranked by the subjects.

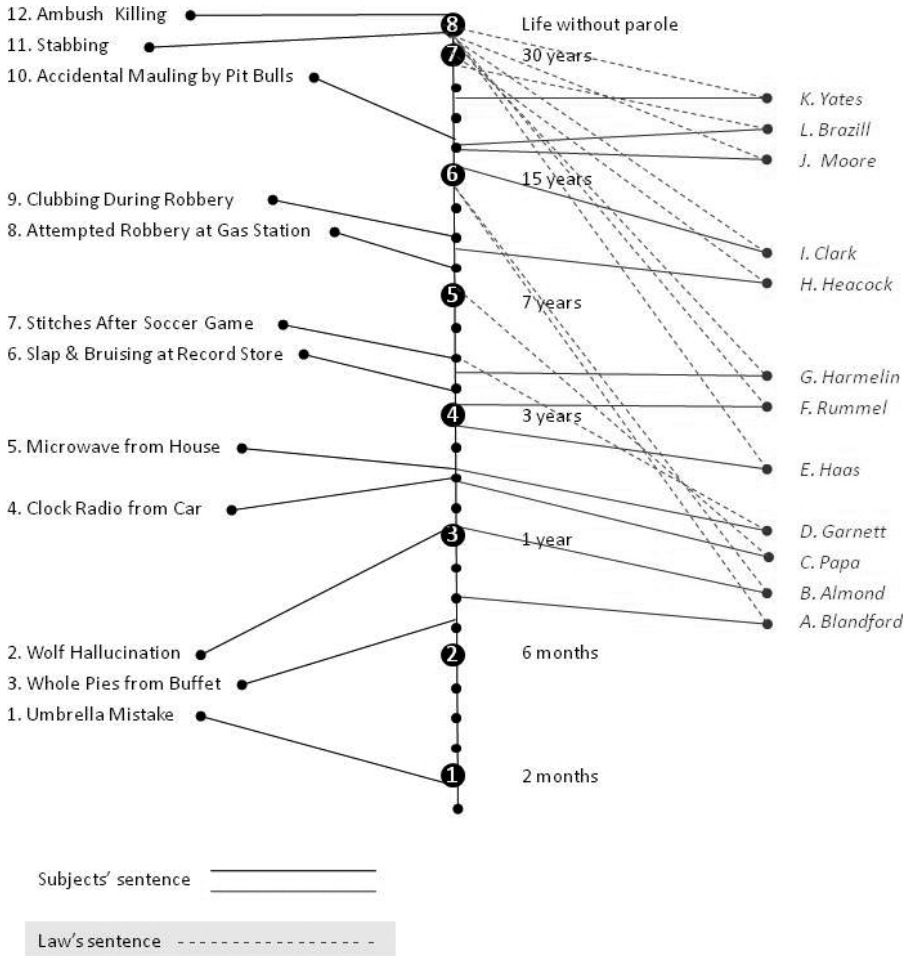
¹⁰³ Subject responses of “death” were coded as fifty years, and subject responses of “life” were coded as forty years. Using these values, the mean sentences for Scenarios 12 and 11 were 44.5 and 38.9 years, respectively.

TABLE 4
SUBJECTS' MEAN SENTENCES FOR SCENARIOS COMPARED
TO ACTUAL SENTENCES

<i>Scenario</i>	<i>Subjects' Mean Sentence</i>	<i>Actual Court Sentence</i>
12. Ambush shooting	Between life and death	
11. Stabbing	Essentially life	
10. Accidental mauling by pit bulls	20.6 years	
<i>L. Accidental teacher shooting (juvenile)</i>	<i>19.2 years</i>	<i>28 years without parole</i>
<i>K. Drowning children to save them from hell (insanity)</i>	<i>26.3 years</i>	<i>life</i>
<i>J. Accomplice killing during burglary (felony murder)</i>	<i>17.7 years</i>	<i>life at hard labor without parole</i>
9. Clubbing during robbery	12.0 years	
8. Attempted robbery at gas station	9.1 years	
<i>I. Killing officer believed to be alien (insanity)</i>	<i>16.5 years</i>	<i>life</i>
<i>H. Cocaine overdose (felony murder)</i>	<i>10.7 years</i>	<i>40 years</i>
7. Stitches after soccer game	5.0 years	
6. Slap and bruising at record store	3.9 years	
<i>G. Cocaine in trunk (drugs)</i>	<i>4.2 years</i>	<i>life without parole</i>
<i>F. Air conditioner fraud (3 strikes)</i>	<i>3.1 years</i>	<i>life without parole</i>
5. Microwave from house	2.3 years	
<i>E. Sex with female reasonably believed overage (strict liability)</i>	<i>2.9 years</i>	<i>40 to 60 years</i>
4. Clock radio from car	1.9 years	
<i>D. Underage sex by mentally retarded man (strict liability)</i>	<i>2.3 years</i>	<i>5 years</i>
<i>C. Marijuana unloading (drugs)</i>	<i>1.9 years</i>	<i>8 years</i>
<i>B. Shooting of TV (3 strikes)</i>	<i>1.1 years</i>	<i>15 years without parole</i>
3. Whole pies from buffet	8.3 months	
<i>A. Incorrect lobster container (regulatory)</i>	<i>9.7 months</i>	<i>15 years to life</i>
2. Wolf hallucination	1.1 years	
1. Umbrella mistake	1.8 months	

The data is graphically presented in Figure 1 below. The solid lines show the subjects' punishment decisions—dark for the “mile-stone” cases and lighter for the “crime-control” cases. The dotted lines show the law's actual sentences.

FIGURE 1
COMPARISON OF SUBJECTS' AND LAW'S "CRIME-CONTROL"
CASE SENTENCES



The difference in the slope of the solid versus dotted lines for the same case shows the extent of the disparity between the subjects and the law for the crime-control cases. Note that the punishment scale is exponential rather than linear (to reflect the way American criminal codes define offense grades and the way lay people think about punishment differences¹⁰⁴); moving up the scale from one large dot to the next may in fact reflect a doubling or tripling of the punishment. Thus,

¹⁰⁴ For a more detailed explanation of the scale, see PAUL H. ROBINSON & JOHN DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 8 (1995).

the differences in slope that the graphic shows actually represent enormous disparities.¹⁰⁵

Within this sampling, the crime-control doctrines most divergent from community views include drug offense penalties, three-strikes (habitual offender) doctrines, strict liability offenses, and felony murder. The differences between community intuitions and legal treatment are sometimes astonishing: 40–60 years instead of 2.9 years (*E*, strict liability), life without parole instead of 3.1 years (*F*, three strikes), 40 years instead of 10.7 years (*H*, felony murder), and life without parole instead of 4.2 years (*G*, drug offense).¹⁰⁶

These differences appear even though our TESS Internet sample of subjects seems quite punitive. Indeed, they are considerably more punitive than the criminal courts typically are when dealing with cases such as those represented by the “milestone” scenarios. The sentences that the subjects imposed in these cases (see Table 4, column 2, bold entries) are often double or triple the punishment imposed in real-world practice (compare Table 1, columns 4 and 5).¹⁰⁷ (The TESS results are also quite a bit more punitive than any of our pilot test’s samples, which were drawn from University of Pennsylvania under-

¹⁰⁵ Subjects’ sentences were less severe than the law’s for each test case considered on its own, all p s < .001. And the subjects’ sentences for the crime-control cases were, on average, twenty years less severe than the sentence actually handed down in the case, a difference that is highly significant ($t(307) = 78.81$, $p < .001$). P -values represent the probability of obtaining the data given that the null hypothesis of no difference between the means is true. The p -values yielded by this t -test represent the probability of obtaining the observed data given that the null hypothesis of no difference between subjects’ sentences and those of the law’s is true.

¹⁰⁶ The two insanity cases, *I* and *K*, were given two of the highest rankings and sentences among the “crime-control” cases (although not nearly as high as the courts gave). Those mean rankings and sentences are the result of a bimodal distribution (the only two cases of the twenty-four to have such), and both stood out as having the highest standard deviations (6.1 and 6.3, respectively, for rankings, and 16.7 and 19.0, respectively, for sentences) of the twenty-four cases. As earlier studies have suggested, lay intuitions are quite sympathetic to mitigations and excuses for seriously mentally ill offenders. See *infra* text accompanying note 128.

¹⁰⁷ This comparison between subjects’ sentences and time served in state systems is appropriate because our subjects imposed the terms of imprisonment that they wanted to be served, without procedures for early release that some state systems permit. The federal system requires offenders to serve eighty-five percent of the sentence imposed. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. § 3624 (2006)) (stating that prisoner may receive credit toward sentence of up to fifty-four days at end of each year of prisoner’s sentence for satisfactory behavior, resulting in fifteen percent reduction of sentence, or eighty-five percent of sentence imposed).

graduates.¹⁰⁸) Despite this punitiveness of the TESS sample, the modern crime-control doctrines still produced sentences that dramatically exceeded those of the subjects.

While the sentences generated by the crime-control cases far exceed the subjects' sentences, for the milestone cases, in contrast, the law's sentences are generally less than the subjects' sentences.¹⁰⁹ Thus, in the subjects' view, the law in the milestone cases is doing no injustice to offenders whatsoever (indeed, if the subjects have a complaint, it is that the law is not punishing the offenders enough).

E. Previous Studies

The previous studies that touch on these matters are consistent with the results reported here.

Three Strikes and Habitual Offender Statutes. The available studies suggest that people do see subsequent offenses as being slightly more blameworthy than equivalent first-time offenses but that they do not support the dramatic increases common in American habitual offender statutes.¹¹⁰ That the political position differs so

¹⁰⁸ Comparison of Punishment Assessments: TESS Sample Versus Pilot Sample (University of Pennsylvania undergraduates, N = 46):

Scenario	Offense	TESS Sample	Pilot Sample
12. Ambush shooting	First Degree Murder	44.5 years	39.4 years
11. Stabbing	Second Degree Murder	38.9 years	34 years
10. Accidental mauling by pit bulls	Manslaughter	20.6 years	15.1 years
9. Clubbing during robbery	Aggravated Robbery	12.0 years	7.8 years
8. Attempted robbery at gas station	Attempted Robbery	9.1 years	4.8 years
7. Stitches after soccer game	Aggravated Assault	5.0 years	1.7 years
6. Slap and bruising at record store	Assault	3.9 years	11.5 months
5. Microwave from house	Burglary	2.3 years	8.4 months
4. Clock radio from car	Theft	1.9 years	5.5 months
3. Whole pies from buffet	Petty Theft	8.3 months	6 days
2. Wolf hallucination	Assault - insanity defense	1.1 years	2.8 months
1. Umbrella mistake	Theft - culpability defense	1.8 months	No punishment

¹⁰⁹ Compare the law's sentences for the milestone cases as shown by the average state sentences on Table 1, column 4, to the subjects' sentences shown on Table 4, column 2, in bold. Only in milestone case 5 (microwave from house) does the law's average sentence exceed the subjects' average sentence (2.4 years versus 2.3 years, respectively). On average, the milestone cases did not produce nearly as much deviation from the law as did the crime-control cases ($t(307) = 87.08, p < .001$).

¹¹⁰ See, e.g., Brandon K. Applegate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIM. DELINQ. 517, 526 tbl.3 (1996) (illustrating disparity between respondents' disfavor of leniency and support for life sentences for three-time offenders). Other studies in the area have examined the effect of

markedly from the lay intuitive view of justice is shown in a study comparing the two. Subjects given a survey in Ohio were asked whether they supported or opposed passing a “three strikes and you’re out” law in their jurisdiction.¹¹¹ Of all respondents, 88.4% answered that they would support such a measure.¹¹² The same set of subjects was then presented with a vignette, identified as a passage from a newspaper story, in which the story’s imaginary subject committed a serious felony after having committed two previous crimes in the state (the point being that under a three-strikes regime, the punishment would be life imprisonment). Respondents were asked to assign an appropriate punishment on a scale ranging from “no punishment at all” to “life in prison, with no possibility of being released.”¹¹³ Whereas true support for habitual-offender statutes would seem to predict a majority of answers in the “life in prison” range, only 16.9% of respondents gave this answer.¹¹⁴ More tellingly, only 11.1% of those who chose a sentence of less than thirty years in prison (a group that includes 86.4% of *all* subjects) had answered that they opposed three-strikes legislation.¹¹⁵ Respondents simply did not sentence according to their reported beliefs. Though there is widespread political support for habitual-offender statutes, lay intuitions of justice significantly contravene the reported public sentiment.

Drug Offenses. The available empirical evidence suggests that, while many people see drug offenses as serious, they typically are not viewed as being nearly as blameworthy as current sentences would suggest. In one study, subjects ranked the offense of marijuana possession as a rather minor offense, comparable to, at most, a minor theft.¹¹⁶ Possession of cocaine was deemed a bit more serious but still only about as blameworthy as a slightly more serious theft.¹¹⁷ A conviction for dealing cocaine was seen as being considerably more

multiple offenses all committed before the offender is caught and punished for any of the offenses. Generally, sentencing for multiple past offenses shows a *decrease* in added punishment amount for each additional offense, rather than an increase. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 189–97 (1995) [hereinafter ROBINSON & DARLEY, *JUSTICE, LIABILITY, AND BLAME*] (discussing theories and patterns of multiple-offense sentencing).

¹¹¹ *Id.* at 522 tbl.2.

¹¹² *Id.*

¹¹³ *Id.* at 523–24.

¹¹⁴ *Id.* at 525.

¹¹⁵ *Id.*

¹¹⁶ Compare Robinson & Kurzban, *supra* note 88, at 1885 tbl.6 (illustrating mean rank of 7.4 assigned to marijuana possession in Study 3), and *id.* at 1888 tbl.8 (illustrating mean rank of 2.2 assigned to marijuana possession in Study 4), with *id.* at 1869 tbl.1 (showing mean rank of 6.8 assigned to short-changing in Study 1), and *id.* at 1876 tbl.3 (showing no offense with mean rank comparable to 2.2 in Study 2).

¹¹⁷ *Id.* at 1885.

blameworthy—more akin to breaking into a car or robbery.¹¹⁸ Importing cocaine was seen as more serious still, similar in seriousness to burglary or assault.¹¹⁹

Other studies come to similar conclusions. The National Sample Survey of Public Opinion on Sentencing Federal Crimes asked nationwide respondents to assign a sentence to crimes, presented as vignettes.¹²⁰ Marijuana possession was assigned a mean sentence of 0.98 years; heroin possession received a mean of 2.7 years; cocaine possession received a median of 3 years, and possession of crack was assigned a median sentence of 3 years.¹²¹ Trafficking in drugs was punished significantly more severely; trafficking marijuana, for example, garnered a mean sentence of 15.3 years.¹²²

Adult Prosecution of Juveniles. The available studies suggest that people dramatically mitigate punishments for children, even for the most serious offenses. In one study, a youth was described as committing the horrific offense of pouring gasoline on a sleeping companion and setting him on fire. Although the offense generates high liability and punishment judgments when committed by an adult, it generated quite limited punishment when the offender was described as young: When the offender was described as fourteen years old, 23% of the subjects would impose no liability, and the average sentence was 5.4 years. When the offender was described as ten years old, 47% of the subjects would impose no liability, and the average liability was 11 months.¹²³

Another recent study attempted to measure public sentiment regarding prosecution of juveniles by describing an offender and showing a videotape of that offender committing a robbery.¹²⁴ Subjects were then asked to rate various aspects of the subject's culpability—but different test subjects were told that the subject was a

¹¹⁸ *Id.*

¹¹⁹ *Id.* Note that the subjects in the study with the larger, more demographically diverse subject pool (Study 2) treated these four drug offenses as significantly less serious than those in the smaller, more narrow pool of Study 1. Compare the mean rankings found in Table 6 (Study 3) to those of Table 8 (Study 4), which suggests that the text here may overstate the seriousness with which the population generally sees drug offenses. *Id.* at 1885–88.

¹²⁰ U.S. SENTENCING COMM'N, NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 25 (1997), available at http://www.ussc.gov/nss/jp_exsum.htm.

¹²¹ *Id.* at 49.

¹²² *Id.* at 47.

¹²³ ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME, *supra* note 110, at 141 tbl.5.5.

¹²⁴ Elizabeth S. Scott et al., *Public Attitudes About the Culpability and Punishment of Young Offenders* 7 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 07-135, 2007), available at <http://ssrn.com/abstract=959635>.

different age (twelve, fifteen, or twenty), and the voice in the video and picture presented were altered to fit the test age.¹²⁵ The study's preliminary results have found that though age is not a factor in subjects' beliefs about the offender's potential for rehabilitation, it is a significant predictor of perceptions of responsibility for the crime and of whether the offender should be tried as an adult.¹²⁶ Subjects indicated that the twelve-year-old was significantly less responsible for the crime than the other two ages and were less likely to answer that the twelve-year-old offender should be tried in adult criminal court.¹²⁷

Abolition of Insanity. The available evidence suggests that people do indeed hold mentally ill offenders blameless when they either do not understand the criminality of their conduct or, if they do understand it, have a substantially impaired capacity to control their conduct. In one study, the vast majority of subjects (66% to 92%, depending upon the facts of the case) imposed no liability in such cases, and even those who did impose liability significantly mitigated the punishment even for a serious offense.¹²⁸

Strict Liability. Available research suggests that people generally do not impose liability in the absence of some level of culpability for a violation. For example, in one study, offenders who made reasonable mistakes about whether a sexual partner was underage were given no punishment by 88% of the subjects, with substantial mitigation of punishment by those few subjects who imposed any.¹²⁹

Felony Murder. The available empirical evidence suggests that peoples' intuitions of justice do not support either the aggravation of culpability or the complicity aspect of the felony murder rule. In one study, for example, subjects aggravated culpability for an accidental killing during a felony but only to the level of manslaughter, not murder.¹³⁰ The accomplice in the felony is punished at an even lower level than manslaughter,¹³¹ reflecting a common tendency of people to discount the liability of accomplices even though the legal doctrine typically treats the two as having identical liability.¹³²

¹²⁵ *Id.* at 8–9.

¹²⁶ *Id.* at 13–14.

¹²⁷ *Id.*

¹²⁸ See ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME, *supra* note 110, at 132 tbl.5.2 (illustrating respondents' desires to impose civil commitment in cases involving serious offenses).

¹²⁹ See *id.* at 89 tbl.4.1 (showing respondents' negligible imposition of punishment in light of negligent mistake).

¹³⁰ See *id.* at 172–73 tbl.6.3, 179–80.

¹³¹ *Id.* at 180 (“[W]hile the [felony murder] doctrine treats the accomplice exactly like a murderer, the subjects impose liability somewhat less than they would for manslaughter.”).

¹³² *Id.* at 36 tbl.2.9, 208–10 (dichotomous-continuous discussion). Norman Finkel analyzed the responses of study subjects to felony-murder hypothetical cases, among others.

III

HOW CAN A DEMOCRATIC PROCESS PRODUCE LIABILITY
RULES THAT THE COMMUNITY SEES AS UNJUST?

By this point, one central question must have struck the reader: How can freely elected and presumably accountable legislators enact criminal justice provisions that are responsive to public sentiment regarding crime but are in conflict with the community's shared intuitions of justice? The concept itself seems to be a contradiction in terms. Indeed, politicians often cite public demand as the prime motivation behind enactments of strict criminal law provisions, indicating that they at least publicly believe themselves to be fulfilling their democratic function.¹³³

There is no short answer to be found, except that the seeming conflict here is real and can be at least partially explained by a number of factors that shape society, community perceptions, and the mechanisms of local and national legislation. Though no one factor is responsible on its own for the enactment of popularly supported policies that in fact conflict with empirical desert, a number of complex processes play a role in leading legislatures to criminalize actions that

NORMAN J. FINKEL, *COMMONSENSE JUSTICE* 164–71 (1995). His data are hard to interpret because he placed his subjects in the roles of juror and appellate judge, so it is difficult to tell whether their decisions enforcing felony-murder rules reflected their own intuitions of justice or reflected their carrying out of their assigned role to apply the existing law as they believed it to be. In a hypothetical case involving a robbery victim dropping dead of a heart attack, 63% were willing to find first-degree murder (even though the law requires this in only a few jurisdictions), and 60% were willing to uphold such a verdict as constitutional. *See id.* at 166. About 50% of the subjects held accomplices of the gunman guilty of first-degree murder. *Id.* at 167–68.

¹³³ Though politicians frequently claim that their enactments are driven by public demand, it is often the case that they are in fact the motivation behind the public opinion itself. *See infra* Part III.B (describing studies identifying government as major source of information for crime-related media coverage that shapes public perception about criminal law). However, it is incontrovertible that they at least make the claim. *See, e.g.*, KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 12 (1997) [hereinafter BECKETT, *MAKING CRIME PAY*]; David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 *CORNELL J.L. & PUB. POL'Y* 557, 568 (2000) (discussing public demand for "three strikes" laws in early 1990s and subsequent enactments championed by lawmakers acting in interests of those demanding stricter laws); Stuntz, *supra* note 85, at 509 ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences . . . and more criminal prohibitions."). For an expansive treatment of the numerous factors that can cause the public to support harsh crime measures (and politicians to support them as well), see generally Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 28–29, 31–32 (1997) [hereinafter Beale, *What's Law Got to Do With It?*].

the citizens do not feel are criminal, or to assign excessively lengthy sentences to crimes.¹³⁴

A good deal of scholarship on the topic suggests that voter views are a major force behind increases in criminal sentence lengths.¹³⁵ Social scientists reviewing public opinion studies on criminal justice matters comment that “[t]he influence of the public on policy in the area of sentencing and parole should not be under-estimated. Many sentencing commissions and judges are to some degree affected by public pressure to make sentences harsher.”¹³⁶ Sentencing commission recommendations often must be enacted or approved by legislatures, and legislators voting on these enactment bills are aware of voter opinions.

Interestingly, however, another line of thinking regarding popular concern for crime issues argues that, while there may be some latent crime-control concerns present in the public consciousness, it would be erroneous to conclude that public pressures often lead to harsher criminal law enactments. Rather, it may be such that the reverse is true: Expressed concern over and attention paid to crime issues by politicians seems to spur public interest in the issue, thereby making it seem as if voter demand has caused certain legislative enactments when, in fact, the public may have been merely “riding the wave” of concern actuated by a politician’s previous comments.¹³⁷

Notwithstanding *how* they arrive at their desires, it seems clear at first glance that voters *do*, in fact, desire higher sentences. Polling studies frequently ask citizens some variation on the question of whether they think sentences for crimes are too lenient, too harsh, or about right. Consistently, those polled think that current sentences are

¹³⁴ See generally Beale, *What's Law Got To Do With It?*, *supra* note 133 (explaining how increase in crime rates during U.S. civil rights era led political campaigns to focus on crime control by following public perception of crime skewed by media coverage and cognitive errors such as overgeneralization of trends, overconfidence in opinions formed from minimal information, and availability of uniquely horrific cases to stand out as general examples of crimes); Doron Teichman, *The Market for Criminal Justice*, 103 MICH. L. REV. 1831, 1847 (2005) (arguing that increased sentence lengths may be effort to displace criminal activity by offering relatively harsher punishments compared with nearby jurisdictions).

¹³⁵ See, e.g., Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1718 (2006) (arguing that legislators increase criminal sentencing lengths to appear responsive to demands of voters and interest groups); Schultz, *supra* note 133, at 558 (stating that intense public support for “three strike” laws led to their passage in twenty-two states and federally over two-year period).

¹³⁶ JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 197 (2000).

¹³⁷ See BECKETT, MAKING CRIME PAY, *supra* note 133, at 78 (arguing that media reproduction of official views on crime generates increased public support for punishment-focused crime policies).

too lenient and wish them to be harsher.¹³⁸ Furthermore, citizens report that a politician's position on sentencing affects their vote: About eighty percent of voters surveyed report that if a candidate advocates tougher sentencing policies, they are more likely to vote for that candidate.¹³⁹

The results of these polls are widely reported; thus it would be easy to conclude that politicians feel that they are doing the will of the people when they vote for longer sentences for various crimes. It is also the case that by doing so, they are avoiding being charged by election-year opponents as "being soft on crime." Still, this is not a complete picture of the factors that shape public opinion regarding criminal law, all of which combine to cause enactments that seem to have popular support but for a number of reasons do not reflect the actual preferences of the community. We will discuss a selection of these factors in order to shed light on this conflict.

A. *Media Omission of Facts Vital to Understanding Sentences*

Current research suggests that there is a complex story behind "what voters want." It is often the case that voters are only informed about the duration of sentences assigned in specific cases through media reports, whether in print, on television, or via the Internet. In one study, researchers asked Canadian and U.S. citizens to read sentencing stories printed in newspapers, and then asked the study subjects to judge the sentence given in each case.¹⁴⁰ Large majorities of readers reported that the sentences assigned in the cases were too lenient and were quite confident in their ratings.¹⁴¹ The researchers noted that most of the crime stories in newspapers were relatively brief; the stories commonly reported the sentence given but generally omitted or glossed over the reasoning underlying the assigned sentences.¹⁴² The study found that "the modal reaction to these stories was to regard the criminal sentences reported in them as too lenient,"¹⁴³ finding such a result in thirteen of the sixteen stories. Furthermore, in spite of the fact that in the stories "[l]ittle information

¹³⁸ Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *CRIME & JUST.* 1, 26–27 (2000).

¹³⁹ Michael J. Hindelang, *Public Opinion Regarding Crime, Criminal Justice, and Related Topics*, 11 *J. RES. CRIM. & DELINQ.* 101, 107–08 & tbl.4 (1974).

¹⁴⁰ Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 *L. & HUM. BEHAV.* 451, 454–56 (1990).

¹⁴¹ *Id.* at 456–57.

¹⁴² *Id.* at 464.

¹⁴³ *Id.* at 456. Generally speaking, "the sentences reported by the newspapers . . . confirmed the a priori view held by most respondents that sentences are generally too lenient." *Id.*

was conveyed on which to base a reasoned evaluation of the appropriateness of the sentence,” the respondents reported a high degree of confidence in their view that the sentences were too lenient.¹⁴⁴

These findings are consistent with other studies. It appears likely that media accounts of crimes are the source that voters generally use to form their judgments on courtroom sentencing. By reading the newspaper or watching television news accounts—which cover a disproportionately high number of violent, as opposed to routine, crimes, and which generally do not highlight extenuating circumstances or the judge’s reasoning—readers and viewers quickly come to the conclusion that the sentences assigned are too lenient. Reading further news reports strengthens this conclusion. In fact, over ninety percent of respondents in one study reported that media reports were their most important source of information regarding the crime problem in America today.¹⁴⁵

This should make it clear that the media holds the central role in shaping the public’s perception that sentencing is too lenient. Realizing this, Julian V. Roberts and Anthony N. Doob examined how the public would perceive sentences if they had a different source of accounts of the cases.¹⁴⁶ These researchers derived an account of the newspaper case from the official courtroom records, creating a summary from actual quotes from the proceedings or paraphrasing actual documents. Importantly, the summary included much information that is generally not found in news reports—the offender’s previous convictions, a brief description of the offense, the defense’s and prosecution’s arguments regarding sentencing for the offender, a summary of the presentence reports, and the final comments offered by the judge.¹⁴⁷

The study proceeded by separating the subjects into two groups: One received a copy of the “court documents” account including all relevant information, and a second matched sample of the subjects received a newspaper account of the same crime. The two groups’ reactions to the material were vastly different. Whereas 63% of the newspaper group thought that the sentence was too lenient,¹⁴⁸ only 19% of the “court documents” group thought the sentence too

¹⁴⁴ *Id.* at 457. “[I]n 58% of the ratings, subjects indicated that they were ‘very confident’ of their evaluations. In an additional 35%, subjects indicated they were ‘somewhat’ confident. In only 7% were subjects ‘not at all confident.’” *Id.*

¹⁴⁵ RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 197 (2d ed. 1998).

¹⁴⁶ Roberts & Doob, *supra* note 140, at 461.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 462.

lenient—while 52% thought it too harsh.¹⁴⁹ Perhaps unsurprisingly, those who read the “court documents” account evaluated the offense as less serious and the offender as a better person than did subjects who had read the newspaper story.¹⁵⁰

Shari S. Diamond reports conceptually similar results.¹⁵¹ Studying members of the public called for jury duty, she asked them to assign sentences to hypothetical defendants whose crimes were presented in some detail—again, unlike presentations given by the news media alone.¹⁵² She found that the sentences given by these better-informed subjects were very similar to the sentences recommended by practicing judges who responded to the same material.¹⁵³ The takeaway point from these studies is that at least part of the reason why the public at large reports a desire for stricter criminal law is because they are, in fact, underinformed about the actual nature of most crimes and offenders. The nature of news reporting is in some ways antithetical to disclosure of the whole fact pattern that leads to any particular criminal sentence. After all, what is newsworthy is the sentencing itself, not the actual cause therefor. With limited space in which to print or report (coupled with a not-insignificant desire to simplify the news for cross-demographic comprehension), news outlets end up leaving gaps in the “whole story” behind any particular sentencing decision. These gaps often cause people to assume that the sentence imposed was simply too light, which, if it happens in enough cases, can entice society at large to believe that a harsher set of sentencing guidelines (or any other proposed legislation *du jour*) is necessary in order to rectify the “problem” in criminal law.

B. Media Coverage of General Crime Issues with the Government as an Information Source

As mentioned previously, the news media are the primary sources of information that people rely on when judging the operation of the criminal law. This would not be problematic if the news media were able to provide a truly neutral and inclusive picture of the criminal law. Unfortunately, this is not the case. As shown in the previous subsection, the news media commonly skew perceptions of sentences in individual criminal cases by not providing all of the relevant information. Perhaps more significant, however, is the news media’s cov-

¹⁴⁹ *Id.* at 462–63.

¹⁵⁰ *Id.* at 463.

¹⁵¹ See Shari S. Diamond, *Using Psychology To Control Law: From Deceptive Advertising to Criminal Sentencing*, 13 L. & HUM. BEHAV. 239, 247–48 (1989).

¹⁵² *Id.*

¹⁵³ *Id.*

erage of general criminal issues, illustrated by specials highlighting the “war on drugs” or by breaking news reports delivered whenever a study reports an uptick in the crime rate. This coverage (and the innumerable examples of similar reports on other issues) is not by itself problematic; it is the function of the news to report on what is important and relevant to society. Rather, the larger issue in terms of the media’s role in shaping public perceptions of the criminal law is traceable to the sources delivering the news to the media in the first place. Though we often assume that the democratic process follows a pattern beginning with news reports, which then shape public opinion, which itself then shapes governmental action, studies have shown that this is often not the case.

In fact, governmental actions are often the prime motivation behind change in public opinion, spurred by popular news reports. The ability of governmental sources “to supply frequent and conveniently formatted ‘news’ meant that the use of state sources also satisfied the organizational needs of news workers,” concludes Katherine Beckett.¹⁵⁴ Her study of news “packages” promoted to news agencies by official sources found that, during four time periods in which all crime-related stories printed in the *New York Times*, the *Los Angeles Times*, and the *Washington Post* were analyzed for content, sixty-five percent of all “packages” (that is, defined issues presented in certain ways) reflected state sponsorship—reliance on a governmental agent as the source of the news contained therein.¹⁵⁵ An additional study analyzing the sources behind drug-related television news reports in the 1980s came to an even more striking conclusion: Seventy-six percent of all news stories containing identified “packages” of information about drugs and related criminality were attributable to state sources.¹⁵⁶

These studies, however, only tell half of the story. That the state is a source of news is not shocking; it is perhaps not even surprising that more than half of all crime-related news coverage is in some way attributable to the government. Such involvement in newsmaking is only relevant to a discussion of popular opinions regarding criminal sentencing and policy if it can be shown that the news does not, in fact, reflect preexisting concerns held by society as a whole. It is assumed that legislators are responsive to the desires of society; the reasons why this is so in a democracy are outside the scope of this discussion. We cannot assume, however, that those societal desires are organic.

¹⁵⁴ BECKETT, MAKING CRIME PAY, *supra* note 133, at 65.

¹⁵⁵ *Id.* at 75.

¹⁵⁶ *Id.* at 76.

We know that people on the whole are influenced by, and shape their opinions according to, what is presented by the media. However, if the picture painted by the media is itself a creation of the very legislators who work to enact stricter criminal law, then they themselves are the force behind those laws, not the demanding public. In other words, we can conclude that governmental influence on the media contributes to the enactment of legislation that deviates from community notions of desert if we can show that public interest in the crime-related problems reported by the media lags behind the news reports—thus showing that the government-provided information has a hand in causing said interest—rather than preceding them.

In many instances, this is in fact the case. While we cannot conclude that a media report can cause any particular change in the opinions of the public, “it is undoubtedly a crucial component of the context in which political opinions are formed. It is quite likely that the media’s reproduction of the official view of crime and drugs played an important role in generating support for crime and drug policies” that were advocated by politicians in power at the time of the study.¹⁵⁷ Between 1964 and 1974 (the first timeframe analyzed in the Beckett study), political initiatives and media coverage were strongly correlated with public concern about crime—and the concern only arose *after* the political moves were initiated.¹⁵⁸ In contrast, the actual crime rate was not correlated with public concern.¹⁵⁹ In the second analyzed time frame (1985–1992), the study found that political initiatives regarding drug laws were strongly correlated with public concern over the drug problem—but that the actual rate of drug use was not.¹⁶⁰

We must be careful not to make too much of these studies, however. Politicians and the media are not the only factors influencing public opinion, and it certainly is not the case that politicians always lead the public by the nose—public opinion and the actions of politicians are more likely mutually reinforcing,¹⁶¹ and the demands of elections will generally make political actors at least try to do what the public demands. Still, the evidence is striking: In June 1993, only 7% of respondents in a national poll identified crime as the nation’s most important problem; by August 1994, this percentage had increased to 52%.¹⁶² Amazingly, this increase contradicted the crime trends at the

¹⁵⁷ *Id.* at 78.

¹⁵⁸ *Id.* at 21.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 22.

¹⁶¹ *Id.* at 23.

¹⁶² *Id.* at 25.

time; victimization studies indicated that most types of crime decreased in prevalence over that time frame. However, then-President Clinton's January 1994 State of the Union address spent significant time addressing the crime problem in the country,¹⁶³ and—most importantly—one of the country's most significant crime-control bills, the Violent Crime Control and Law Enforcement Act of 1994,¹⁶⁴ was debated in Congress and passed that year. There is no doubt that these political events contributed significantly to the rise in public concern over crime policy that occurred between 1993 and 1994.

In sum, it is clear that the media are prime motivators of public opinion. While it is often assumed that the media reports objective fact and unbiased information, this may not always be the case. It is problematic, then, to assume that politicians are strictly responsive to the will of the people. Though public opinion may seem to demand stricter crime-control laws, it may simply be that it has been shaped by the very politicians claiming merely to follow public opinion. The previous sections noted that public opinion regarding individual instances of sentencing would be significantly different if the public were able to consider the entire set of facts behind the decision. It is not too far a leap to conclude that public demands regarding stricter criminal laws would be different if the public were given similarly inclusive and unbiased accounts of the more general criminal statutes and proposals in force at any given time. Finally, while politicians claim to be responsive to public demands by enacting harsher criminal penalties, this may be less than true. Evidence exists to show that public interest in crime policy follows rather than causes legislative activity. To unequivocally state that harsher criminal enactments are simply a response to public demand, therefore, is to mischaracterize the situation.

C. *Assuming Headline Crimes To Be Paradigmatic*

As mentioned previously, the media are the chief sources upon which the public bases its opinions regarding criminal law. Another related reason why citizens tend to think that criminal sentences are too lenient involves the ways citizens imagine the crime when they answer the opinion poll asking “whether penalties for crimes are too

¹⁶³ President William J. Clinton, *Address Before a Joint Session of the Congress on the State of the Union* 126, 127, 133–35 (Jan. 25, 1994), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1994_public_papers_vol1_text&docid=pap_text-64.pdf.

¹⁶⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; see also Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1407–08 (2006) (describing Act as “the largest single crime bill in history”).

lenient, too severe, or about right.” Recall that the majority of citizens choose the “too lenient” answer to this question. Evidence suggests that when asked this question, people bring to mind violent crimes, and this is disproportionately done by those who give the “too lenient” answer.¹⁶⁵ One cause for this distortion is the reality that only the most heinous or most significant crimes receive significant news coverage.

When a citizen thinks about the appropriate sentence for a crime, he calls to mind a prototype or exemplar of the crime. The citizen does not do what the legislative system must do, which is to consider the necessary and sufficient conditions for having committed that crime. That is, the law must specify what counts as, for instance, murder or rape. If the citizen is judging whether “life” is an appropriate prison sentence for “murder,” she will imagine her prototype of a violent murder and report that, indeed, life is the appropriate sentence. Yet that does not mean that she thinks that life in prison is the just sentence for a person who brings to an end the life of her terminally ill husband who is in terrible pain, for example. In fact, the citizen would be shocked at the severity of the sentence in that instance, despite it being an example of “murder.”

There is a systematic distortion here, because the prototype of the crime that the citizen brings to mind is the clear, unqualified case of deliberate murder, and not the cases of murder that would require qualifying descriptions about how they occurred. In other words, when thinking of murder cases, the citizen does not consider mercy killings or killings done under provocation. Such distortions of the content of specific offenses occur for other crimes besides murder, as well. The dynamic is exacerbated by the fact that news coverage presents a somewhat misleading perspective of the frequency with which such dramatic crimes occur. In one analysis, 25% of media crime stories were about murder, yet murder is involved in less than 1% of crimes.¹⁶⁶

Additionally, this “over-broadening of the category” can occur when a certain sort of law is passed. The most salient example is found in the expansion of sex-offender laws. When a terrible incident occurs, such as a child being kidnapped, sexually molested, and perhaps eventually killed, legislators may feel that public opinion demands a hardening of the criminal penalties that can be mobilized if similar incidents occur in the future. Further, some continuation of confinement for “mentally-ill offenders” is often mandated after sexual

¹⁶⁵ Roberts & Doob, *supra* note 140, at 464–65.

¹⁶⁶ *Id.* at 452.

offenders have completed their prison terms¹⁶⁷—and once committed, offenders are almost never released.¹⁶⁸ Finally, laws may be enacted to prohibit the freed offender from living within various distances of spots where children may congregate.¹⁶⁹

The prototype of the sexual offense—the kidnapping and rape of a child—that comes to mind when people think of the sexual offender may justly warrant the sentence just described. However, the sexual offender laws, as they are currently written, often criminalize a number of actions that are morally quite distant from the prototype. For example, in New Jersey, a teenage person who has sexual intercourse with another teenage person who is just under the legal age of consent has committed a sexual offense.¹⁷⁰ In this instance the offense is “criminal sexual contact,” because the victim is a minor. Despite the striking dissimilarity between this crime and the paradigmatic sex offense, both will be referred to as such under the law.

However, news media reporting of the legislature’s movement toward passing sexual offender laws, not surprisingly, continues to invoke the actual case that triggered the legislature into action. The reports pay much less attention to other, less offensive cases that would also fall under the scope of the law. Therefore, the public does not focus on whether the scope of the proposed laws will be overly broad and inflict too-severe sentences on persons who commit less

¹⁶⁷ Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 703 (2008) (“In 1990, Washington became the first state to pass a modern law allowing for involuntary commitment of ‘sexually violent predators.’ Other states quickly followed suit, and there are currently twenty states with some version of an SVPA [Sexually Violent Predators Act].”). For an example of statutes authorizing civil confinement post-sentence-completion, see Adam Walsh Child Protection and Safety Act, 18 U.S.C. § 4248 (2006); Sexually Violent Persons Commitment Act, 725 ILL. COMP. STAT. ANN. 207 (West 2008) (invalidated by *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009), but upheld as constitutional by *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009)); KAN. STAT. ANN. § 59-29 (West Supp. 2009) (amended 2010).

¹⁶⁸ Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5, 10 (2000).

¹⁶⁹ Consider this description of the relevant Georgia state law:

The law, described when it was adopted in 2006 as the nation’s toughest restriction on sex offenders, prohibited them from living within 1,000 feet of schools, churches or any other place that children might congregate, including more than 150,000 school bus stops in the state. The ban applied even when a school, a church or the like opened in an area where an offender was already living.

Brenda Goodman, *Georgia Justices Overturn a Curb on Sex Offenders*, N.Y. TIMES, NOV. 22, 2007, at A26 (referencing GA. CODE ANN. § 42-1-15 (West Supp. 2009), which was held unconstitutional in *Mann v. Georgia Department of Corrections*, 653 S.E.2d 740, 745 (2007), to extent that it permits taking of property without just compensation).

¹⁷⁰ N.J. STAT. ANN. § 2C:14-3 (West 2005).

morally repugnant crimes. The unjust consequences of these new laws are downplayed and thereby hidden from public view.

What emerges is an account of sentencing policies that is much more complicated than it seems at first glance. The standard account holds that the legislatures are doing “the will of the people” when they pass “harsh measures” against crimes. The real mechanisms involved are much more nuanced. Social and political scientists suggest that when citizens are asked relatively simple questions about crimes, they respond in terms of their momentary interpretations of the question. To answer, they think of the crimes that they have seen in the media, which are usually violent crimes presented in dramatic and one-sided terms. They use their answers about sentence duration to make the point that crime is bad and deserves sanction. However, when the question set gives the citizens the opportunity to give a more tempered and nuanced view of what to do about crimes, they take that chance.¹⁷¹ A more nuanced presentation of the crime at hand inevitably leads to a more nuanced liability judgment by the person asked.

To summarize, a third dynamic arises from citizens’ tendencies to think about crimes using the prototypes of crimes that are quickly and automatically recalled when a crime category is discussed. Here, the prototype is generally a “perfect” version of the category—a murder, for example, is a highly deliberate killing of an innocent victim, and not the more complex mix of intention, provocation, and human error that is the case with many nonparadigmatic murders. By conceptualizing the question about penalty severity as an inquiry into the appropriate severity of penalties that should be assigned to the prototype versions of a crime, citizens tend to signal a desire for more severe penalties in general. This masks the fact that a citizen is really only expressing a desire for relatively severe penalties being assigned to the “perfect” (and thus most severe) instances of these crimes. Yet, the resulting sentencing statutes allow for those harsher sentences to be assigned for much lesser forms of the offense, and the public remains unaware.

D. Public Fear

People’s opinions about the sentences required for proper criminal punishment fluctuate as a function of their current perceptions of the threat of crimes and, more generally, their state of fear. If, as the news media can make happen, people feel that the threat of crime is

¹⁷¹ Dena M. Gromet & John M. Darley, *Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures*, 19 Soc. JUST. RES. 395, 421 (2006).

high, they will report that criminals need to be locked away to reduce that threat. Long sentences are a way to reduce the threat of crime. People express a desire for crime to be controlled when they answer that sentences are too lenient, and, at the moment they answer, they perceive increasing the duration of sentences as one way of achieving that end.¹⁷²

The point here is that people take different perspectives in answering the questions that they are asked in surveys depending on their perceptions of crime rates, whether or not their perceptions are actually correct. Perhaps more importantly, people tend to generalize their feelings toward crime overall when answering questions about specific crimes. If they are asked these questions when they are primarily concerned with conveying the message that they want more attention paid to crime prevention, then they will answer *all* questions about actions that they perceive as having a crime prevention component favorably. Thus, they may report that they support “harsher prison sentences” but would think, if they were to stop and reflect, that some of the specific examples of harsh sentences are actually unduly harsh and thus unjust. However, this is not the question they perceive themselves as answering. Instead, they see themselves as expressing approval of policies that incapacitate criminals by incarcerating them or policies that seek to deter criminal conduct among the general population.

Further, studies have demonstrated that people report support for deterrence and incapacitation as crime control practices.¹⁷³ Here, we are making an importantly different argument than in other sections. In the previous sections, we generally suggested that the public was in some sense being misled, often by mass media reports, into supporting sentences that would be unjust. Now, we suggest that the public sometimes construes questions concerning sentencing practices as questions about their favorability toward achieving crime control overall, without factoring in their own judgments about appropriate sentence durations or their sense of the injustice of draconian sentences. Put simply, if any person has a general desire for more “crime control,” he will tend to consistently answer that crimes should

¹⁷² See Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 771–79 (1990) (arguing that politicians will endorse policies because of public preference formed from miscalculations of risk); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1292 (2005) (“[T]he public’s fears of crimes will be fueled by the media, and they will perhaps place greater stock in incarceration policies that promise to deal with their fears in the most immediate fashion.”).

¹⁷³ Kevin M. Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*, 21 SOC. JUST. RES. 119, 133 (2008).

have stricter punishments, without stopping to consider that perhaps some current punishments are already strict enough—or too strict.

Another related effect of high levels of public fear or concern is the passage of “designer laws” designed to address very specific events that have been widely reported or that enter the popular consciousness. Imagine, for example, a brutal attack on a mother and child, committed by polo-clad youths pretending to practice their golf swings in a public park. Media coverage is unrelenting, saturating the airwaves with updates on the case and with other reports of intimidation by nine-iron. Though the vast majority of teenagers merely want to work on their short game, concerned citizens demand legal action to counter the heavily publicized threat. Out of concern for the sensibilities of the public (and wanting to look “tough on crime”), legislators “view these incidents with alarm” and criminalize possession of a golf club or other “weaponized sporting equipment” inside of certain “safety zones,” such as within a half-mile of any school or public park. The penalty for possession, of course, is severe—in fact, many demand that all instances of “criminal possession of a golf club” be punished as severely as was the assault that triggered the public’s outrage in the first place. Sadly, this scenario is less farfetched than it seems. Legislatures have passed numerous harsh criminal statutes as direct responses to fear based on coverage of a crime that captures the public consciousness¹⁷⁴—often disregarding prior legislative enactments that already criminalize the covered activity. The consequences of such new, fear- or panic-driven legislation are often disastrous.¹⁷⁵

¹⁷⁴ For instance, Garland notes:

Many of the laws passed in the 1990s—Megan’s law, Three Strikes, sexual predator statutes, the reintroduction of children’s prisons, paedophile registers, and mandatory sentences . . . are designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public. . . . Typically these measures are passed amidst great public outrage in the wake of sensational crimes of violence, often involving a disturbingly archetypal confrontation between a poorly controlled dangerous criminal and an innocent, defenceless middle-class victim.

GARLAND, *supra* note 12, at 133.

¹⁷⁵ Many of these sorts of ad hoc additions to criminal laws, generated in haste in response to a perceived public demand, criminalize actions that are already criminalized in the general sections of the criminal code and do so in ways that are inconsistent with the penalties set for the acts in the general codes, thereby generating considerable legal complexities. See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 637–38 (2005) (describing how pressure from interest groups leads to criminalization of offenses already covered by general provisions and arguing that redundant offenses make code interpretation confusing for public and law enforcement alike); see also GARLAND, *supra* note 12, at 103–38 (describing recent change in correctional policy and factors behind these new penalogical aims).

E. Next-Election Vulnerability

During the 1970s and 1980s, a powerful, specific version of the law and economics perspective emerged and quickly gained adherents. It is called the “public choice perspective,” and it helps illuminate why legislators in general will sometimes vote for measures that they know are bad ones from a public policy standpoint and, specifically, will vote for draconian sentencing legislation.¹⁷⁶ The basic assumption of the public choice perspective, applied to legislators, is that legislators, like any political actor, will rationally maximize their own self-interest.¹⁷⁷ In other words, when we elect a legislator, we have not created a saint who will consistently work for the public good; we have instead positioned a personally ambitious person into a seat in the legislature from which he or she will keep a keen eye on his or her own personal interests.¹⁷⁸

As indicated by public choice theorists, one such interest is in getting re-elected. The legislator faces the need to raise money for increasingly expensive re-election campaigns and to take legislative stands that will attract voter support in later elections. The fact that campaigns are expensive can be useful for the incumbent legislator, since it provides a high barrier to entry for candidates running against the incumbent. Therefore, one task of the incumbent is to cast votes that do the bidding of various interest groups. The interest groups’ task is to “pay off” the legislator for a favorable vote. The payoffs can be campaign contributions, votes that the interest group can mobilize for the candidate, or implicit promises of future campaign contributions¹⁷⁹ (and sometimes—a current favorite—a promise of a lobbying position in the interest group organization or in lobbying firms the interest group controls after the politician leaves office).¹⁸⁰

¹⁷⁶ To get a sense of the public choice position, see BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 193–95 (2006). As Tamanaha remarks: “The primary objective of politicians is to ensure their own reelection.” *Id.* at 193.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 194.

¹⁷⁹ *Id.* at 193–94 (“A great deal of legislation . . . involves legally imposed and sanctioned transfers of wealth secured by well-financed and organized interest groups at the expense of hapless groups or the unorganized in society. Legislators are paid by beneficiaries of the legislation they produce . . .”).

¹⁸⁰ The eventual ability to transition from a legislative position to a more secure and better-paid position as a functionary in the network of organizations whose interests the legislator has served is important here. It provides security well past that experienced by legislators who have to be re-elected at intervals, and it also provides a monetary return that compensates the former legislator for a number of years receiving a merely adequate public salary. The classic example involves the legislator voting for ultra-expensive defense projects that would benefit the different defense contractors with plants in his legislative district.

Commonly, a legislator's primary goal is to remain in office. Even when considering a post-legislature career, the legislator will be more valuable to an interest group if he has served several terms in the legislature. So, not surprisingly, the successful legislator is alert to occasions or actions that might derail his ability to accumulate campaign funds or attract votes in coming elections. Votes on criminal codes and sentence durations have the possibility of causing such derailment.

We have already mentioned one way of stating the problem: allowing an opponent to cast one's voting record as "soft on crime." The dynamic that links citizens' apparent support of harsh sentencing, detailed above, to legislative increases in prison sentences is the legislators' concern in being perceived as "soft on crime" and thus vulnerable to attack by opponents during election cycles.¹⁸¹ Negative campaigning involving distortions of the meaning of incumbents' voting patterns is a well-known political phenomenon, and it would make sense for a politician to go to considerable lengths to avoid leaving any voting record that could make him or her vulnerable to such charges—after all, no politician wants to be seen as supporting the "crime lobby."¹⁸² How often these negative attacks happen in practice is not clear, but the knowledge of their possibility may be enough for many politicians to be leery of associating with crime legislation that does anything else but treat crime harshly.¹⁸³ This fear of being seen as "soft on crime" is a self-perpetuating cycle—if no party is willing to risk such a label, sentencing standards will only spiral

¹⁸¹ Hindelang, *supra* note 139, at 108.

¹⁸² See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 16 (2008) (describing political parties' competition to appear hard on crime). The commonly cited example of this kind of campaign is the "Willie Horton" ads that associated Governor Dukakis (who, at the time, was running for President against eventual winner George H.W. Bush) with the prison furloughing of a criminal who committed a murder while on release. See generally STEVE TAKESIAN, *WILLIE HORTON: TRUE CRIME AND ITS INFLUENCE ON A PRESIDENTIAL ELECTION* (2002).

¹⁸³ This fear of looking "soft on crime" has implications even outside of crime policy proper; that is, politicians may *want* to vote against crime bills because they are bad policy, or because of some other concern, such as constitutionality—but the fear of attack is too salient to allow such a vote.

[A] federal officeholder who votes against a federal car-jacking law will likely be characterized by the officeholder's opponent as soft on crime. Although the officeholder might respond to the attack ad with a discussion of how the vote was motivated by federalism concerns, the officeholder may rightly be concerned that the defense may be too nuanced to be effective in a thirty-second sound bite. The officeholder may legitimately want to avoid the risk of having to expend scarce campaign funds in responding to such an ad altogether.

See, e.g., William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 152 (1998).

upward, whether or not that outcome is in accord with community views.¹⁸⁴

A second force is also operating. Politicians planning to seek reelection are often wary of crossing “single issue voters.” In general, the current perception of the average voter is as one who does not closely attend to the politician’s pattern of voting on the multitudes of individual bills that they consider. Some voters are “single issue” voters—whether or not they vote for any particular candidate depends wholly on that candidate’s stance on one issue alone. For instance, voters who think that abortion is murder will tend to vote against any candidate who fails to support the various proposals for laws that limit, restrict, or otherwise move toward making abortions impossible. In this instance, the situation for the legislator may be symmetric in that there also may be voters who will vote against any candidate who supports bills restricting abortions.

F. Summary

The reader should by now realize that public opinion is subject to the influence of many factors, none of which can be definitively identified as primary but all of which have some effect. Unfortunately, as a result, the true feelings of the population are not always reflected in legislative activity or even in public opinion polls. The influence of the media in shaping public opinion often causes people to profess opinions that they would not hold if given all of the information in any particular case. People’s generalization of crime opinions, and their construction of crime archetypes upon which they base their sentencing judgments, often simplify their thinking to the point that, because only the worst crimes are reported and come to mind, they, when polled, often want to impose only the worst punishments. As such, any particular legislator can look to this flawed public opinion and conclude that the majority support harsher crime laws, when in fact they do not.

Another reason for the passage of legislation that can conflict with desert is the nature of the democratic process on the whole. The media’s crime reporting is often based on information provided by the government—and, as discussed, public concern about crime often follows legislative consideration of crime issues, rather than being the cause of said action. Additionally, the legislators’ self-preservation

¹⁸⁴ For a general discussion of the upward spiral that characterizes American criminal law enactments, see Stuntz, *supra* note 85, at 509. See also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (discussing trend of increased criminalization as abuse of criminal justice system).

interest dictates that they not put themselves in a position that could be vulnerable to attack by a rival—a situation that can be brought about by advocating sentencing reduction or opposing harsher penalties, even if such reforms would be in accord with empirical desert.

The takeaway point here is this: Although we cannot pinpoint one single reason why the democratic legislative process produces crime laws that conflict with the intuitions of justice of the community, we can point to a number of factors that work together to cause such results. These outcomes do happen. Laws passed are often not in accord with the community's sense of justice, as Study 1 reported in Part II makes clear. Knowing some of the reasons why this happens, however, may help us to avoid such deviant enactments in the future. Doing so would harness more of the benefits of keeping the law in accord with shared community perceptions of justice and would reduce the harmful consequences of deviations from desert.

IV

TESTING THE CRIMINOGENIC EFFECTS OF INJUSTICE: STUDIES 2A AND 2B

As we have argued elsewhere, there are good arguments to suggest that there is significant utility in distributing liability and punishment according to people's shared intuitions of justice—perhaps greater than the utility of distributing liability and punishment in the traditional utilitarian manner (to optimize deterrence, rehabilitation, or incapacitation).¹⁸⁵ We will briefly summarize these “utility of desert” arguments.

First, some of the system's power to control conduct derives from its potential to stigmatize violators. With some potential offenders this is a more powerful, yet essentially cost-free, control mechanism when compared to imprisonment. Yet the system's ability to stigmatize depends upon its moral credibility with the community. That is, for a conviction to trigger community stigmatization, the law must have earned a reputation for following the community's view on what does and does not deserve moral condemnation. Liability and punishment rules that deviate from a community's shared intuitions of justice undercut this reputation.

Second, the effective operation of the criminal justice system depends upon the cooperation, or at least the acquiescence, of those involved in it—offenders, judges, jurors, witnesses, prosecutors,

¹⁸⁵ For a fuller account of the argument, see ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 5, at 175–210, Robinson & Darley, *Intuitions of Justice*, *supra* note 1, and Robinson & Darley, *Utility of Desert*, *supra* note 100.

police, and others. To the extent that people see the system as unjust—as in conflict with their intuitions about justice—acquiescence and cooperation are likely to fade and be replaced with subversion and resistance. Vigilantism may be the most dramatic reaction to a perceived failure of justice, but a host of other less dramatic (but more common) forms of resistance and subversion have shown themselves. Jurors may disregard their jury instructions. Police officers, prosecutors, and judges may make up their own rules. Witnesses may lose incentives to offer their information or testimony. And offenders may be inspired to fight adjudication and correctional processes rather than participate in and acquiesce to them.

Perhaps the greatest utility of desert comes through a more subtle but potentially more influential mechanism. The real power to gain compliance with society's rules of prescribed conduct lies not in the threat of official criminal sanction but in the influence of the intertwined forces of social and individual moral control. The networks of interpersonal relationships in which people find themselves, the social norms and prohibitions shared among those relationships and transmitted through social networks, and the internalized representations of norms and moral precepts control people's conduct. The law is not irrelevant to these social and personal forces. Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real-world effect may be its ability to assist in the building, shaping, and maintaining of shared norms and moral principles. Criminal law can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality but will only be effective in doing so if it has sufficient credibility.

Finally, the criminal law can gain compliance with its commands through another mechanism as well: If it earns a reputation as a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society with the complex interdependencies that characterize ours, a seemingly harmless action can have destructive consequences. When the action is criminalized by the legal system, one would want the citizen to respect the law, even though he or she does not immediately intuit why that action is banned. Such deference

will be facilitated if citizens believe that the law is an accurate guide to appropriate prudential and moral behavior.

The extent of the criminal law's effectiveness in all these respects—in bringing the power of stigmatization to bear, in avoiding resistance and subversion to a system perceived as unjust, in facilitating, communicating, and maintaining societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its moral authority—is to a great extent dependent on the degree to which criminal law has gained moral credibility in the minds of the citizens governed by it. Thus, criminal law's moral credibility is essential to effective crime control and is enhanced if the distribution of criminal liability is perceived as “doing justice”—that is, if it assigns liability and punishment in ways that the community perceives as consistent with its shared intuitions of justice. Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.

Studies 2a and 2b were designed to test for evidence that reduced moral credibility in the criminal justice system produces disillusionment that in turn could undermine the deference described above. Specifically, these studies examine whether knowledge of the extent to which existing criminal law doctrines deviate from ordinary intuitions of justice can affect people's general respect for the law, as well as their intention to cooperate, support, and comply with it. We hypothesized that, where criminal law doctrines deviate dramatically from ordinary intuitions about justice, such awareness of the law's predictable injustices would indeed negatively affect people's attitudes toward the law, as well as weaken their behavioral intentions to cooperate, support, and comply with it.

A. Study 2a Design and Methodology

We ran two studies to test this hypothesis. In Study 2a, 59 subjects (34 female, 25 male; age range of 18–77) were recruited to participate in a short web survey by two separate means. An invitation to go to a website to participate in the study was circulated to the University of Pennsylvania Law School community and other acquaintances, with a request that people in turn send the invitation to their acquaintances. (Students were excluded from participation.) Eventually, 26 subjects from this source took the online survey. None of these people knew of the study beforehand, its goals or its design, nor who was involved in its design. (As reported below, the results from these subjects did not differ in any significant way from the results obtained from other sub-

jects.) The remaining 33 subjects were recruited via Amazon.com's Mechanical Turk system¹⁸⁶ and were paid \$0.95 for their participation. This system coordinates a large pool of paid volunteers who perform tasks over the Internet (including many other tasks besides surveys) for a wide range of requesters. All subjects were assured that their data would be kept anonymous.

Study 2a used a simple pre-post design. Subjects were first asked a series of questions to assess their general attitudes and behavioral intentions with regard to the criminal justice system. Their responses to these questions comprised the baseline responses. They were then exposed to a set of cases in which the criminal justice system in a hypothetical jurisdiction gave liability and punishment that was unjust—either too high or too low. All cases and results were real but were not from any single jurisdiction. Subjects were then asked the same set of questions regarding their views to be answered on the assumption that they lived in that hypothetical jurisdiction. The question of interest was whether subjects' answers to the questions based on living in the hypothetical criminal justice system would differ from their earlier baseline answers under the current criminal justice system.

The eight questions of greatest interest for present purposes are reproduced in Table 5 below. A subset of these questions—Questions 1, 2, and 3—examines the extent to which people regard the criminal law, whose norms they are likely to internalize, as a reliable source of moral authority. A second subset—Questions 4, 5, and 6—examines people's willingness to cooperate with and assist in the operation of the criminal justice system. For instance, these questions shed light on how willing people are to report conduct deemed criminal, even though it may not seem particularly condemnable to them. A third subset—Questions 7 and 8—examines people's intentions to comply with the criminal law's rules in morally grey areas.¹⁸⁷ All questions were to be answered on a 9-point scale, which asked subjects to rate their level of agreement with each statement, ranging from 1: "strongly disagree" to 9: "strongly agree," with interim points for "disagree," "agree," and "unsure." As is typical with such scales, most

¹⁸⁶ Mechanical Turk is an online system run by Amazon that enables researchers (as well as other entities) to recruit individuals to perform various tasks for payment. The tasks that can be performed include, but are not limited to, surveys such as the one we conducted. See *AMAZON MECHANICAL TURK*, <https://www.mturk.com/mturk/welcome> (last visited Oct. 18, 2010).

¹⁸⁷ We also asked four other questions that pertained to similar issues. However, these were not affected by the manipulation in that they did not show any pre-post stimulation differences, so we do not discuss them further.

subjects avoided the extremes and answered within the range of 3: “disagree” to 7: “agree.” The questions were presented at the beginning of the survey in a new random order for each subject.

TABLE 5
 QUESTIONS ON THE EFFECT OF THE CRIMINAL JUSTICE
 SYSTEM’S MORAL CREDIBILITY

<i>Question: Agree or Disagree?</i>
<p>1. Life sentence means offense conduct must be heinous You see a story on the evening news about a prisoner who was sentenced to life in prison. Based on his extremely harsh sentence, you would conclude that the person must have committed a heinous crime, and believe that he deserves the punishment that he got.</p>
<p>2. Law prohibition means posting false comments must be condemnable You learn from a newspaper story that posting false negative comments on another person’s online profile site (e.g. Facebook) can count as an act of criminal libel. Based on the criminal law’s prohibition of this act, you would consider it to be condemnable.</p>
<p>3. High sentence for financial maneuver means condemnable Your newspaper reports that a particular financial maneuver on taxes has just been made a crime and that the law has assigned it a very serious sentence of 28 to 32 years. Because the law assigns such a high sentence, you would conclude that the conduct must be morally condemnable and probably deserves such a sentence.</p>
<p>4. Report removal of arrowhead You learn of a person in your town who has illegally taken an arrowhead from an important historical site which they visited. It is illegal to take anything from the site. You would report the removal to the relevant authorities.</p>
<p>5. Give found handgun to police You are walking through an alley and find a hand gun next to a sewer drain. You think it might not be safe for children to leave it there, but you worry that picking it up and carrying it to police might create problems for you. No one is around to see what you are doing. You would pick up the gun and take it to the police.</p>
<p>6. Report dog violation to authorities Your neighbor is a dog lover. He recently got three more dogs, for a total of six. The law only allows 3 dogs in a single home. You might report the neighbor’s new dogs to the relevant authorities.</p>
<p>7. Go back and report your mistake to gas station While on vacation, in a place that is distant from the one you live in, you drive off from a gas station without paying. You realize this later, but you also know that the employees could have no knowledge of your identity, and that you would not be traceable. You have the possibility to turn back and report your mistake, but you are somewhat concerned that this act itself would lead to some penalty. You would turn back or attempt to contact the gas station to correct for your mistake.</p>
<p>8. Go back and report your mistake to restaurant While on vacation, in a place that is distant from the one you live in, you drive off from a restaurant without paying. You realize this later, but you also know that the employees could have no knowledge of your identity, and that you would not be traceable. You have the possibility to turn back and report your mistake, but you are somewhat concerned that this act itself would lead to some penalty. You would turn back or attempt to contact the restaurant to correct for your mistake.</p>

Having responded to these questions to establish a baseline, subjects were then presented with seven real-world cases, for which pilot testing had shown that the liability or sentence actually given in the case deviated dramatically from ordinary intuitions. The cases are

described in Appendix C in the order in which they were presented. Several of these cases engage the crime-control doctrines described above. Subjects were instructed truthfully that all of the cases and sentences were real. They read each case and assigned a sentence that they thought was appropriate, if any, from a drop-down menu of sentences.¹⁸⁸

The actual sentences assigned to these cases were then revealed to the subjects,¹⁸⁹ with instructions reminding them that these sentences had all come from real-life cases. It was not explicitly revealed to subjects that all of the cases had in fact occurred within the American criminal justice system. Instead, subjects were instructed to assume that all of the cases had come from a single, hypothetical criminal justice system, and that they should try to form an impression of this system as a whole.

Out of the seven cases, five (cases 1, 3, 4, 5, and 7 in Appendix C) had real-world sentences much more severe than most people judged appropriate, whereas the remaining two (cases 2 and 6) received no sentence, though most people answered that a serious sentence should be imposed. For each case in turn, the computer program that administered the survey (Qualtrics) revealed the actual sentence to subjects, as well as the sentence that the subject had previously assigned. Subjects were asked to calculate the difference between the two sentences and to enter it on the screen. This exercise was meant to focus the subjects' attention on the difference between their own intuitions and the sentences actually imposed in the hypothetical system.

Subjects next responded to the same set of questions that were asked in the first part of the survey, set out in Table 5, which assessed their general attitudes and intentions towards the criminal justice system (this time in a new random order). They were instructed to respond to these questions as if they were living in the hypothetical criminal justice system which had assigned the liability and sentences they had just seen.

Our specific hypothesis was that learning about the injustices created by the current criminal justice system (described to subjects as a hypothetical system), including those created by current crime-control doctrines like those tested in Study 1, would undermine the system's moral credibility and have the detrimental effects on attitudes rele-

¹⁸⁸ The options presented to subjects were as follows: Death, Life, 30 years, 26 years, 22.5 years, 19 years, 15 years, 13 years, 11 years, 9 years, 7 years, 6 years, 5 years, 4 years, 3 years, 2.5 years, 2 years, 1.5 years, 1 year, 10.5 months, 9 months, 7.5 months, 6 months, 5 months, 4 months, 3 months, 2 months, 6.5 weeks, 5 weeks, 3.5 weeks, 2 weeks, 11 days, 1 week, 4 days, 1 day, Liability but no punishment, No punishment.

¹⁸⁹ See Column 4 of Appendix C.

vant to crime control described above. We predicted that when responding to questions about how they would think and act if they were living in the hypothetical system, subjects would be less inclined to defer to the criminal law and less inclined to cooperate and comply with it.

The hypothetical system framing was derived from recent research on the “hypothetical society paradigm.”¹⁹⁰ We framed our study in this way because we surmised that most people have strong existing beliefs about the justness of their own criminal justice system, having lived within that system for many years; thus, experimenters could not reasonably expect to change such beliefs in a few minutes. Moreover, owing to a desire to respond consistently, most individuals would probably be reluctant to indicate that their own beliefs and intentions had changed in the course of a single survey session. The hypothetical system framing is useful in liberating subjects to express what is more likely to be an accurate appraisal of their own beliefs and intentions with full knowledge of the conditions described in that system (which happens to be the current one).

At the conclusion of the survey, subjects responded to a series of standard demographic items. They also responded to two general questions (on a 9-point scale) about the hypothetical criminal justice system. The first of these asked: “Do you think that the hypothetical criminal justice system whose cases you have just seen gives people the punishment that they deserve, no more, no less?” where 1 was: “Not at all—the criminal law in that system does very badly,” the midpoint, 5, was: “The criminal law in that system does neither well nor badly,” and 9 was: “To a great extent—the criminal law in that system does very well.” The second general question asked subjects to indicate their agreement with the following statement: “The hypothetical criminal justice system does a reliable job of doing justice and would have credibility with the citizens it governs,” where 1 was “strongly disagree,” 3 was “disagree,” the midpoint 5 was “unsure,” 7 was “agree,” and 9 was “strongly agree.”

B. Study 2a Results and Discussion

The two subject pools were somewhat different demographically. The first group (the emailed invitation sample) was consistently older, better educated, and wealthier than the Mechanical Turk sample.

¹⁹⁰ Gregory Mitchell & Phillip E. Tetlock, *Experimental Political Philosophy: Justice Judgments in the Hypothetical Society Paradigm*, in *EXPLORATIONS IN POLITICAL PSYCHOLOGY* (Jon A. Krosnick & I-Chant A. Chiang eds.) (forthcoming May 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912981.

There were no statistically significant differences in political views, belief in a God, or in the gender composition of the two samples. Most importantly, the two groups did not differ in their response to learning about the unjust sentencing outcomes of the hypothetical system—there was no reliable variation in pre-post stimulation differences when comparing the two groups. Hence, we collapse the two groups in the following analyses.

As Appendix C shows, the average sentences imposed by subjects were dramatically different from the actual sentences imposed by the criminal justice system for each of the seven cases.¹⁹¹ Reflecting this, responses to the two general questions which asked about the hypothetical system showed that people generally thought this system did a poor job of administering justice. In response to the first question—whether the system assigned deserved punishments—the average response, 3.41, was significantly lower than the scale midpoint of 5.¹⁹² The same was true for the average on the second question about the credibility of the system, for which the mean was 3.97.¹⁹³ Evidently, having learned about the unjust punishments given by this system, subjects' impressions of it were markedly negative.

The data that are critical for the study's main hypothesis concern the differences between the pre-stimulation and post-stimulation responses to the questions that asked about intentions and attitudes with regard to the criminal justice system. As Table 6 shows, subjects' attitudes and behavioral intentions post-stimulation shifted noticeably from what they had been at the pre-stimulation baseline. For seven of the eight questions, responses moved in the direction of decreased reliance on, and decreased willingness to comply and cooperate with, the criminal law. For Question 2, this decrement was only marginally reliable. Moreover, these shifts occurred with respect to each of the three areas of interest we investigated: deference to the law in drawing conclusions about condemnability of conduct relevant to shaping norms, intention to cooperate with and assist the system, and intention to comply with it. The eight questions on which these shifts occurred, and the means for both time points, were as follows (significance values are reported for one-tailed, paired-samples *t*-tests).

¹⁹¹ Paired sample *t*-tests, all $p < .001$. Paired sample *t*-tests are used to determine whether there are statistically significant differences between the means from two separate variables, i.e., between the same subjects' responses to two separate questions. See David C. Howell, *STATISTICAL METHODS FOR PSYCHOLOGY* 182 (4th ed. 1997).

¹⁹² One-sample *t*-test, $t(58) = -5.02$, $p < .001$.

¹⁹³ One-sample *t*-test, $t(58) = -3.72$, $p < .001$.

TABLE 6
STUDY 2A PRE- AND POST-STIMULATION AVERAGES

<i>Question</i>	<i>Baseline average</i>	<i>Post-stimulation average</i>	<i>Significance</i>
1. Life sentence means offense conduct must be heinous	6.46	5.14	p<.001
2. Law prohibition means posting false comments must be condemnable	6.14	5.76	p<.07
3. High sentence for financial maneuver means condemnable	5.25	4.63	p<.02
4. Report removal of arrowhead	5.93	5.14	p<.01
5. Give found handgun to police	6.66	5.56	p<.001
6. Report dog violation to authorities	5.15	4.59	p<.01
7. Go back and report your mistake to gas station	7.05	5.69	p<.001
8. Go back and report your mistake to restaurant	7.15	5.71	p<.001

The size of these shifts was predicted by subjects' responses to the first general question about whether the hypothetical system assigned deserved punishments. For each of the eight items, the degree to which subjects saw the hypothetical system as assigning unjust punishments correlated with the size of their attitude shift from pre- to post-stimulation.¹⁹⁴ These correlations are important because they show the link between individuals' general beliefs about the justness of the hypothetical criminal justice system and their more specific attitudes and intentions with regard to that system.

Study 2a shows how knowledge that a criminal justice system produces systematic injustices can generate negative attitudes toward that system. It also suggests that those negative attitudes can lead to diminished intentions to defer to, cooperate with, and comply with the law. The systematic changes in attitude and intentions that we observed occurred even with a relatively small sample size ($N < 60$), suggesting that the effects may be quite substantial. However, the "within-subjects" design of Study 2a is open to a possible criticism concerning demand characteristics—that by asking the same questions twice, there may have been an implicit suggestion perceived by some subjects that the experimenters expected them to change their responses. While acknowledging this point, we note that our subjects were participating in a web survey, and that they were entirely anonymous, which, in contrast to a laboratory setting, should diminish the implied

¹⁹⁴ Pearson correlation coefficients ranged from $r = -.22$ to $r = -.37$, all $ps < .05$, one-tailed. The Pearson correlation coefficient indicates the strength and direction of any linear relationship between two variables; it ranges between -1 and +1, where -1 is a perfect negative correlation and +1 is a perfect positive correlation.

pressure to respond in a way that is perceived to be desired by the researcher. The fact that the “disillusioning cases” moved in both directions—with some sentences that were too harsh and some too lenient—also made it less than obvious what change in responses the experimenters might be expecting. However, to more conclusively rule out this possibility, we ran Study 2b, which employed similar measures to those used in Study 2a, but with a “between-subjects” manipulation in which each subject was asked the questions only once.

C. Study 2b Design and Methodology

Two hundred and seven subjects (137 female, 70 male) were recruited via Amazon.com’s Mechanical Turk system and were paid \$0.75 for their participation. The design of the study was straightforward. Subjects were randomly assigned by the survey program (Qualtrics) to one of two groups. The experimental or “high-disillusionment” group ($N = 108$) was presented with the same series of seven real-world cases that were presented in Study 2a (see Appendix C), in which the actual sentencing outcome deviates dramatically from ordinary intuitions. Subjects read each case in turn and assigned a sentence that they thought was appropriate, if any. The actual sentences assigned to these cases were then revealed, alongside subjects’ own sentences. As in Study 2a, subjects were instructed that these cases and sentences were all real and had been handed down by a variety of legal jurisdictions but that they should assume that the sentences had all been given by a single, hypothetical criminal justice system. Subjects then responded to the same eight questions that were asked in Study 2a (see Table 5), which were presented in a new, random order for each subject.

The control “low-disillusionment” group ($N = 99$) followed the same procedure, except that the seven cases being “sentenced” by subjects were chosen so that the actual sentences given by courts in the cases accord more closely with ordinary lay intuitions¹⁹⁵—that is, none of the cases engaged the application of one of the modern crime-control doctrines described in Part I. These cases, along with their sentences, are shown in Appendix D. The cases for the high-disillusionment group were presented in the order shown in Appendix

¹⁹⁵ The cases were taken from an earlier study. See Robinson & Kurzban, *supra* note 88, at 1894–98 (presenting twenty-four cases used in study). The sentences reported to subjects corresponded to the sentences that might commonly be given in the criminal justice system. In fact, for each case, the sentence described corresponded to the sentence handed down in a very similar actual case. The sentences also very closely matched the average sentences given by forty-six University of Pennsylvania undergraduates who participated in an earlier pilot study. See *supra* note 108.

C; the cases for the control low-disillusionment group were presented in this order for each subject: 7, 1, 2, 3, 6, 5, 4 (see Appendix D).

Our hypothesis was that exposure to the injustices created by the criminal justice system, including those created by current crime-control doctrines, would undermine the system's moral credibility and have the same detrimental effects documented in Study 2a. Thus, we predicted that when reporting how they would think and act in the hypothetical criminal justice system, the high-disillusionment group would report a lessened inclination to defer to the criminal law and to cooperate and comply with it than the low-disillusionment group. The procedures in the high- and low-disillusionment conditions resembled each other as closely as possible, therefore allowing us to test for the specific causal effect of disillusionment.

As in Study 2a, at the conclusion of the survey, subjects responded to a series of demographic items, as well as the same two questions that were asked of Study 2a subjects regarding their general impressions of the hypothetical criminal justice system.

D. Study 2b Results and Discussion

The results of both the low and high disillusionment groups are reported in Table 7. As a check on the manipulation, and as Appendix C shows, subjects' average sentences in the high-disillusionment condition were dramatically different from the actual sentences imposed by the criminal justice system for each of the seven cases.¹⁹⁶ In contrast, for the low-disillusionment condition, the degree of discrepancy between subjects' sentences and the law's was much lower (see Appendix D). Three out of the seven cases produced statistically significant discrepancies, and these were of much smaller size than those in the high-disillusionment condition. Subjects' average sentences for the "wolf hallucination" case were lower than the law's sentence (seven days vs. three months¹⁹⁷), whereas their sentences for the "clock radio" case were on average higher than the law's (eleven months, five days vs. five months¹⁹⁸), as were their sentences for the "slap and bruising at record store" case (nineteen months, ten days vs. twelve months¹⁹⁹). However, although they were significant, these differences were quite small in terms of sentence duration in comparison with the discrepancies for the high-disillusionment condition. Reflecting the differences between the conditions of the two groups,

¹⁹⁶ Paired sample *t*-tests, all *ps* < .001.

¹⁹⁷ *t* (98) = 12.64, *p* < .001.

¹⁹⁸ *t* (98) = 2.53, *p* < .02.

¹⁹⁹ *t* (98) = 2.47, *p* < .02.

responses on the two general questions which asked about the hypothetical system showed that subjects in the high-disillusionment condition thought the system did a much poorer job of administering justice than did subjects in the low-disillusionment condition. The high-disillusionment group thought the system did a worse job of assigning deserved punishments (3.04 vs. 5.85 on the 9-point scale²⁰⁰), and also thought the system would have less credibility with its citizens (3.44 vs. 5.96²⁰¹). For both questions, the mean for the high-disillusionment group was significantly below the scale midpoint of 5, whereas the mean for the low-disillusionment group was significantly above the scale midpoint. The manipulation was thus sufficient to produce more negative attitudes about the hypothetical system among those in the high-disillusionment group.

Our main question of interest, though, was whether these negative general attitudes would translate into specific decreases in willingness to defer to this hypothetical criminal justice system. As predicted, the subjects in the high-disillusionment group showed less deference to and less willingness to assist or cooperate with the criminal justice system than did subjects in the low-disillusionment group when responding to the test questions. Six of the eight questions produced differences that were statistically significant in the predicted direction at the $p < .05$ level (one-tailed, paired-sample t -tests). That is, the probability of obtaining these data, assuming that the null hypothesis of no difference between the means is true, was less than .05 for six of the eight questions.

Table 7 compares these results to the baseline results for the subjects in Study 2a, who responded to the same eight questions at the start of Study 2a before any disillusionment.²⁰² The mean response scores for this no-disillusionment group were statistically significantly different from the high-disillusionment cases in seven of the eight instances, and the difference was marginally significant for the

²⁰⁰ $t(205) = 10.29, p < .001$.

²⁰¹ $p < .001$.

²⁰² The comparison between the Study 2a baseline means and the Study 2b means is not ideal because the subjects were not randomly assigned to the studies. However, the two Mechanical Turk surveys were run only ten days apart, and analyses revealed that there were very few differences between the groups. The Study 2a subjects were significantly older than those in Study 2b, but there were no other significant differences across other demographic variables, including gender, political views, annual income, belief in God, and highest education completed. Critically, there were no significant differences between the sentences handed out by the Study 2a subjects and those handed out by the Study 2b high-disillusionment group, and there was only one significant difference between these two subgroups on the post-disillusionment questions. We conclude that it is highly unlikely that a cohort difference compromises the comparison between the Study 2a baseline and the Study 2b subjects.

remaining item (Question 2, $p < .07$). Table 7 suggests that the greater the disillusionment, the less likely that people are to cooperate with the criminal justice system and to defer to it as a moral authority that shapes societal norms and their internalization of those norms.

TABLE 7
STUDY 2A BASELINE AND STUDY 2B RESULTS²⁰³

<i>Question (for full text of questions, see supra Table 5)</i>	<i>Study 2a baseline No Disillusionment</i>	<i>Study 2b Low Disillusionment</i>	<i>Study 2b High Disillusionment</i>
1. Life sentence means heinous	6.46 ^a	6.59 ^a	5.35 ^b
2. Posting condemnable	6.14 ^a	5.38 ^b	5.59 ^{a,b}
3. Financial move condemnable	5.25 ^a	5.16 ^a	4.34 ^b
4. Report arrowhead	5.93 ^a	5.65 ^a	4.95 ^b
5. Turn in hand gun	6.66 ^a	5.40 ^b	4.32 ^c
6. Report dogs violation	5.15 ^a	4.75 ^{a,b}	4.43 ^b
7. Return to gas station	7.05 ^a	6.63 ^a	5.63 ^b
8. Return to restaurant	7.15 ^a	6.47 ^b	5.84 ^c

What conclusion should we draw from these results in relation to the crime-control costs of doing injustice? They would seem to suggest that there are clear benefits to be found in doing justice: greater assistance and cooperation with the criminal justice system, upon which the system critically depends, and greater ability to harness the powerful forces of social influence and the internalization of norms to gain compliance in borderline cases and to shape norms where needed.

However, it might be argued, given what has been said in Part III about the distortions and imperfections inherent to public perceptions of crime and punishment, that instances of injustice and failures of justice by the system may not be immediately and fully appreciated by the community. The fog of media errors and inaccuracies may protect the system's reputation even when it does not deserve it and, thus, deviating from desert might not result in a loss of moral credibility and its consequent detrimental effects.²⁰⁴

²⁰³ Where two cells on a row do not share the same letter, their values are statistically different. That is, if three adjacent cells have the superscripts: "a," "a,b," "b," it means that the first cell is significantly different from the third cell, but that the second cell is not significantly different from either the first or third cell.

²⁰⁴ The reverse is also possible: Distorted media coverage may create the impression that the criminal justice system is deviating from desert when it is not. This is a potential problem especially when, as is currently the case, the media tend to focus on the absolute amount of punishment imposed rather than upon the relative amount of punishment among different cases. That is, when a sentence is reported in isolation, which is the traditional news coverage approach, it may seem inappropriate, yet an examination of a fuller collection of cases may suggest that it is indeed just the sentence this offender deserves,

Unfortunately, it seems unlikely that the fog of media reporting will so completely insulate the system that it can freely do injustice and fail to do justice without concern that these imperfections will be revealed and undermine its moral credibility. Indeed, what seems likely is that, just as crime is news (thereby exaggerating the rate and nature of crime), so too are injustice and failure of justice news.²⁰⁵ Even if the nature of the news coverage hides some portion of the deviations from desert, the more frequently and more seriously the system deviates from desert, the greater the chances that such deviations will come to light.

Worse, even a very few disclosures have the potential to undermine the system's credibility. As discussed previously, what we know about making and keeping reputations tells us that the system's intention regarding doing justice counts enormously.²⁰⁶ While accidental or unavoidable injustices or failures of justice may be forgiven when the system seems committed to trying to do justice, if revealed deviations from desert are intended by the system—when they are planned and predictable applications of the criminal law's rules, as with the modern crime-control doctrines examined in Parts I and II—then even a single telling case can have detrimental consequences. The system's only protection is to indeed try to do justice as best it can, admitting that there are some limitations on how perfect it can be in practice.²⁰⁷

E. Limitations and Future Research

In the studies reported here we relied on self-report measures of individuals' attitudes and of their willingness to take various actions. How well these sorts of self-report measures predict actual behavior might be questioned. Considerable research has shown that the extent

given his relative blameworthiness and the spread of the punishment continuum. A useful part of the agenda for future research may be to understand how to encourage less distorting media reporting. Some of this will come naturally if the system moves formally to desert as a distributive principle—something likely to promote public discussion and improve public understanding of the nature of shared intuitions of justice and the central role of relative blameworthiness. However, special efforts to improve news reporting may be a good investment for the long-term success of the criminal justice system.

²⁰⁵ Indeed, especially if the system formalizes and publicizes the importance of doing justice, such as by adopting desert as the system's distributive principle in the way that the Model Penal Code drafters have done, deviations from desert will attract more press attention, not less.

²⁰⁶ See Robinson & Darley, *Utility of Desert*, *supra* note 100, at 495–96 (discussing impact of doing injustice on reputation of criminal justice system).

²⁰⁷ For an analysis of the various doctrines by which the criminal justice system regularly and intentionally deviates from desert and a critique of the justifications offered in support of each doctrine of deviation, see generally ROBINSON & CAHILL, *LAW WITHOUT JUSTICE*, *supra* note 23.

to which such measures of attitude and intention predict behavior varies greatly, depending on whether they specifically capture the context and circumstances in which the relevant behaviors will be enacted.²⁰⁸ It is well established that very general attitudinal measures are poorer predictors of behavior than more specific measures that capture individuals' "behavioral intentions" to act and to do so in certain ways.²⁰⁹ Accordingly, the self-report measures that we used in the present studies were quite specific in describing the context and circumstances in which the behaviors of interest would occur. Because of this, we suspect that they have some predictive value with regard to whether people will cooperate with the law (as examined in Questions 4, 5, and 6, *supra* Table 5). One might of course look to what people actually do, and this would provide better evidence of lack of cooperation and assistance. For example, one might look at data on the actual rates of crime reporting, witness cooperation, or jury nullification in different areas where there are divergent levels of confidence in the moral authority of the criminal justice system. The United States, for instance, could be compared with other countries with noticeably less just criminal justice systems—which may include most of the countries in the world. Unfortunately, such data are very difficult to find and expensive to collect.

²⁰⁸ See generally ICEK AJZEN & MARTIN FISHBEIN, *UNDERSTANDING ATTITUDES & PREDICTING SOCIAL BEHAVIOR* (1980) (discussing how measures of attitude and intention can be used to predict behavior, correspondence between measures of attitude and measures of behavior, and application of measures in six case studies of socially relevant behavior).

²⁰⁹ Ajzen and Fishbein's "theory of reasoned action" originated the term "behavioral intention." This theory has been critical in shedding light on the conditions under which attitudes predict behavior. See *id.* at pt. 1 (outlining theory of reasoned action, including construct of behavioral intention as way to predict behavior from attitudes). Much research originating from this theory (and leading up to it) has corroborated the importance in predicting behavior of asking questions that gauge people's intentions to perform the specific behaviors of interest. See generally Icek Ajzen, *Attitudes, Traits, and Actions: Dispositional Prediction of Behavior in Personality and Social Psychology*, in 20 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 1–63 (1987) (providing theoretical treatment of when and how general dispositions predict specific behaviors); ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 155–218 (1993) (providing integrative review of accumulated research on attitudes including their relation to behavior); MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION, & BEHAVIOR: AN INTRODUCTION TO THEORY & RESEARCH* (1975) (presenting conceptual framework for theory of reasoned action and model of behavior prediction based on argument that behavioral intention is function of attitude toward specific behavior and subjective norms); A.R. Davidson & J.J. Jaccard, *Variables that Moderate the Attitude-Behavior Relation: Results of a Longitudinal Survey*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1364, 1364–76 (1978) (investigating how attitudes predict specific behaviors of having children and using oral contraceptives, showing that closer correspondence between attitude measures and behaviors correlates to stronger predictive relation).

It is not as clear that there is better evidence than this self-report data when one considers the issue of shaping societal norms and promoting the internalization of norms (Questions 1, 2, and 3). Whether these influences will exist is a function of the extent to which people find the criminal law to be a reliable moral authority, which is what is measured in these three questions.

The third effect of disillusionment—compliance with the criminal laws' commands (Questions 7 and 8)—could also be measured more directly than by relying upon the self-reporting done here. However, we suspect that there is a limit to what one will find. For much conduct, the impropriety is clear, and nothing that the criminal justice system can do will change that fact. Societal forces, such as deeply held existing attitudes, can maintain a norm without much help from the criminal justice system. Other forces can establish the condemnability of certain conduct, especially that at or near the core of wrongdoing, even without the help of the criminal law.²¹⁰ Even extreme disillusionment, then, is not likely to undermine social norms with regard to this type of conduct. We would expect the extent of the law's moral credibility to have more of an effect in borderline cases, where the condemnability of conduct is not as clear.²¹¹

The issue of compliance is further complicated because the criminal justice system can potentially affect rates of compliance through multiple causal routes. As we have argued, the moral credibility of the system likely exerts some causal effect on compliance. For instance, a person may remain stopped at a deserted red light purely as a function of internalized norms, rather than any cost-benefit analysis. And these norms, as we have previously argued, are shaped by the moral credibility of the criminal justice system. But compliance is also affected by more local cost-benefit analyses, including, for example, concerns about a highly arbitrary and punitive criminal justice system. Such a system can produce a variety of unpredictable and perverse effects. For example, a system perceived as being arbitrary and highly punitive may encourage people to avoid acts that potentially entangle them in the system. This might have negative effects, as in dissuading people from reporting crime to the police or being a witness in court. Indeed,

²¹⁰ See Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007) (arguing that matters on which there is high agreement across demographics cannot easily be manipulated, whether due to human predisposition to holding such intuitions or to universal social learning conditions).

²¹¹ See Robinson & Darley, *Intuitions of Justice*, *supra* note 1, at 29–31 (arguing that criminal justice system will command more deference in borderline cases if perceived to be morally authoritative); Robinson & Darley, *Utility of Desert*, *supra* note 100, at 475–77 (discussing how criminal law's moral authority has effect in cases where ambiguity exists as to whether conduct is wrong).

this sort of perverse effect may be what accounts for the shift in subjects' responses to the gas station and restaurant items in Studies 2a and 2b: The perceived injustice of the system discourages people from returning to pay the bill they forgot to pay. However, under the right circumstances, such a reputation for arbitrariness also might produce beneficial effects, such as helping to discourage people from committing crimes. On the other hand, few people would want to live in a society whose program for avoiding crime is to be particularly arbitrary or unjust in its treatment of suspected violators.²¹²

F. Previous Studies

The conclusions reached here are consistent with previous studies suggesting that conflicts between the criminal law's dispositional rules and the community's shared intuitions of justice have the sorts of detrimental effects described above. As discussed below, a number of studies have confirmed the existence of the relationship between an individual's disbelief in the morality of a particular law and his or her willingness to obey that law. Studies also show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid. Some studies also go further in showing how perceptions of injustice might lead to more generalized flouting of the law.

Several studies have focused on how beliefs about the morality of a particular law can affect compliance with it. In one such study by Grasmick and Green, a random sample of 400 adults was selected

²¹² As previously mentioned, a possible criticism of the Study 2a design is that it introduces a demand to respond in ways that the subject perceives that the researcher expects. See *supra* Part IV.B. Study 2a is more vulnerable to this criticism than is Study 2b because it used a within-subjects design. The lack of face-to-face contact between the researcher and subject diminishes the concern, although perhaps not entirely. But the results of Study 2b, which was performed between subjects, cast more doubt on the existence of any such demand effect. Subjects, of course, perceived a relation between the two parts of Study 2b, but it is unlikely that this exerted pressure on them to respond in a particular way. The expected effect was not necessarily obvious to subjects in the disillusionment condition, since the sentences were both overly punitive and overly lenient. We thus think it unlikely that subjects were able to reliably divine the hypothesis under investigation. Indeed, one potential hypothesis they might have entertained, entirely contrary to the one that was supported, is that the researchers wanted them to respond in more moral and law-abiding ways in the high-disillusionment condition, since a reliance on personal morality comes to the fore when the legal system is doing a poor job. Finally, the manipulation was also produced by allowing whatever differences existed between subjects' sentences and the law's to emerge naturally, and it did not rely on any explicit statements about the quality of the legal system by the researchers; subjects had to draw their own inferences about this issue. In sum, we conclude that the worry about "experimenter demand" is insubstantial.

from the Polk City Directory and subsequently interviewed.²¹³ Information was gathered about the subjects' involvement in eight illegal activities— theft of property worth less than \$20, theft of property worth more than \$20, gambling illegally, cheating on tax returns, intentionally inflicting personal injury, littering, illegal use of fireworks, and driving under the influence.²¹⁴ The respondents were then asked to estimate the perceived certainty of arrest, the perceived severity of punishment, and their moral commitment to adhering to the given legal rule.²¹⁵ The researchers summarized their results by saying that “three independent variables—moral commitment, perceived threat of legal punishment and threat of social disapproval—appear to constitute a concise and probably exhaustive set of factors which inhibit illegal behavior.”²¹⁶

Similarly, in another study, Jacob suggests a greater relation between compliance and a law's perceived moral correctness than between compliance and the perceived likelihood of punishment for violating it. He interviewed 176 people over the age of eighteen from Evanston, Illinois by allowing a computer to pick random phone numbers. The respondents were interviewed regarding whether they sped on highways, had smoked marijuana, and would shoplift a \$50 item if no one was looking.²¹⁷ Marijuana smokers were the most numerous, followed by speeders, followed by potential shoplifters. Two-thirds of respondents thought the fifty-five mile-an-hour speed limit was right, three-quarters agreed that the laws against shoplifting were correct, but only one-quarter thought the law against marijuana was correct. The results showed that for those who think the speeding laws are right, 62.3% comply, while only 9.8%, who think it is wrong, comply. Of those who think the marijuana law is just, 85% do not smoke marijuana. Contrastingly, only 36% of those respondents who think that the law is wrong complied with its ban on smoking. There was no statistical difference in shoplifting, which is evidence of high agreement that shoplifting is wrong.²¹⁸ The researchers conclude that “[t]he relationship between compliance and legitimacy appears to be consider-

²¹³ Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 329 (1980) (describing research procedures).

²¹⁴ *Id.* at 330 (explaining research procedures).

²¹⁵ *Id.*

²¹⁶ *Id.* at 334.

²¹⁷ See Herbert Jacob, *Deterrent Effects of Formal and Informal Sanctions*, 2 L. & POL'Y Q. 61, 64–67 (1980) (presenting outcomes of Illinois phone survey comparing effects of perceived cost of violating law and perceived legitimacy of law on imputed compliance).

²¹⁸ *Id.* at 70 (presenting results regarding legitimacy of law and compliance).

ably stronger than the one between compliance and perceptions of severity or certainty of sanctions.”²¹⁹

Matthew Silberman conducted a similar study of 174 undergraduates at a small private university.²²⁰ The students responded to whether they had ever committed certain moral or legal violations, such as assault, use of hard drugs, petty theft, vandalism, shoplifting, drunk and disorderly conduct, premarital sex, marijuana use, and drinking under age. The students then responded to questions regarding the morality of the act, the certainty of punishment, the severity of punishment, and peer involvement. One proposed hypothesis that Silberman tested was that “[t]he higher the degree of moral support for the legal regulation of an offense or offenses, the lower the probability that the offense or offenses will be committed”²²¹ After reviewing the data, Silberman concluded that “[w]hen public sentiment in general disapproves [of] a given offense, it is relatively unlikely to occur. Similarly, serious criminal activity is less likely to occur among those who show a high degree of moral commitment, even though these individuals might commit less serious offenses,” thus validating his hypothesis.²²²

The previous studies demonstrate that perceptions of the moral legitimacy of particular laws can affect compliance with them. Other studies have gone further in showing how perceptions of the immorality of a particular law, or of some act of the criminal justice system, can lead to more generalized effects on compliance. Janice Nadler’s recent series of studies looked at how knowledge of injustices created by the criminal justice system can affect intentions to comply with the law.²²³ In the first study, subjects read mock newspaper stories describing legislation that was perceived as either highly just or highly unjust. Subjects in the unjust condition later reported greater intentions to engage in minor acts of law-breaking which were unrelated to the content of the unjust legislation, such as parking illegally or making illegal copies of software.²²⁴ In a second study, conducted over

²¹⁹ *Id.* at 70; see also Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292, 301 (1977) (stating that “[t]he belief that marijuana use is immoral . . . functions to inhibit marijuana use,” while “legal threat . . . shows a measurable, but essentially trivial influence on marijuana use/nonuse”).

²²⁰ Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442 (1976).

²²¹ *Id.* at 457.

²²² *Id.*

²²³ See Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (providing experimental evidence in support of idea that perceived legitimacy of one law influences compliance with other laws).

²²⁴ *Id.* at 1410–15 (discussing results of Experiment 1).

the Internet, subjects acted as mock jurors and had to render a verdict in a fictional case in which the evidence pointed to a guilty verdict.²²⁵ Prior to this, they were exposed to a mock news story of a (real) crime in which the protagonist watched his friend abduct and rape a seven-year old girl in a casino. The story had two versions—one in which the protagonist was described as being appropriately punished (just version), and another in which he was not punished at all (unjust version). In the ensuing mock trial scenario, with unrelated content, subjects who had seen the unjust news story were more likely to engage in juror nullification by rendering a “Not Guilty” decision.

A similar study by Erich J. Greene presented cases including the one described in the Nadler study and also examined their effect on subjects’ attitudes.²²⁶ Greene reached similar conclusions to those arrived at by Nadler. More specifically, subjects who had read cases in which the legal system behaved in ways counter to their moral intuitions rated themselves “more likely to take steps aimed at changing the law, . . . less likely to cooperate with police, more likely to join a vigilante or watch group, and less likely to use the law to guide behavior.”²²⁷ He further concluded, “Overall, participants appeared less likely to give the law the benefit of any doubt after reading cases where the law was at odds with their intuitions.”²²⁸

These studies affirm the conclusion reached by our Studies 2a and 2b. Nadler’s first study is closest to ours and is also her most conclusive. However, whereas Nadler’s study only investigated issues of compliance, our studies have extended her result by showing effects not only on compliance, but also on cooperation and moral credibility.²²⁹ The unjust primes in Nadler’s studies were also somewhat fictionalized, whereas the primes in our studies were descriptions of real cases. Nadler’s studies are thus an important first step that our studies have extended. The conclusion we draw is that knowledge of systemic injustice can negatively affect not only compliance, but also

²²⁵ *Id.* at 1416–24 (presenting methodology and findings of Experiment 2).

²²⁶ Erich J. Greene, *Effects of Disagreements Between Legal Codes and Lay Intuitions on Respect for the Law* (June 2003) (unpublished Ph.D. dissertation, Princeton University) (on file with Mudd Library, Princeton University).

²²⁷ *Id.* at iv.

²²⁸ *Id.* at v.

²²⁹ Nadler’s second study, on juror nullification, does investigate cooperation, but its results are not as easily interpreted as those of her first study, nor are they easily assimilated with our own results. The greater proportion of “Not Guilty” verdicts in the unjust condition were accompanied by diminished ratings of the defendant’s guilt. Nadler, *supra* note 223, at 1424–25. This suggests that the unjust prime (the defendant who got off) may have produced juror nullification through shifting subjects’ thresholds for criminal culpability, rather than through affecting their perceptions of the moral credibility of the criminal justice system.

other relevant variables such as cooperation and moral credibility, and that these effects can be produced simply through knowledge of several current criminal law practices.

A more recent study by Mullen and Nadler shows how the perception of moral illegitimacy in the legal system can increase rates of deviant behavior.²³⁰ During the experimental session, 137 undergraduates read a newspaper article that summarized the legal trial of a doctor who allegedly provided an unlawful late-term abortion. Subjects were randomly assigned to read either that the defendant was found ‘Guilty’ or ‘Not Guilty.’ One week prior to this session, subjects had completed a questionnaire that assessed their attitudes about abortion, and these attitudes were used to predict the critical dependent variable, which was whether subjects failed to return (i.e., stole) the pen that was provided to fill out their questionnaire. After subjects completed all the studies, they were instructed to return their pen and an envelope containing their materials to designated boxes. The researchers numbered the identical pens with ink that was only visible under ultraviolet light. Therefore, subjects did not know that their pen was numbered but the experimenter was able to identify the pens that were not returned at the end of each experimental session. The percentage of subjects who did not return the pen was substantially higher for those subjects who had strong pro-choice attitudes and who were exposed to the guilty verdict—that is, those for whom the outcome clashed with their moral principles. The researchers interpreted these results as indicating that exposure to outcomes that are inconsistent with a person’s strongly held moral beliefs increases the likelihood of their engaging in deviant behavior.²³¹

Finally, people’s common compliance with tax law raises interesting issues related to these points. Large numbers of American citizens pay their taxes even though the penalty for tax evasion is not great, the probability of detection is trivial, and the expected sanction, therefore, is quite small.²³² For these reasons, many legal scholars believe that the threat of official sanction does not explain why such large numbers of citizens pay taxes.²³³ A survey by Karyl A. Kinsey sheds some light on the underlying forces.²³⁴ When people reported

²³⁰ Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1239 (2008).

²³¹ See *id.* at 1243–45 (analyzing results of two studies).

²³² See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1782 (2000) (posing problem of explaining tax compliance).

²³³ See *id.* (discussing alternative explanation for tax compliance).

²³⁴ Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259 (Joel Slemrod ed., 1992) (presenting results of study of effects of enforcement contacts on

that a friend or coworker, after contact with the IRS, had been made to pay more taxes than they properly owed, the people thought the tax laws generally were less fair and were more likely to intend to cheat on their taxes in the future.²³⁵ Nadler, in reviewing the study, comments that “[t]he results of the tax study suggest that exposure to reports of an unjust legal outcome in a particular situation might lead to lower perceived fairness of the law more generally, which in turn can lead to noncompliance with the law in the future.”²³⁶ It would appear that one who sees tax law and the IRS as being just is likely to comply even though expected sanctions are small and unlikely.

Taken together, these studies complement our own in suggesting that knowledge of systematic injustice produced by the criminal justice system, particularly when it is intentional, can have a range of deleterious effects on people’s attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice. Our studies have shown that these sorts of effects are not limited to compliance, but generalize to cooperation and assistance with the legal system, as well as to perceptions of its moral authority, which can affect its ability to harness the normative forces of social influence and the internalization of norms. The flip side, of course, is that if the criminal justice system reflects ordinary perceptions of justice, it can take advantage of a range of psychological mechanisms that serve to increase assistance, cooperation, compliance, and deference.

V

TESTING THE EFFECTS OF LAW’S MORAL CREDIBILITY: STUDY 3

The studies reported in Part IV suggest that doing injustice and failing to do justice can undermine the criminal justice system’s moral credibility, which in turn can lead to citizen reluctance to support, assist, and defer to the system. Those studies were conducted using data collected by the present researchers under controlled conditions. One may wonder whether the same effects might be observed in data from large population samples collected by others.

In this study, we worked with existing national databases to see what, if anything, they might tell us about our hypothesis concerning

sanctions perceptions, perceived fairness of tax laws, and intentions of future compliance with tax laws).

²³⁵ *Id.* at 276, 282 (discussing effects of vicarious enforcement contacts on intention to comply in future).

²³⁶ Nadler, *supra* note 223, at 1409–10.

the practical impacts of a system's moral credibility on the effective operation of the criminal justice system. One large national survey involving telephone interviews with Americans presents potentially relevant variables. The database includes people who recently participated in criminal court proceedings. Bivariate and multivariate statistical techniques were used to determine whether the observed results support our research hypothesis: As the moral credibility of the criminal justice system increases, the willingness to defer to the courts to resolve a similar case in the future will also increase. The findings presented below suggest that the dynamics from the experiment reported in Studies 2a and 2b also operate among people who have actual experience with the criminal courts. Put simply, if a person has a high level of confidence in the moral credibility of the criminal justice system, he or she will be more likely to defer to the system in the future.

A. Study 3 Dataset

The study used data from the Survey of Public Opinion on the Courts in the United States, conducted in 2000.²³⁷ That dataset, which is available from the National Archive of Criminal Justice Data at the University of Michigan, consists of 1567 telephone interviews of randomly selected adults in the United States.²³⁸ Interviews were conducted by the Indiana University Public Opinion Laboratory (IUPOL) between March 22, 2000 and May 3, 2000.²³⁹ The survey

²³⁷ DAVID B. ROTTMAN, RANDALL HANSEN, NICOLE MOTT & LYNN GRIMES, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, PUBLIC OPINION ON THE COURTS IN THE UNITED STATES, 2000 (2000), <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3864?archive=ICPSR&q=public+opinion+on+the+courts+> [hereinafter ROTTMAN DATASET] (search "All Fields" for "ICPSR03864").

²³⁸ Sample characteristics: Gender: Male, 44%, female, 56%; Race/Ethnicity: White, not Hispanic, 52%, African American, 26%, Hispanic, 20%, other minority, 2%; Age: Average = 43 years; Education: Less than high school, 9%, high school graduate, 29%, some college, 35%, college graduate, 27%; Household Income: \$20,000 or less, 26%, \$20,001 to \$40,000, 30%, \$40,001 to \$80,000, 30%, \$80,000 or more, 14%; Marital Status: Married, 50%, living together but not married, 5%, single, never married, 22%, separated, divorced, or widowed, 23%. See ROTTMAN ET AL., *Codebook and Data Collection Instrument*, in ROTTMAN DATASET, *supra* note 237, at 1, 31–32 (describing sample characteristics).

²³⁹ The sampling strategy adopted by IUPOL corrected for the common problem of underrepresentation of racial and ethnic minorities in telephone surveys by oversampling African Americans and Hispanics. The survey was administered in English and Spanish. Additionally, the IUPOL took a number of steps to ensure data quality. First, interviewers received at least four hours of training. Most of the interviewers had prior experience conducting telephone surveys. Second, a widely accepted telephone survey sampling technique, random-digit-dialing with quotas, was used to contact potential respondents. Finally, selected telephone numbers were called repeatedly until an interview was successfully completed. Telephone numbers were replaced if the individual who was contacted by the research staff refused to participate on three separate occasions, if the number was discon-

instrument consisted of two sets of questions. The first set, administered to all respondents, asked subjects their perceptions of the courts in general, while the second set, which was administered only to respondents who reported recent experience with the courts, queried respondents specifically about their recent court involvement (e.g., the type of case and their role in it).²⁴⁰

The present study focused on a subset of respondents within the larger data file who reported recent significant interaction with the criminal justice system. Specifically, we selected survey respondents who met all of the following criteria: (1) either the respondent or a member of his or her household had involvement in the courts in the last twelve months; (2) the case was a criminal matter (including juvenile offenses); and (3) in the case, the subject or household member was either a juror or a witness, but not a defendant, and thus less likely to have a personal stake in the outcome of the case. Of the 1567 subjects, 146 individuals met these criteria. Of that 146, 141 were suitable for use in the present study.²⁴¹

The subsample consists of nearly equal numbers of men and women. A majority of subjects were white, but racial and ethnic minorities were well represented in the data file. The respondents' ages ranged from eighteen to more than seventy-two years. An overwhelming majority of subjects graduated from high school, and more than one-third had earned a four-year college degree. When asked about their combined household incomes (before taxes), a majority of subjects reported an income exceeding \$40,000. As for marital status, over half of respondents were married. Finally, over two-thirds of the subjects who reported experience in recent criminal court cases

nected or no longer in service, or if the potential subject was not contacted after twenty attempts. See ROTTMAN ET AL., *Description*, in ROTTMAN DATASET, *supra* note 237, at iv (describing survey methodology).

²⁴⁰ See ROTTMAN ET AL., *Codebook and Data Collection Instrument*, in ROTTMAN DATASET, *supra* note 237, at app. A ("Data Collection Instrument") (reproducing questions asked of subjects).

²⁴¹ A common problem with using telephone survey data is that some respondents do not answer every question. Missing cases were replaced using Similar Response Pattern Imputation (SRPI). SRPI is a technique that is widely used to impute missing cases. Using a series of matching variables, SRPI searches the data file of interest for "donor cases." Once a similar response pattern is found, the donor's score is used in place of the missing value. When compared to other methods for handling missing cases (e.g., mean imputation and listwise deletion), research shows that SRPI is a superior technique. See Gerhard Gmel, *Imputation of Missing Values in the Case of a Multiple Item Instrument Measuring Alcohol Consumption*, 20 STAT. MED. 2369, 2379 (2001) (showing that SRPI, or "hot-deck imputation," is superior relative to other available procedures).

(either personal or vicarious through a household member) served as jurors.²⁴²

B. Study 3 Variables

Three survey items were used to develop the key predictor (or independent) variable. Interviewers asked respondents “[P]lease tell me how well you think the courts in your community handle each of the following kinds of cases.”²⁴³ Subjects were then asked to judge their local courts’ handling of cases involving violence, substance abuse, and delinquency on a scale ranging from 1 to 5, with 1 being “the very lowest” and 5 being “the very highest.”²⁴⁴ These scores reflect respondents’ judgments about the extent to which local criminal court outcomes, such as whether individuals who deserve it are punished and whether the deserved amounts of punishment are imposed, are consistent with their own ideals. The average responses suggest that the subjects with court experience view the outcomes of criminal cases as most consistent with their intuitions of justice in cases involving violence (3.40), and comparatively less so for cases involving drug abusers or drunk drivers (2.96) and juvenile delinquency (2.74).

Each subject’s three answers to the survey items were summed to create the single scale that was used as the predictor variable, which we term “moral credibility.” The scale thus ranged from 3 (low moral credibility) to 15 (high moral credibility), with the average subject’s score at 9.09. A series of statistical tests confirmed that the moral credibility scale is a valid and reliable measure.²⁴⁵

²⁴² Subsample characteristics: Gender: Male, 49%, female, 51%; Race/Ethnicity: White, not Hispanic, 56%, African American, 24%, Hispanic, 17%, other minority, 3%; Age: Average = 41 years; Education: Less than high school, 5%, high school graduate, 22%, some college, 37%, college graduate, 36%; Household Income: \$20,000 or less, 17%, \$20,001 to \$40,000, 24%, \$40,001 to \$80,000, 41%, \$80,000 or more, 18%; Marital Status: Married, 56%, living together but not married, 4%, single, never married, 19%, separated, divorced, or widowed, 21%; Role in criminal court case: Juror, 69%, witness, 31%. When compared to the full sample of survey respondents, the subsample consists of slightly more females, individuals who have received higher levels of formal education, and those with higher household incomes. In terms of race/ethnicity, age, and marital status, the two samples are very similar.

²⁴³ ROTTMAN ET AL., *Codebook and Data Collection Instrument*, in ROTTMAN DATASET, *supra* note 237, at app. A, 1 (“Data Collection Instrument”).

²⁴⁴ *See id.*

²⁴⁵ Various statistical techniques are used by behavioral and social scientists to evaluate the psychometric properties of multi-item summated scales. To assess the validity of the moral credibility scale, the three survey items are entered into an exploratory factor analysis. This technique is used to determine whether the three survey items tap into the same underlying construct. The factor structure that emerges indicates that the scale is unidimensional (eigenvalue = 2.07; factor loadings > .80). For technical details on factor-

The outcome variable in the study was “willingness to defer to the criminal justice system in the future.” There are a number of ways in which this measure is related to real-world behaviors of any particular member of society. High willingness to defer to the system might mean that a person is less likely to take self-help measures, engage in vigilantism, or flee from police, and is more likely to report violations by others rather than ignore them, more likely to turn himself or herself in after an accident, and so on.

A single survey item was used to construct the outcome variable. Survey respondents with criminal court experience were asked, “How likely would you be to go to the courts to resolve a similar dispute you became involved in at some point in the future?”²⁴⁶ Respondents were asked to select from four responses on a scale ranging from “very unlikely” (coded as 1) to “very likely” (coded as 4). The distribution of responses was: 24.3% “very unlikely,” 15.3% “unlikely,” 22.2% “likely,” and 38.2% “very likely.” The average score on the 4-point scale was 2.73.

C. Study 3 Results and Discussion

Following standard practices in the social sciences, we first conducted a relatively lenient test of the research hypothesis where the relationship between moral credibility and willingness to defer to the criminal justice system in the future was analyzed without consideration of potential intervening variables, such as the respondent’s race, gender, age, or socio-economic status. This test established whether some relationship exists between the two key variables. To evaluate the relationship between moral credibility and willingness to defer to the system, we employed Pearson’s r .²⁴⁷ The Pearson’s r coefficient

analytic techniques, see generally MARJORIE A. PETT, NANCY R. LACKEY & JOHN L. SULLIVAN, *MAKING SENSE OF FACTOR ANALYSIS* (2003) and BRUCE THOMPSON, *EXPLORATORY AND CONFIRMATORY FACTOR ANALYSIS* (2004). To assess the scale reliability, two common measures of internal consistency are used. The results of these procedures confirm that the scale possesses a high level of reliability (Cronbach’s alpha = .78; mean inter-item correlation = .54). For a discussion of coefficient alpha and reliability theory, see generally Jose M. Cortina, *What Is Coefficient Alpha? An Examination of Theory and Applications*, 78 J. APPLIED PSYCHOL. 98 (1993). In sum, the evidence indicates that the moral credibility scale has strong psychometric properties.

²⁴⁶ ROTTMAN ET AL., *Codebook and Data Collection Instrument*, in ROTTMAN DATASET, *supra* note 237, at app. A, 8 (“Data Collection Instrument”).

²⁴⁷ The linear statistical techniques used in this section are sensitive to the distributional characteristics of the variables included in the analysis. When variable scores resemble a normal distribution (or a bell-shaped curve), we gain confidence that our estimates are unbiased. Statistical tests show that the score distributions for the moral credibility and willingness to defer variables are symmetric (or bell-shaped). Thus, the results from the linear statistical models will not be adversely affected by displeasing variable attributes.

ranges from -1.0 to +1.0. The closer the estimate is to an absolute value of 1 (that is, either -1.0 or +1.0), the stronger the relationship. The correlation between these two key variables we examined is +.283 (significance level = .001).²⁴⁸

In other words, when the law's moral credibility is high, people express a greater willingness to defer to the system in the future. This is an important finding because it demonstrates in an existing database the real-world benefits of moral credibility—if those who believe more strongly in the moral credibility of the system are more willing to defer to its authority, the incidence of negative activities such as the use of self-help or fleeing from law enforcement should decrease as moral credibility increases.

We then tested the research hypothesis using multivariate analysis. Ordinary least-squares (OLS) regression was used, which allowed us to rule out concerns that the observed relationship between moral credibility and willingness to defer to the criminal justice system could be explained by potential intervening variables, such as the respondent's race, gender, age, and socio-economic status, thus providing a more stringent test of the effect of moral credibility when compared to Pearson's *r*. Table 8 presents an OLS model where the outcome measure—willingness to defer to the criminal justice system—is regressed onto moral credibility and onto standard subject characteristics that might also have influence.²⁴⁹ The standardized regression coefficients

²⁴⁸ The study used two-tailed tests of statistical significance. The two-tailed test, also known as a nondirectional test, does not require that the direction of the research hypothesis (i.e., positive or negative) be specified. The one-tailed test is a directional test, commonly used when the research hypothesis is directional in nature. Both tests are appropriate in a variety of situations; however, the two-tailed test requires that a higher threshold be met to achieve statistical significance.

²⁴⁹ The respondent characteristic variables were coded as follows: gender (1 = male respondent, 0 = female respondent), age (in years), race (1 = white, non-Hispanic respondent, 0 = racial and/or ethnic minority respondent), education (1 = less than fifth grade to 9 = graduate or professional degree), household income (1 = less than \$10,000 to 10 = more than \$120,000), and marital status (1 = married respondent, 0 = otherwise). According to established guidelines, the sample is sufficiently large to estimate a six-variable OLS model to detect medium effect sizes. See Samuel B. Green, *How Many Subjects Does It Take To Do a Regression Analysis?*, 26 MULTIVARIATE BEHAV. RES. 499, 503 (1991) (showing that power-based analyses suggest that seven-variable regression model consists of minimum of 102 cases to show medium effect sizes). Finally, we evaluated the intercorrelations between the independent variables. When correlations are high, say above .80, harmful levels of collinearity may result in biased parameter estimates. See Mark H. Licht, *Multiple Regression and Correlation*, in READING AND UNDERSTANDING MULTIVARIATE STATISTICS 45 (Laurence G. Grimm & Paul R. Yarnold eds., 1995) (stating that correlations between independent variables in excess of .80 should be considered "very problematic"). Our investigation revealed that none of the bivariate correlations between the independent variables exceeded an absolute value of .41. Results from the model diagnostic tests strongly suggested that collinearity was not a threat. For example, the estimates

are similar to Pearson's r estimates in that they range from -1.0 to +1.0.

TABLE 8
OLS REGRESSION MODEL

Variable	Willingness to Defer to the Criminal Justice System in the Future	
	Standardized Regression Coefficient	Significance Level
Moral Credibility	.265	.002
Male	-.072	.395
Age	-.128	.148
White	.062	.476
Education	-.134	.144
Household Income	.017	.859
Married	.167	.069

As can be seen in Table 8, the effect of moral credibility is positive and statistically significant, indicating that higher levels of moral credibility correspond to a greater willingness to defer to the criminal justice system. The effect of moral credibility is stronger than any of the other variables in the model, which means that it is more important in predicting deference to the criminal justice system than those other variables.²⁵⁰ Indeed, it is the only one of the variables that is statistically significant.²⁵¹ The importance of this finding is under-

from the tolerance tests exceed .70, which is considered a conservative threshold in the social and behavioral sciences.

²⁵⁰ The formal statistical interpretation of the moral credibility effect is as follows: Each standard deviation increase in the moral credibility scale corresponds to a .265 standard deviation increase in the willingness to defer to the criminal justice system in the future.

²⁵¹ A number of model statistics can be used to evaluate the fit of an OLS regression equation. The measure of joint correlation (or F -test) for the model presented in Table 8 indicates that the group of independent variables reliably predicts willingness to defer to the criminal justice system in the future ($F = 2.91$, significance level = .01). The coefficient of multiple determination (or R^2) shows that the model explains 13% of the variation about the dependent variable, willingness to defer. We explored whether other variables outside the scope of the theory being tested here also influence whether experienced respondents are willing to assist legal authorities during the criminal court process. Prior research has shown that citizens who perceive police processes as procedurally just report a greater willingness to participate in crime prevention programs. See Michael D. Reisig, *Procedural Justice and Community Policing—What Shapes Residents' Willingness To Participate in Crime Prevention Programs*, 1 POLICING: J. POL'Y & PRAC. 356, 364 (2007) (discussing results of survey showing that people who believe police exercise authority fairly are more willing to participate in crime prevention). Based on prior research, we reason that perceptions of procedural justice regarding court processes may also influence willingness to serve as a juror or witness in a criminal court case. When entered into the equation featured in Table 8, the procedural justice scale (a 7-item summated scale, Cronbach's alpha = .889) was a significant predictor (standardized regression coefficient = .303, significance level = .003).

scored by the fact that effective operation of the criminal justice system depends upon such deference from citizens.

To summarize, the study attempted to assess whether there are real-world crime-control benefits to administering justice in a manner that is consistent with the intuitions of justice of the community. After an analysis using both bivariate and multivariate statistical techniques, the results showed that respondents with criminal court experience who viewed their community courts as morally credible in dealing with criminal cases (specifically those involving violence, drugs/alcohol, and delinquency) expressed a greater willingness to defer to the criminal justice system in the future.²⁵² The results from the study empirically challenge the conventional wisdom that deviations from desert are essentially cost-free. Individuals who perceived failures of the criminal justice system were significantly less likely to say they would defer to the system in the future.²⁵³

D. *Limitations and Future Research*

Before discussing avenues for future research on the effects of moral credibility, we should note a limitation of the research strategy employed in Study 3. Like many social scientific studies that test directional research hypotheses, Study 3 used cross-sectional survey data from a general population sample. As previously noted, the responses provided by each participant were collected during individual telephone interviews. Cross-sectional data of this type only

²⁵² A potential limitation of the study concerns the use of a non-random subsample to estimate a behavioral outcome. Statistical problems arise when membership in the subsample is not independent from the outcome measure. When this is the case, selection bias becomes a threat. The most frequently employed approach for dealing with sample selection bias is Heckman's two-step correction. See Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386, 393–96 (1983) (providing empirical application of Heckman's two-step correction using citizen survey data); James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 ECONOMETRICA 153, 156–60 (1979) (providing formal demonstration of how two-step Heckman estimator can correct for sample selection bias). This two-step modeling process has several requirements, one of which is the inclusion of exclusion restrictions in the first-stage model (i.e., variables that predict the selection outcome in the first-stage model but are not related to the dependent variable in the second-stage model). Unfortunately, we were unable to construct a first-stage model that included exclusion restrictions that predicted membership in the subsample (i.e., recent personal or vicarious experience as a juror or witness). Accordingly, the extent to which sample selection bias was a problem in this study remains unknown.

²⁵³ We assessed whether the correlation between moral credibility and willingness to defer to the criminal justice system differed between the two groups that make up our subsample—jurors and witnesses. We found that the estimates for jurors and witnesses were nearly identical. Grouping jurors and witnesses into a single subsample increases statistical power. Given the consistent bivariate relationship between the two key variables across these two groups, this approach is empirically justifiable.

allow us to make claims about relationships between key theoretical variables (i.e., moral credibility and willingness to defer) that are correlational in nature. Although the observed effect of moral credibility in Table 8 is consistent with our hypothesis, we cannot claim that the analysis presented above demonstrates a causal link between moral credibility and willingness to defer to the criminal justice system in the future. When considered alongside the results from the controlled experiments from Studies 2a and 2b, however, the weight of the evidence suggests that moral credibility is a salient causal mechanism in determining behaviors among members of the general public that help the criminal justice system function.

We encourage future researchers to investigate whether moral credibility predicts differences in the kinds of measures noted in the introduction to Part IV: the stigmatization effect of criminal apprehension and conviction, vigilantism, the willingness of citizens to assist or at least acquiesce in the system's judgments and directions, to internalize the system's pronouncements about what conduct is truly condemnable, and to defer to its commands in situations of criminalization grey areas.²⁵⁴ Studies such as these will help determine the explanatory and predictive scope of moral credibility.

Research also needs to be conducted in other countries with criminal justice systems of noticeably different levels of moral credibility than that of the United States. Doing so would help determine whether the findings reported here can be replicated in settings outside the United States. Unfortunately, the general databases that currently exist, nationally and internationally, offer little opportunity for such testing. Ideally, research could examine a measure of moral credibility drawn from different societies with noticeably different levels of moral credibility in their criminal justice systems. One could then compare these two groups as to the predicted resulting attitudes and behaviors of cooperation with and deference to the system. If a

²⁵⁴ Several recent studies have used legal compliance with soft crimes and cooperation with police scales and may prove useful in future studies on the effects of moral credibility. See Michael D. Reisig, Jason Bratton & Marc G. Gertz, *The Construct Validity and Refinement of Process-Based Policing Measures*, 34 CRIM. JUST. & BEHAV. 1005, 1014 (2007) (using compliance scale consisting of six minor offenses: "made a lot of noise at night," "bought something you thought might be stolen," "drank alcohol in a place you are not suppose [sic] to," "smoked marijuana," "illegally disposed of trash and litter," and "broke traffic laws"); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513, 541 (2003) (using compliance scale items that asked respondents whether they followed rules about seven types of behavior: "where to park a car legally," "how to legally dispose of trash and litter," "not making noise at night," "not speeding or breaking traffic laws," "not buying possible stolen items on the street," "not taking inexpensive items from stores or restaurants without paying," and "not using drugs such as marijuana").

system's moral credibility is higher, do we see higher levels of citizens reporting crimes to police, agreeing to serve as witnesses, internalizing the law's condemnation of newly criminalized conduct, following the legal instructions given to jurors, and a variety of other effects discussed in Part II?

CONCLUSION

At the start of this Article, we described the concerns of two quite different groups, traditionally opposed to one another, who had found common ground in their opposition to the recent shift toward desert as the primary distributive principle for criminal liability and punishment.²⁵⁵ The first group—those concerned with what they see as the over-punitiveness of current criminal law—worryes that setting desert as the dominant distributive principle means continuing the punitive doctrines that they find so objectionable, and perhaps even making things worse. The second group—those concerned with ensuring effective crime control—worryes that a desert distributive principle will create many missed crime-control opportunities and will increase avoidable crime. The evidence we present should give some comfort to both groups that a shift toward desert will not undermine these goals.

The first group's concern about punitiveness rests upon a false assumption that the current punitive crime-control doctrines of which they disapprove are a product of and a manifestation of the community's intuitions of justice. As is clear from Study 1 reported in Part II, however, the reverse is true. The current crime-control doctrines seriously conflict with people's intuitions of justice by exaggerating the punishment deserved. Thus, a distribution of liability and punishment that tracks lay intuitions of justice would significantly reduce the injustice now present. As Part III explains, the modern crime-control doctrines are not a product of the community's sense of justice, but rather of the distortions inherent to American crime politics.

We also provide a persuasive response to the concerns of the second group: that a desert distributive principle will create many missed crime-control opportunities and will increase avoidable crime. Studies 2 and 3 reported in Parts IV and V help refute the common wisdom of the past half-century that it is cost-free for the system to deviate from desert in the pursuit of crime control through deterrence, incapacitation of the dangerous, and other such coercive crime-control programs. There are crime-control costs in deviating from desert that follow from the system's reduced moral credibility within the commu-

²⁵⁵ See *supra* Section B of Introduction.

nity it governs. Those crime-control costs must be taken into account in setting an effective crime-control program. The power of the forces of normative social influence and internalization of norms, and reasons to be increasingly skeptical about the crime-control effectiveness of the traditional mechanisms of coercive crime control,²⁵⁶ suggest that, in the long run, doing justice may be the most effective means of fighting crime.

In conclusion, we believe that the studies reported here will give assurances to both groups concerned about a shift to desert as the distributive principle for criminal liability and punishment. The shift to a desert distribution—specifically empirical desert—will not seriously undermine the criminal justice system’s crime-control effectiveness—and indeed may enhance it—and is not likely to increase the system’s punitiveness—and instead is more likely to reduce it—in order to better track the community’s shared intuitions of justice.

²⁵⁶ See ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 5, at 21 (discussing reason to be skeptical of crime control effectiveness of measures that deviate from desert).

APPENDIX A
TEXT OF STUDY 1'S "MILESTONE" SCENARIOS

1. UMBRELLA MISTAKE – John takes another person's umbrella assuming it to be his own because it has the same unusual color pattern as his own, a fact that the police confirm.

2. WOLF HALLUCINATION – Another person slips a drug into John's food, which causes him to hallucinate that he is being attacked by a wolf. When John strikes out in defense, he does not realize that he is in fact striking a person, a fact confirmed by all of the psychiatrists appointed by the state, who confirm John could not prevent the hallucination.

3. WHOLE PIES FROM BUFFET – The owner has posted rules at his all-you-can-eat buffet that expressly prohibit taking food away; patrons can only take what they eat at the buffet. The owner has set the price of the buffet accordingly. John purchases dinner at the buffet, but when he leaves he takes with him two whole pies to give to a friend.

4. CLOCK RADIO FROM CAR – As he is walking to a party in a friend's neighborhood, John sees a clock radio on the backseat of a car parked on the street. Later that night, on his return from the party, he checks the car and finds it unlocked, so he takes the clock radio from the backseat.

5. MICROWAVE FROM HOUSE – While a family is on vacation, John jimmyes the back door to their house and steps into their kitchen. On the counter, he sees their microwave, which he carries away.

6. SLAP AND BRUISING AT RECORD STORE – A record store patron is wearing a cap that mocks John's favorite band. John follows him from the store, confronts him, then slaps him in the face hard, causing him to stumble. The man's face develops a harsh black and yellow bruise that does not go away for some time.

7. STITCHES AFTER SOCCER GAME – Angry after overhearing another parent's remarks during a soccer match in which John's son is playing, John approaches the man after the game, grabs his coffee mug, knocks him down, then kicks him several times while he is on the ground, knocking him out for several minutes and causing cuts that require five stitches.

8. ATTEMPTED ROBBERY AT GAS STATION – John demands money from a man buying gas at a gas station. When the man refuses, John punches the man several times in the face, breaking his jaw and causing several cuts that each require stitches. He then runs off without getting any money.

9. CLUBBING DURING ROBBERY – To force a man to give up his wallet during a robbery attempt, John beats the man with a club until he relinquishes his wallet, which contains \$350. The man must be hospitalized for two days.

10. MAULING BY PIT BULLS – Two vicious pit bulls that John keeps for illegal dog fighting have just learned to escape and have attacked a person who came to John's house. The police tell John he must destroy the dogs, which he agrees to do but does not intend to do. The next day, the dogs escape again and maul to death a man delivering a package.

11. STABBING – John is offended by a woman's mocking remark and decides to hurt her badly. At work the next day, when no one else is around, he picks up a letter opener from his desk and stabs her. She later dies from the wound.

12. AMBUSH SHOOTING – John knows the address of a woman who has highly offended him. As he had planned the day before, he waits there for the woman to return from work and, when she appears, John shoots her to death.

APPENDIX B
TEXT OF STUDY 1'S "CRIME-CONTROL" SCENARIOS

A. INCORRECT LOBSTER CONTAINER – John and two other sea-food importers import lobster from Honduras shipped in plastic containers. Honduran law (but not U.S. law) requires that the containers be cardboard. John is convicted of a U.S. federal law that criminalizes the importation of fish or wildlife in violation of foreign law.

B. SHOOTING OF TV – When he was younger, John committed a number of offenses: twice convicted for burglarizing an unoccupied building, once convicted of throwing a rock at a car, and once convicted of stealing electricity. Several decades later, John, now 59, is annoyed by the constant arguing between his two sons about what to watch on television. On this day, he stops the argument by picking up the .22-caliber revolver that his oldest son left on a nearby table and shooting the television.

C. MARIJUANA UNLOADING – John frequently helps move furniture for hourly pay for the man from whom he rents a room. On this occasion, as he is unloading boxes at the house where he lives, he discovers that some contain marijuana. He nonetheless helps with the unloading but insists that the boxes with marijuana be stored other than in the house in which he lives. Some time later, authorities seize 47 of the boxes that contained 1169 kilograms of marijuana.

D. UNDERAGE SEX BY MENTALLY RETARDED MAN – John is a 20-year-old mentally retarded man with an IQ of 52. He is introduced to Jane, who says she is 16, a fact confirmed by her friends. They have several long telephone conversations. On this evening, John is stranded without a ride home and notices Jane's house nearby. From her bedroom window she sees him coming and directs him to use a nearby ladder. They talk for several hours, then have consensual intercourse. John leaves about 4:30 a.m. 8 1/2 months later, Erica gives birth and her parents contact the police. She was only 13 at the time of the intercourse.

E. SEX WITH FEMALE REASONABLY BELIEVED OVERAGE – John, 19 years old, lets a runaway stay in his apartment. She tells him she is 18. He reasonably believes that she is over the legal age of 16 and has consensual intercourse with her several times. He is later arrested because she in fact is 14 years old.

F. AIR CONDITIONER FRAUD – John promises to fix the air conditioner in a local bar where he is having a drink. The bar owner gives him \$129 for parts, which he takes, but he has no intention of returning to do the job. He has been previously convicted of committing such frauds more than a half dozen times.

G. COCAINE IN TRUNK - John runs through a red light in the early morning and is pulled over by police. After arresting John for possession of a small amount of marijuana, the police search his car and find a small package of cocaine in the trunk, two-thirds of a kilo, about the size of a soda can and a half. John has no prior criminal record.

H. COCAINE OVERDOSE - John is asked to bring cocaine to a "drug party." Three of the people at the party and John shoot up with the cocaine. One of them uses too much and overdoses and dies. John is arrested for his homicide.

I. KILLING OFFICER BELIEVED TO BE ALIEN - John suffers from paranoid schizophrenia of a subtype characterized by delusions and hallucinations. He believes alien life forms, usually disguised as government agents, are trying to kill him. He keeps a bird in his car to warn of airborne poison. He sets fishing line with beads and wind chimes throughout his house as an alarm system against alien invasion. On this occasion, he circles his neighborhood block blaring loud music in an attempt to keep the aliens away. A policeman comes in response to complaints about the excessive noise. Believing the officer to be an alien who has come to kill him, John shoots and kills the officer.

J. ACCOMPLICE KILLING DURING BURGLARY - John agrees to help another man burglarize a house while the owner is away. Neither man is armed. When the owner returns unexpectedly, John is surprised when the other man shoots and kills the owner with a gun the man apparently found in a nightstand.

K. DROWNING CHILDREN TO SAVE THEM FROM HELL - Jane and her husband are very religious. With their five young children, they live in a trailer. Jane is mentally ill and has several times attempted suicide, mutilated herself, failed to feed her children, and believes there are cameras in the ceilings. She comes to believe that because she is a bad mother, her children are doomed to eternal torment in hell. In order to save them from this state, she drowns them all in the bathtub.

L. ACCIDENTAL TEACHER SHOOTING - John, 13 years old, is upset about being suspended from school for ten days just before summer vacation for throwing water balloons. He returns to the middle school to say good-bye to friends. When told by a seventh grade teacher, with whom he has a good relationship, that he must leave, he pulls out a pistol and points it at the teacher. The gun discharges, hitting the teacher and killing him.

APPENDIX C
SENTENCES FOR STUDIES 2A’S AND 2B’S SEVEN “HIGH
DISILLUSIONMENT” CASES

<i>Title</i>	<i>Summary Description (The studies used more detailed descriptions.)</i>	<i>Average punishment imposed by subjects in Studies 2a and 2b, respectively</i>	<i>Punishment imposed by court</i>
Case 1. Possession of Weapon By Federal Prison Guard	John, a disabled guard at a federal prison, is prosecuted under a state weapon possession statute that exempts any “guard of any state prison or of any penal correctional institution.” John thinks he qualifies.	2 months; 2 months	3 years
Case 2. Convenience Store Murder Inaction	Two women at a convenience store argue. One stabs the other. After the attacker flees, the victim is bleeding profusely but unable to stand up and get help. John steps over her and takes a photograph of her with his cell phone but does not call for an ambulance. If he had anonymously called 911, the victim would not have died.	3.8 years; 2.9 years	No liability— legal rules do not permit liability for such inaction
Case 3. Sex With Female Reasonably Believed To Be Age of Consent	19-year-old John lets two run-aways stay at his apartment. The girls tell him they are 18 years old and he reasonably believes them because they look at least 18. Each have consensual intercourse with him. He is convicted of two counts of sexual assault of a child because the girls in fact are under 16.	1.3 years; 2.3 years	50 years
Case 4. Seafood Import	John imports seafood from Honduras. While the law of his state does not require it and while John does not know it, Honduran law requires that cardboard rather than plastic containers be used for the shipment (in order to help the country’s lumber industry). John is convicted of violating a law in his state that criminalizes the importation of wildlife in violation of a foreign law.	3.5 months; 6 months	8 years

<p>Case 5. Shooting of TV</p>	<p>30 years ago, John was convicted of burglarizing an unoccupied building and, 5 years later, of throwing a rock at an automobile driven by his father-in-law. Now age 59, John is frustrated by the constant arguing between his two adult sons, who still live at home, over what television program to watch. Using a gun his oldest son left on the table, he shoots out the television set.</p>	<p>9 months; 11 months</p>	<p>15 years imprisonment without possibility of parole</p>
<p>Case 6. Upper East Side Rapist</p>	<p>Jane is followed into her apartment building by John who forces his way into her apartment and, threatening her with a knife, anally rapes her. John does the same thing to ten other women in the area. Jane one day sees John on the street and notifies police, who arrest him.</p>	<p>33.9 years; 32.7 years</p>	<p>No liability—defendant was son of a diplomat</p>
<p>Case 7. Air Conditioner Fraud</p>	<p>Many years ago, the 21-year-old John used his employer’s credit card to pay \$80 for four new tires without permission. He pled guilty to felony fraud. A few years later, John forged a check for \$28.36 to pay rent at a hotel, another felony. On a hot August day, John, now 30 years old, is in a bar and offers to fix the AC unit, which he claims needs a new compressor, for \$120.75. The owner gives him the money, but John never returns.</p>	<p>4.4 years; 3.3 years</p>	<p>Life in prison without possibility of parole</p>

APPENDIX D
SENTENCES FOR STUDY 2B’S SEVEN “LOW
DISILLUSIONMENT” CASES
(for text of scenarios, see Appendix A)

<i>Title</i>	<i>Average punishment imposed by subjects in Study 2b</i>	<i>Average punishment imposed by courts as reported to subjects</i>
1. Umbrella Mistake	4 days	No liability
2. Wolf Hallucination	7 days	3 months, 10 days
3. Clock Radio from Car	11 months	5 months, 2 days
4. Slap and Bruising at Record Store	19 months	12 months
5. Attempted Robbery at Gas Station	5.7 years	5 years
6. Mauling by Pit Bulls	17.7 years	15 years
7. Ambush Shooting	41 years	Life